

## **THE ASEAN CHARTER AT 10: PROSPECTS AND RETROSPECT**

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### **Introduction**

1. In exactly 5 days, ASEAN will be celebrating its 50<sup>th</sup> anniversary. This is therefore an early celebration of ASEAN's birthday.
2. I consider my job as a member of the HLTF and as its second chairman, one of the most important in my life and career. Drafting the ASEAN Charter is historically as important as drafting the constitution of a country or the Charter of an international organization with one difference. You usually draft a constitution of a country or the Charter of an international organization at the time of their founding. In the case of ASEAN, we were drafting its Charter when it was 40 years' old. I would like to dedicate this lecture to the members of the HLTF and their assistants. I would also like to recognize some members of the Singapore delegation who are here this morning and to thank them for a memorable year of good work and comradeship.
3. In my lecture, I will focus on three points. First, I will give a brief account of the history of the making of the Charter. Second, I will explain why I consider the Charter to be a revolutionary document. Third, I will review some of the suggestions for amending the Charter.

## **The Making of the ASEAN Charter**

4. According to my good friend, Professor Walter Woon, the author of the Commentary on the ASEAN Charter, the first person to propose a Charter for ASEAN was the legendary Foreign Minister of the Philippines, General Carlos P. Romulo. He did this at the 7<sup>th</sup> ASEAN Foreign Ministers Meeting, in Jakarta, in 1974. Romulo was ahead of his time and the idea languished with the senior officials for 30 years.
5. Thirty years after Romulo's proposal, the 10<sup>th</sup> ASEAN Summit, held in Vientiane, in 2004, adopted the Vientiane Action Programme (VAP). In the Annex to the VAP, there was a commitment to work towards the development of an ASEAN Charter. In that same year, the ASEAN Secretariat, then led by Secretary-General, Ong Keng Yong, put up a paper containing a review of the institutional framework of ASEAN and the need for ASEAN to have legal personality. The senior officials produced a draft Charter for the consideration of their Ministers.
6. In 2005, the ASEAN Foreign Ministers agreed to work towards the promulgation of an ASEAN Charter. At the 11<sup>th</sup> ASEAN Summit, held in Kuala Lumpur, in 2005, the leaders adopted the Declaration on the Establishment of the ASEAN Charter. The summit also established an Eminent Persons Group. Its mandate was to put forward bold and visionary recommendations. The members of the EPG were appointed in their individual capacities and were not constrained by instructions from their respective governments. The group was chaired by a former Deputy Prime Minister of Malaysia, Musa Hitam, and included other elder statesmen of ASEAN, such as, the former President of the Philippines, Fidel Ramos, the former Foreign Minister of Indonesia, Ali Alatas and the former Deputy Prime Minister of Singapore, Prof S Jayakumar.
7. The EPG did not disappoint. It produced a very bold report which was accepted by the 12<sup>th</sup> ASEAN Summit, in Cebu, the Philippines, in January 2007. The Summit also appointed the HLTF to draft the ASEAN Charter. Unlike the EPG, the HLTF worked under the supervision of the ASEAN Foreign Ministers. Several of the bold

and visionary proposals made by the EPG did not survive the reality test administered by the foreign ministers. For example, we were told to ignore the EPG's proposal that ASEAN would eventually become a "union". We were also told not to include any language on "suspension, expulsion and withdrawal". We were also instructed that consensus would remain the principal mode of decision-making.

8. The HLTF had two chairmen, Ambassador Rosario Manalo of the Philippines and myself. Rosario chaired the first 8 meetings and I chaired the last 5. The two of us and Walter Woon have edited a book on the making of the ASEAN Charter. I hope that you have read our book. I would be happy to answer any question you may have on the work of the HLTF and the drafting process.

### **The Charter is a Revolutionary Document**

9. I would now like to turn to my second point. I wish to explain why I regard the ASEAN Charter as a revolutionary document.
10. First, the Charter is a revolutionary document because it seeks to make a paradigm change to the nature of ASEAN. Pre-Charter, ASEAN was strong on networks but weak on institutions. ASEAN was prolific in making decisions and agreements but weak on compliance. ASEAN was famous for its informality and its culture of mutual accommodation and consensus-making. Post-Charter, the ASEAN Way has not been abandoned. It has, however, been strengthened by a greater reliance on institutions and the rule of law.
11. Second, I consider the Charter as a revolutionary document when you consider the political reality of the 10 member states. One is an absolute monarchy, two are ruled by communist parties, one has a government formed by the military after it had overthrown an elected government, one has a power-sharing arrangement between the army and the elected government, and the remaining 5 are democracies with local characteristics. A friend, Michael Vatikiotis, has recently published a book

entitled, “Blood and Silk: power and conflict in modern Southeast Asia”. The book is a reminder of the political realities of our region.

