Centre for Asian Legal Study **Jones Day Foundation**
Faculty of Law
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JONES DAY CALS PROFESSORIAL LECTURE ON THE RULE OF LAW IN ASIA

Lecture by Richard Malanjum

Title: **International Sanctions and the Rule of Law**

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Introduction:

1. I am honoured to stand before you this evening to explore the complex intersection of international sanctions and the rule of law. However, due to time constraints and guided by the maxim - 'the less you know, the more you say', I am limiting the discourse to a much narrower area – I would like to share my experience so far with the practical relationship between the rule of law in the international setting and international sanctions, with reference to due process in the United Nations Security Council ISIL (Da'esh) and Al-Qaida Sanctions regime ('the 1267 Sanctions regime') and its implications for the sanctioned nationals and entities of the Member States in Asia.

2. But before going any further, I wish to thank the event Organiser, the Centre for Asian Legal Study, Faculty of Law, National University of Singapore, in particular (Dr.) Jaclyn L Neo, Associate Professor, Faculty of Law, National University of Singapore, in her capacity as the Director of the Centre for Asian Legal Studies and Dr Dian Shah. Thank you for making it possible for me to speak this evening. I also appreciate the main sponsor of this event – the Jones Day Foundation. And, of course, this event has an added sparkle with the

presence of the Chief Justice of Singapore. Thank you for your company, Chief Justice.

Singapore and the rule of law:

3. The "2023 edition of the World Justice Project (WJP) Rule of Law Index shows that over 6 billion people now live in countries where the rule of law is declining. This was corroborated by Mr Volker Turk, the UN High Commissioner for Human Rights, who admitted during his briefing on the Secretary-General's new Vision for the Rule of Law on 04.08.2023 that '(T)oday, SDG16 – like so many of the SDGs – is off track. Many rule of law and justice institutions face a crisis of capacity and public trust. Millions of people have no effective access to justice and live in conditions of profound injustice.' However, Singapore has maintained its global ranking in 2023 at 17, a spot it held in the 2022 report, making it the highest ranking among the ASEAN nations. It is, therefore, comforting to know that I am delivering this paper in a country that respects the rule of law.

The rule of law in the international setting:

4. The international community has recognised the indisputable significance of the rule of law and has committed itself, including during the 2005 World Summit, to "an international order based on the rule of law and international law." However, some academic writings have theorised that the cause for broad consensus on the importance of the rule of law is due to the vagueness of the said doctrine itself.[1]

5. While there are various interpretations and understandings of the rule of law, the then Secretary-General in the 2004 report proclaimed that 'the "rule of law" is a concept at the heart of the Organization's mission' The concept, in summary, refers to a principle of governance that encompasses, among others,

[1] 'The UN Security Council and the Rule of Law', Final Report and Recommendations from the Austrian Initiative, 2004-2008, Simon Chesterman (Institute for International Law and Justice, New York University School of Law); page 3, paragraph 8

fairness in the application of the law, due process, avoidance of arbitrariness and procedural and legal transparency.

6. In the context of sanctions, as laid out by Secretary-General Kofi Annan in 2006, the minimum standards required to ensure fair and transparent procedures include the following four basic elements: (1) the right of a person against whom sanctions measures have been taken to be informed; (2) the right of such a person to be heard; (3) the right to review by an effective review mechanism; and (4) a periodic review of sanctions by the Security Council.[2]

International Sanctions:

7. The primary international organisation that imposes international sanctions is the United Nations, with the responsibility carried out by its principal organ, the Security Council - Articles 24 and 25 of the United Nations Charter give the authority. Under Chapter VII of the Charter, the Security Council imposes sanctions through resolutions passed by the Council's Member States. The other bodies are the European Union and the Organization for Security and Cooperation in Europe (OSCE). However, the scope of the sanctions they imposed is less extensive than that of the United Nations. Under resolution 1373, all States are also called upon by the Security Council, among others, to prevent and suppress terrorist attacks and take action against perpetrators of such acts, including via targeted financial sanctions. Many states have, therefore, also established autonomous sanctions regimes.

