



PROJECT MUSE®

---

The ASEAN Charter: An Opportunity Missed or One that *Cannot*  
Be Missed?

Mely Caballero-Anthony

Southeast Asian Affairs, Volume 2008, pp. 71-85 (Article)

Published by ISEAS–Yusof Ishak Institute



➔ For additional information about this article

<https://muse.jhu.edu/article/257251>

# **THE ASEAN CHARTER**

## **An Opportunity Missed or One that *Cannot Be Missed?***

Mely Caballero-Anthony

### **Introduction**

Since the formal adoption of the much-awaited ASEAN Charter in November 2007, opinions have been mixed regarding its impact on the institutional development of the forty-year-old association. From media reports, commentaries and editorials that emerged, the views expressed on the Charter have covered both ends of the spectrum, as reflected in comments from the most enthusiastic that called the Charter a “momentous event” in ASEAN’s history, to the tad less salubrious and sceptical remarks on “long on talk, short on action” — and the starkly dismissive ones which referred to the event as a missed opportunity.

To be sure, the debates on the real impact of the Charter on ASEAN are far from over. More of the same contentions will continue in the months and years to come. Nonetheless, two years since the drafting of the Charter commenced, perhaps this is the best time to do a stocktake and examine how the process(es) of improving the institutional capacity of ASEAN has come along. This chapter therefore provides a short review of the events that led to the adoption of ASEAN Charter and offers some thoughts on a number of issues that have emerged as a consequence of this regional exercise.

### **The Starting Point**

It is interesting to note that the idea of an ASEAN Charter was proposed by Malaysia in 2004,<sup>1</sup> although the decision to draw up a Charter was formally adopted at the

---

MELY CABALLERO-ANTHONY is Associate Professor, S. Rajaratnam School of International Studies, Nanyang Technological University.

Eleventh ASEAN Summit in 2005. The Malaysian concept paper entitled, “Review of ASEAN Institutional Framework: Proposals for Change” had argued that in order to successfully transform ASEAN into an ASEAN Community, it would have to be prepared for profound changes including its institutional framework. One of the suggestions, therefore, was to review and revise ASEAN’s current institutional framework, working methods, and rules — hence the need to draft a Charter.<sup>2</sup>

The announcement of having a Charter at the Eleventh ASEAN Summit led to the appointment of a ten-person Eminent Persons Group (EPG) with a representative from each of the ASEAN states, which was given the mission of providing the ASEAN leaders “bold and visionary” inputs and recommendations for the Charter.<sup>3</sup> Apart from their official mandate, the EPG was also encouraged by the ASEAN leaders to conduct a series of consultations with civil society groups and business networks in keeping with the new thrust of the grouping to become a more inclusive organization. The initiative for a bottom-up consultative process was announced by Malaysia’s Prime Minister Abdullah Badawi, speaking in his capacity as the 2005 ASEAN Chair. According to him, ASEAN had to be “transformed” to become a more people-centred community.<sup>4</sup>

### **The Drafting Processes: Raising Expectations for a Normative and Participatory Form of Regionalism in Southeast Asia**

The announcement of the ASEAN Charter attracted a lot of attention not only among many scholars and analysts on regionalism in Southeast Asia, but especially among the civil society organizations (CSOs) and non-government organizations (NGOs) that had for some years been less than enthusiastic about ASEAN. The interest to get involved in regional processes was triggered by the invitation issued by ASEAN officials for them to get involved in the drafting of the Charter. This was to be done through a series of consultative meetings between officials and interested CSOs. To kick off the bottom-up consultative process, the EPG invited representatives from the different CSOs in the region to the first ASEAN-CSO meeting held in Kuala Lumpur, Malaysia on 7–9 December 2005. The first ASEAN Civil Society Conference (ACSC) brought together around 120 participants from a number of CSOs in the region, which produced a “Statement of the ASEAN Civil Society Conference to the 11th ASEAN Summit”.<sup>5</sup> The document was subsequently submitted to the ASEAN Heads of State at their first ever interface with civil society groups on 12 December 2005. Although the meeting only lasted for about 15 minutes, the representatives of ACSC were

able to submit and read out their manifesto entitled “Building a Common Future Together” — a title chosen to complement the Eleventh Summit’s theme of “One Vision, One Identity, One Community”.<sup>6</sup> The CSO statement highlighted a number of issues for ASEAN officials to consider, including civil society participation in decision-making processes in ASEAN, establishment of channels for civil society inputs to the ASEAN Secretariat, establishment of an ASEAN Human Rights Commission, as well as a regional mechanism for the protection of rights of women and children and of migrant workers.<sup>7</sup>

The convening of ACSC raised hopes that a framework was finally being established to facilitate a more institutionalized engagement between ASEAN officials and the citizens of the region. This also led to the formation of the Solidarity for Asian Peoples Advocacy (SAPA) in February 2006, which brought together under one umbrella twelve CSOs including Forum Asia and Third World Network.<sup>8</sup> The formation of SAPA appeared to have enhanced the level of CSO engagement with ASEAN, complementing the fledgling attempts started by another loose CSO body called the ASEAN Peoples Assembly (APA).<sup>9</sup>