12. It is quite remarkable that the Charter, in its Preamble, Purposes and Principles, emphasize ASEAN’s commitment to: “democracy, the rule of law and good governance”. In Article 2 (2)(h), the Charter also commits ASEAN to adhere to “constitutional government”. This is a polite way of saying that the Charter is against the unconstitutional changes of governments.
13. It is also remarkable that the Charter, in its Preamble, Purposes and Principles, commits ASEAN to “promote and protect human rights and fundamental freedoms”.
14. Third, it is a miracle that ASEAN has not one but two, human rights bodies, namely, the ASEAN Intergovernmental Commission on Human Rights (AICHR) and the Commission on the Rights of Woman and Child. Why do I call it a miracle? I do so because of the 10 ASEAN member states, only 4, namely, Indonesia, Malaysia, Philippines and Thailand, had national commissions of human rights. You would normally expect the minority to follow the majority and not the other way around. In this case, the majority agreed to follow the minority. This remarkable decision was made by the foreign ministers, at their meeting, held on 30 July 2007 in Manila. The Ministers met by themselves, without their staffers. Only the chairman of HLTF and the ASEAN Secretary-General were present. When the meeting was over, the Secretary-General provided the HLTF with a summary of the Ministers’ decisions. The decision of the Ministers to establish an ASEAN human rights body was greeted by some of my colleagues with disbelief. I remember that my colleague from Vietnam demanded to see his minister. Ong Keng Yong had the unpleasant duty of informing us that our ministers did not want to see any of us! Post-Charter, Myanmar has established a national commission of human rights.
15. Fourth, I consider the Charter to be a revolutionary document because of its strong commitment to sustainable development and to the protection of the environment.

The Preamble contains the following paragraph: “Resolved to ensure sustainable development for the benefit of present and future generations ...”

16. Article 1(9) declares that one of the purposes of ASEAN is: “9. To promote sustainable development so as to ensure the protection of the region’s environment, the sustainability of its natural resources, the preservation of its cultural heritage and the high quality of life of its peoples.”
17. A critic may say that these are aspirational statements and cannot be enforced. My response is to point out that aspirational statements are not without moral and political force. If an ASEAN government were to act in an irresponsible manner towards its environment, it can be held to account by its citizens and by its neighbours.
18. Fifth, I consider the Charter to be a revolutionary document because of its commitment to the rule of law, to international law and to the peaceful settlement of disputes. The rule of law is mentioned in the Preamble, Purposes and Principles. Article 2(2)(j) states that one of ASEAN’s principles is to uphold the UN Charter and international law, including international humanitarian law.
19. In Article 2, on Principles, we have Article 2(2)(c) on the “renunciation of aggression and of the threat or use of force or other actions in any manner inconsistent with international law.”
20. In Article 2(2)(d), we find the principle of “reliance on peaceful settlement of disputes.” Taken together, I am impressed that, through the Charter, ASEAN and its member states have made such a strong commitment to the rule of law, to upholding international law and to the peaceful settlement of disputes.
21. Sixth, the Charter is seeking to make a paradigm change in an area in which ASEAN had been weak, namely, dispute settlement. Culturally, ASEAN’s preference was for disputes between member states to be settled by consultations and negotiations.

In other words, the preference was for diplomacy over the law. However, in the field of trade and economic agreements, the ASEAN member states realized that it was necessary to have a more formal, binding dispute settlement procedure. ASEAN had to keep up with the WTO's dispute settlement system.

22. The EPG recommended the establishment of dispute settlement mechanisms in all fields of ASEAN cooperation. The HLTF tried to implement the EPG's recommendation. Some members of HLTF proposed the establishment of an ASEAN Court, like the European Court of Justice. There was, however, no consensus on the proposal.
23. A whole Chapter of the Charter, Chapter VIII, is devoted to the settlement of disputes. Article 22 states that member states shall endeavor to resolve their disputes through dialogue, consultation and negotiations. Article 23 states that member states to a dispute may agree to settle the dispute by resorting to good offices, conciliation and medication. The Charter states that the ASEAN Chair and the Secretary-General may provide good offices, conciliation or mediation. Article 24(3) provides that disputes concerning ASEAN economic agreements shall be settled in accordance with the Vientiane Protocol on the Enhanced Dispute Settlement Mechanism. Article 25 prescribes that appropriate dispute settlement mechanisms, including arbitration, should be established for disputes concerning the Charter or other ASEAN instruments.
24. Seventh, the Charter has tried to rationalize and streamline ASEAN's institutional structure and to empower the Secretary-General and the Secretariat. The Charter gives the Secretary-General four deputies, two of whom would be recruited in an open exercise. Article 23(2) of the Charter states that the parties to a dispute may request the Secretary-General to exercise his good offices, mediation and conciliation. Most importantly, Article 27 of the Charter gives the Secretary-General the duty to monitor compliance and to report on non-compliance to the Summit.