8. 'Today, there are 15 ongoing sanctions regimes imposed by the Security Council that focus on supporting the political settlement of conflicts, nuclear non-proliferation, and counter-terrorism. Each regime is administered by a

[2] Secretary-General Kofi Annan, non-paper written to United Nations Security Council referenced by Under-Secretary-General for Legal Affairs Nicolas Michel in his address to the United Nations Security Council, *Proceedings of 5474th Meeting,* S/PV.5474, New York, 22 June 2006, 5.

sanctions committee chaired by a non-permanent member of the Security Council.'[3]

9. Some of the sanctions regimes are these: Al-Shabaab Sanctions, the 1267 Sanctions regime, Libya Sanctions, Iraq Sanctions (1518), the Democratic Republic of the Congo Sanctions, Sudan Sanctions, 1988 Sanctions ('Taliban Sanctions'), and the Democratic People's Republic of Korea, ('DPRK Sanctions') to mention a few. Only the 1267 Sanctions regime has a form of due process with the establishment of the Office of the Ombudsperson in 2009.

The 1267 Sanctions regime:

10. As mentioned earlier, I am focusing on the 1267 Sanctions regime, an international targeted sanction, or some describe it as 'smart sanctions'[4], instead of comprehensive sanctions, which were once commonly imposed before their negative impacts outweighed the positive outcomes. Comprehensive sanctions are broad measures that affect entire countries in almost all spheres of life. Iraq, for instance, experienced the humanitarian consequences of the United Nations sanctions imposed after it invaded Kuwait in 1990.[5] Today, Iran is still experiencing it, and so is North Korea. Just the other day, a consular officer of a country who spent his time in Iran during the pandemic shared what he saw. There were hardly any vaccines available in the hospitals. But the black markets for vaccines were thriving well, fueled by corruption. One may not be off the mark to think that the imposition of comprehensive sanctions encourages corruption, which undermines good governance based on the rule of law.

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[3] DPPA fact-sheet - (https://www.un.org/securitycouncil/sites/www.un.org.securitycouncil/4les/subsidiary_organs_series_7sep23_.pdf)

[4] Targeted Sanctions: A Policy Alternative? - Gary Clyde Hufbauer (PIIE) and Barbara Oegg (PIIE)
© Peterson Institute for International Economics-February 23, 2000

[5] The sanctions contributed to a significant deterioration in the health and nutrition of the Iraqi population. The lack of spare parts and equipment hindered the maintenance and repair of critical water and sewage treatment facilities, leading to deteriorating water quality, a rise in waterborne diseases, and increased public health risks. Vulnerable populations, including children, the elderly, and individuals with disabilities, were particularly affected by the sanctions.

11. The 1267 Sanctions regime was established in 1999 in response to the 7 August 1998 bombings by Osama bin Laden and members of his network against the US embassies in Nairobi (Kenya) and Dar es Salaam (Tanzania). Resolution 1267, adopted by the Security Council, initially provided sanctions against the Taliban for the turnover of Usama bin Ladin to the appropriate authorities of a country where he had been indicted. By resolution 1333 (2000), the Al-Qaida organisation was included. Further resolutions would set apart the Taliban into another sanctions regime while ISIL (Da'esh) was added to the 1267 Sanctions regime.

12. After the establishment of the 1267 Sanctions regime, there have been a significant number of listings. In fact, as of today, this regime has the highest number of individuals and entities listed. Of the little over 1000 listed under the UN Sanctions regimes, 256 individuals and 89 entities are listed under the 1267 Sanctions regime, with at least 44 of those from the ASEAN countries.

Terrorism threats and the 1267 Sanctions regime:

13. Let me digress a little here. Questions: Is the ISIL (Da'esh) and Al-Qaida still a threat to international peace and security today? Is the 1267 Sanctions regime still necessary?

14. My view is that the 1267 Sanctions regime is still needed. Preventing the easy flow of funds, banning free travel, and enforcing an arms embargo on those involved can mitigate the expansion of terrorism threats. The latest report of the UN Monitoring Team – July 2023 15 reported that for South-East Asia, the 'increased counter-terrorism pressure in the region accounted for the relatively low number of terrorist attacks during the reporting period. Successful counterterrorism operations against ISIL-South-East Asia (ISIL-SEA, QDe.169) and Abu Sayyaf Group (ASG, QDe.001), especially in the Philippines, provide a reminder of the residual threat due to the substantial number of terrorists remaining in the region.'

15. In fact, on 5 March 2023, The Vibes, a Malaysian Online news portal, reported that the Islamic State (IS) had established a media platform called Al Malaka Media Centre in Malaysia, which is linked to IS media outlets in Indonesia and the Philippines. According to the report, Al Malaka Media Centre provides content within the dark web. It seeks to use its radical ideology to destabilise the current administration in Malaysia by lending support to an unnamed domestic "radical political party and an established radical organisation". This might be propaganda, but one that should not be dismissed at the same time.

Terrorism, 1267 Sanctions regime and the rule of law:

16. So, knowing terrorism threats are still there, why should the rule of law be applied to the 1267 Sanctions regime? The initial policy of one Permanent Member of the United Nations on non-notification (meaning – depriving the right of a person against whom sanctions measures have been taken to be informed) of designated individuals or entities under the 1267 Sanctions regime is summed up by this statement: 'We don't notify terrorists; we kill them'.[6]

17. Individuals and entities can be listed under the 1267 Sanctions regime without them knowing or being allowed to be heard before the listing. An individual and entity could also be listed upon the request of a Member State based on little or flimsy information. Only by resolution 2610 (2021) is evidence-based information required for listing. Due process or fair and clear procedures are absent for the benefit of individuals and entities. By the time they realise it, their assets have already been frozen, banned from travelling and stigmatised as terrorists. An individual or entity, based on information of being involved in ISIL (Da'esh) or Al-Qaida or just being 'associated with', can be the reason for listing if a Member State submits the name to the 1267 Sanctions Committee. If, by consensus, the submission is accepted, the name is listed accordingly.

[6] The Powers of Process – The Value of Due Process in Security Council Sanctions Decision-Making - Devika Hovell - Oxford University Press @ p 17

18. Although the term ‘associated with’ has been defined in a resolution (res 1617), which includes ‘participating in the financing, planning, facilitating, preparing, or perpetrating of acts or activities by, in conjunction with, under the name of, on behalf of, or in support of’, it may still be broad enough to include a legal practitioner or a legal firm who might have inadvertently acted for a client which has a link to Al-Qaida or ISIL (Da’esh) organisations. Giving donations to charitable bodies without knowing their connections to those organisations can be another reason for listing.

19. In fact, before the establishment of the Office of the Ombudsperson, those who have been listed depended on the goodwill of their national or residence states or the designating states for the removal of their names from the list. It may take years to do so. Meanwhile, their assets are frozen; they are unable to operate or open a bank account, unable to work, and, if employed, would only be allowed to take a portion of the salary sufficient for living expenses, banned from travelling and ostracised by their communities. The stigma will continue even after the listed individuals have passed away. The estates of the deceased will continue to be sanctioned.

20. Not only the listed individuals but also members of their families are made to suffer. I call it the ‘collective impact’ of the sanctions and disproportionate to the intention of the sanctions measures. Due to the absence of any semblance of fairness and justice in the enforcement of the sanctions measures, there can be a backlash in that, due to the suffering and feeling of injustice and unfairness, the younger members of the families of the listed individuals may end up becoming terrorists or supporters. The purpose of the Sanctions regime is, therefore, not achieved and is, in fact, undermined. The ‘collective impact’ and the felt injustice and unfairness would have created conditions which could induce those affected into terrorism. This is one simple reason why the rule of law is critical regardless of the activities the sanctions regime intends to confront.