25. Eighth, the Charter emphasizes that ASEAN should be a people-oriented and people-centred organization and all sectors of our society should benefit from ASEAN integration and community building. The Charter begins with the following words: “We, the peoples of the Member States of ASEAN”. I would also point out that, eleven of the fifteen Purposes of ASEAN directly affect the people’s life, livelihood and well-being. We do not want ASEAN to become an elitist organization which is out of touch with the ground. The inclusion of Chapter V of the Charter and the requirement to engage with the civil society are meant to reinforce the goal to be a people-oriented and people-centred organization. Article 16 and Annex 2 are very significant. Annex 2 contains an extensive list of entities associated with ASEAN.

### **Reviewing and Amending the Charter**

26. The Charter was signed on the 20<sup>th</sup> of November 2007 and came into force on the 15<sup>th</sup> of December 2008. It has been in force for 9 years. The Charter is not perfect but it appears to have worked satisfactorily.
27. Article 48 of the Charter states that any member state may propose amendments to the Charter. Article 50 states that it may be reviewed 5 years after its entry into force, which was in 2013. No review of the Charter was held that year. I understand that an update of the Charter is on the current chairman’s list of deliverables, and member states are presently discussing the proposed updating of certain sections of the Charter.
28. On track two, however, some ASEAN think-tanks, non-governmental organizations and individuals have expressed dissatisfaction with some provisions of the Charter. For example, they would like to do away with the principle of “non-interference in the internal affairs of ASEAN member states”. They would also like the method of decision-making to be by majority vote instead of consensus. They would like the Charter to contain sanctions for non-compliance to include “suspension and expulsion”.

29. I would respectfully point out to my friends who have made such proposals that they are impractical and may be counter-productive. ASEAN unity is of paramount importance. In the interest of unity, we are sometimes unable to take action in situations which call for urgent action such as the complex situation in the Rakhine state of Myanmar. In such situations, my heart is with the critics. However, my head tells me that there is wisdom in strategic patience. ASEAN is evolving in the right direction. If we become impatient and insist that the majority should prevail and we should not allow the minority to block consensus, we may feel triumphant but we may be doing harm to ASEAN. The out voted minority may withdraw from ASEAN, leading to the break up of ASEAN. That would be a tragedy.
30. I take very seriously the aspiration, expressed in the Charter, for ASEAN to be a people-oriented and a people-centred organization. One of the lessons I have learnt from Brexit is that we must not allow ASEAN to become as an elitist organization, which is out of touch with our citizens. ASEAN must bring benefits to the citizens of ASEAN. ASEAN integration must bring benefits to small and medium-sized business as well as to big business. The ASEAN Secretariat should make a special effort to cultivate our students, young people, young parliamentarians, small and medium-sized enterprises, our sports community as well as our media and arts communities. We want the people of ASEAN to feel ownership of the organization. I support former Foreign Minister, George Yeo's suggestion that ASEAN should make a bid to host the FIFA World Cup. Also, inspired by the success of Eurovision, I have suggested that ASEAN should hold an annual singing competition.
31. We can also improve the communication between our civil society and the leaders of ASEAN. The status quo is not satisfactory. The representatives of civil society complain that their meetings with ASEAN's leaders are perfunctory and scripted. On the other hand, some of ASEAN's leaders complain that the leaders of civil society are often hostile and disrespectful. I think the solution is for the ASEAN Secretariat to play the role of the liaison between ASEAN and the civil society.

Ambassador Ong Keng Yong, when he was the Secretary-General, had acted as a bridge between the two sides.

32. Finally, I think we should try to find an issue in the field of human rights in which there would be a consensus to take action. My suggestion would be to focus on human trafficking. I hope that AICHR would consider this suggestion sympathetically.

### **Conclusion**

33. I shall conclude. I believe in ASEAN and salute it on the occasion of its 50<sup>th</sup> birthday. I salute ASEAN for having kept the peace in Southeast Asia for 50 years. I salute ASEAN for enabling the ASEAN economies to grow and integrate. I salute ASEAN for the indispensable role it plays as the convener and neutral chairman of our region's institutions and networks. I believe that the ASEAN Charter has helped to strengthen ASEAN by augmenting its institutions and the rule of law. I believe that ASEAN has a bright future provided that we remember the advice given by Singapore's founding Foreign Minister, Mr S Rajaratnam, on the 8<sup>th</sup> of August 1967, in Bangkok. He urged the ASEAN member states to embrace the ASEAN spirit and to act in accordance with it. He defined the ASEAN spirit as the willingness of the ASEAN member states to consider making adjustments to their national policies for the sake of the greater good of ASEAN.

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