21. The sting of the sanctions measures is felt at the implementation/enforcement level, carried out not by the Security Council but by the Member States, which

are bound to comply under Article 25 of the United Nations Charter by enacting domestic laws to accommodate such measures. In Singapore, it is the United Nations Act 2001 through regulations made by the Minister. I also note that Singapore has its own autonomous sanctions regime under the Terrorism (Suppression of Financing) Act 2002, which refers to the 1267 Sanctions regime. Unlike the United Kingdom and the European Union, I have not encountered any reported case filed in Singapore challenging the regulations.[7] It is also interesting to note that Singapore directs those designated under the 1267 Sanctions regime to submit their de-listing requests directly to the Office of the Ombudsperson.[8]

The Office of the Ombudsperson - due process with fair and transparent procedure:

22. The establishment of the Office of the Ombudsperson has allowed listed individuals and entities to submit their petitions for delisting directly to the Ombudsperson. The Office's primary function is stipulated in resolution 1904 (2009), namely, to assist the 1267 Sanctions Committee when considering delisting requests by listed individuals and entities. When performing the task, the Ombudsperson acts 'independently and impartially and shall neither seek nor receive instructions from any government'.

23. The assistance given by the Ombudsperson to the Committee in a delisting request comes in the form of a comprehensive report, which includes a recommendation with reasons for whether to retain or delist as requested. The recommendation is arrived at after analysing all the information gathered for the case from the designating State and relevant States, from open sources and the requesting listed individual or entity and their witnesses, if any, given during interviews in person or online. The requesting listed individual or entity may be represented by counsel throughout the process. Presently, lawyers

[7] HM Treasury vs Mohammed Jabar Ahmed & Ors [2010] UKSC 2; Kadi and Al Barakaat International Foundation v Council and Commission (2008) C-402/05; the Case of Nada v. Switzerland (ECHR - Application no. 10593/08).

[8] https://www.mha.gov.sg/what-we-do/managing-security-threats/countering-the-financing-of-terrorism

representing listed individuals and entities are doing it pro bono. So far, most lawyers are from European countries, and some are from the Middle East. I have yet to meet any lawyers from the Asian region, let alone the ASEAN nations. I hope lawyers from Singapore will take up the challenge.

24. When analysing the information gathered, the Ombudsperson is not bound by principles of evidence law of any state, such as the hearsay rule. All information is receivable and considered based on whether it is credible and reasonable.

25. The Sanctions Committee decides whether to allow or reject the delisting request submitted by a listed individual or entity but is guided by the recommendation of the Ombudsperson. If the recommendation is to retain the listing, then that is the end of the matter. If it is to delist, then unless ALL the fifteen Members of the Sanctions Committee who come from the respective fifteen Members of the Security Council disagree, the recommendation stays. This is what is called the 'reverse consensus' in the process.

26. If there is no consensus to disagree with the delisting recommendation by the Ombudsperson, a Member of the Sanctions Committee can request the Chair of the Committee to submit the matter to the Security Council for a decision. Pending the decision of the Security Council, the delisting recommendation is stayed. Since the establishment of the Office, such an event has yet to happen.

27. In the case of **Mohammed Al-Ghabra v European Commission (Case T-248/13),** the Office of the Ombudsperson has been recognised by the Court of Justice of the European Commission as the proper forum to approach for delisting under the 1267 Sanctions regime. The Court noted that resolution 2161 (2014) requests that "States 'encourage individuals and entities that are considering challenging or are already in the process of challenging their [inclusion on the Sanctions Committee list] through national and regional courts to seek removal from [that list] by submitting de-listing petitions to the Office of the Ombudsperson'. There is no rational reason for failing to do so…"

28. So far, the Office has completed 105 cases, of which 70% were recommended to be delisted. One case takes between 8 to 16 months to complete. One of the main challenges in the process is the delay in receiving information from Member States. The Office has no power to subpoena for information. Much is left to the goodwill of the Member States. It is not an ideal situation. Conversations with Member States are therefore continuing to find ways to strengthen the process. There are issues of sovereignty and national security to consider by Member States before information is shared.

29. The establishment of the Office for the 1267 Sanctions regime is a positive step to address any injustice and unfairness that some of those listed may experience, significantly since their fundamental human rights are directly affected. It also provides an avenue for those whose earlier reasons for listing are no longer valid to seek delisting. In addition, the procedural mechanism provided helps enhance the legitimacy of the Sanctions regime in that national and regional courts may no longer have a basis to intervene in the implementation and enforcement of the sanctions measures by Member States.

30. Based on the mandate given and the performance of the Office, it is reasonable to conclude that it has satisfied the basic rule of law principles elaborated above, namely, fairness in the application of the law, due process, avoidance of arbitrariness and procedural and legal transparency. Insofar as it provides the right for petitioners to be heard and the right to review by an effective review mechanism, the Ombudsperson procedure fulfils several of the minimum due process standards set out by Koffi Annan in 2006 for ensuring fair and transparent procedures for sanctions regimes.

31. Unfortunately, to date, only the 1267 Sanctions regime provides this avenue of recourse. The other sanctions regimes do not have a similar independent mechanism for ensuring due process to listed entities and individuals. A Focal Point Mechanism exists, managed by staff members of the UN Secretariat, but it is not independent and does not provide a petitioner the opportunity to be heard. It does not fulfil the minimum standards for due process.

32. Some Member States believe that international sanctions are premised on political decisions and that the rule of law has no place. As between Member States, it may be so. But when international sanctions, which could be tantamount to an economic death sentence, directly affect the fundamental human rights of individuals, those listed individuals should at least be allowed to be heard or seek some remedy to address any injustice or unfairness they are experiencing. It must be borne in mind that sanctions are preventive and not punitive.

Conclusion:

33. In conclusion, based on the existing status of the international targeted sanctions regimes imposed by the Security Council, it is a case of the spirit being willing to embrace the rule of law, but the flesh is weak. I say so because the 2004 report of the then Secretary General states:

> 'Peace and stability can only prevail if the population perceives that politically charged issues, such as ethnic discrimination, unequal distribution of wealth and social services, abuse of power, denial of the right to property or citizenship and territorial disputes between States, can be addressed in a legitimate and fair manner.[9]

34. I hope that no judge of national and regional courts someday, due to the blatant absence of minimum standards of due process in the existing international targeted sanctions save for the 1267 Sanctions regime, is compelled to repeat what Lord Hope said in the case of **HM Treasury v Mohammed Jabar Ahmed & Ors [2010] UKSC 2.** He said:

> 'Even in the face of the threat of international terrorism, the safety of the people is not the supreme law. We must be just as careful to guard against unrestrained encroachments on personal liberty.'

35. As I have indicated above, the threat of terrorism confronts all nations, including ASEAN countries. However, so too are the imperatives of the rule of law and

[9] The Secretary-General, Report of the Secretary-General: The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies, U.N. Doc. S/2004/616 (Aug. 23, 2004).

due process, which are critical to these processes. I hope I have given a sense of why these issues are also relevant to ASEAN countries, given the number of petitioners from this region listed. To date, to my knowledge, none have sought to be delisted – perhaps due to a lack of awareness of the delisting procedures.

36. While the Ombudsperson procedure represents a significant development regarding due process, the Office would be 'another piece of furniture in the room' unless petitioners are aware that the mechanism exists and if it is being utilised by those entitled to do so. All regions, including Asia, need greater awareness of the sanctions mechanisms.

37. ASEAN countries and their legal fraternity should consider initiating programs raising awareness of international sanctions, including delisting mechanisms. With her robust compliance with the rule of law, I hope Singapore can organise training on international sanctions implementation and shortcomings, including compliance with the rule of law for the ASEAN nations. In September 2022, the African Union (AU), in partnership with the Institute for Security Studies (ISS), organised a training on sanctions in Accra, Ghana, for the Experts of the Committee of Sanctions of the Peace and Security Council (PSC) and selected units of the Political Affairs, Peace and Security Department of the AU Commission. A similar training could be envisaged for ASEAN nations.

38. Finally, petitioners should ideally be represented by counsel in making delisting requests, which is in and of itself an aspect of due process. This is where the legal fraternity should play its role. I believe that lawyers in Singapore are more than capable of stepping up to this challenge, not for financial reward but to safeguard the fundamental human rights of those in need.