After the first ASEAN-CSO meeting in Malaysia in December 2005, four other consultative meetings took place in 2006 (Bangkok in February, Manila in March, Bali in April, and Singapore in June). Meanwhile, other informal parallel consultations were undertaken with some Track Two networks in the region. Among them was the ASEAN-ISIS network, which has worked with ASEAN-SOM for some time. The ASEAN-ISIS was specially invited by the ASEAN-SOM to provide ideas on the Charter. ASEAN-ISIS subsequently issued their own “ASEAN-ISIS Memorandum No.1 2006 on the ASEAN Charter”, which was submitted to the ASEAN Foreign Ministers’ meeting in Bali, Indonesia in April 2006, around the same time that the EPG was conducting their second consultative meeting. It is interesting to note that the ASEAN-ISIS Memorandum approximated a full version of a Charter for ASEAN, which contained significant elements including a list of ASEAN principles, an outline of ASEAN organs to be established, its institutional arrangements, consultation and decision-making process, external relations, rights and obligations, financial matters and even sanctions.<sup>10</sup> Aside from the inputs from ASEAN-ISIS, there were also similar proposals submitted by other Track Two institutions like the Institute of Southeast Asian Studies (ISEAS), which prepared its own document on framing the Charter. Their inputs were also submitted to the EPG and the ASEAN-SOM in time for the Eleventh Summit in Kuala Lumpur.<sup>11</sup> After conducting a series of consultative meetings, dubbed as “Consultations with the People”, the EPG finally submitted its recommendations to the ASEAN leaders at the Twelfth ASEAN Summit in Cebu, Philippines in January 2007.

The EPG Report generated a lot of attention for the boldness in its vision and ideas that it had for ASEAN. Furthermore, the fact that the Report was widely published and made easily available through the ASEAN Secretariat website — a significant departure from the past practice of non-transparency — reinforced the perception, at least during that period, that Southeast Asia was indeed at the cusp of a new era of “regionalism”. There were at least two elements in the Report that explained this optimism.

First, the principles and norms of ASEAN. Aside from attempting to streamline and integrate many of the declared principles of ASEAN into one coherent framework — principles already articulated in several ASEAN Documents, namely ASEAN Vision 2020, Hanoi Plan of Action, Bali Concord I and II, Treaty of Amity and Cooperation — the EPG Report went a step further to openly call for “the active strengthening of democratic values, good governance, rejection of unconstitutional and undemocratic changes of government, through the respect and institutionalization of the rule of law, including humanitarian law”. Clearly articulated also was the respect for human rights and fundamental freedoms.<sup>12</sup>

Second, the issue of rights and obligations of members. To stress the salience of observing members’ rights and obligations, the Report included a provision for possible sanctions. Specifically, the Report had proposed that “ASEAN should have the power to redress cases of serious breach of ASEAN’s objectives, major principles ... [and] such measures may include *suspension of any of the rights and privileges of membership*”.<sup>13</sup> And while the “ASEAN Way” was not going to be completely discarded, the intent of such a provision was to supplement the ASEAN way with a culture of adherence to rules which were, by the merits of the Charter, going to be legally binding.

In brief, the EPG Report therefore raised high expectations of an emerging sea change in the thinking among ASEAN elites. The recommendations on democracy and human rights and on obligations of member states, including the idea of adopting sanctions, reflected a growing attitude among officials that sticking to the practice of “lowest common denominator” in standards of behaviour was no longer acceptable in a maturing ASEAN. More importantly, a rules-based ASEAN was also going to enhance its credibility both as an important actor in and a leader outside the region.

The wave of optimism, however, was short lived. As one tracked the turn of events that followed the submission of the EPG Report to the ASEAN Summit in January 2007, it soon became clear that despite the endorsement of the EPG Report by ASEAN leaders, serious rifts began to emerge among the members on a number of controversial issues, particularly on the issue of sanctions. Between

the ASEAN Summits in January and November 2007, a High Level Task Force (HLTF) was assigned to prepare the draft of the Charter, which was to be approved by the leaders in time for ASEAN's fortieth anniversary celebrations in Singapore. But even then, the HLTF were apparently told by the ASEAN Senior Officials that the draft Charter must be "practical and doable". The HLTF were apparently also instructed to exclude any discussions on sanctions and not to change the consensus decision-making process.

While these qualifications already signalled the possibility of a watered-down version of the Charter, nothing could have prepared the region for the unexpected demonstrations in Myanmar in September 2007, just two months before the holding of the Summit. The week-long demonstrations led by Buddhist monks that erupted in parts of Myanmar and beyond its capital Yangon, were met with force and severe repression by the military junta. The incidents of violence that followed, which were captured on television across the globe, visibly shocked Myanmar's neighbours and international community. These events also practically snuffed out whatever optimistic mood prevailed in the region.

Interestingly, the response from ASEAN leaders was noticeably sharp and swift. Not only did ASEAN issue a joint statement expressing their "revulsion" to the atrocities that occurred, but it joined the rest of the international community in "urging Myanmar to exercise utmost restraint ... seek political solution ... and release all political detainees including Aung San Suu Kyi".<sup>14</sup> Despite the rhetoric, however, the Summit went ahead with the participation of Myanmar. What further dampened the mood was the "leaking" of copies of the draft Charter prior to the start of the Singapore Summit, which turned out to be a watered-down version of what the EPG Report had recommended. Thus, in spite of the splendid efforts by the host Singapore to run the Thirteenth ASEAN Summit as smoothly as possible, Myanmar's attendance at the summit cast a long shadow on ASEAN's fortieth anniversary celebrations. And, as if the list of setbacks to the celebrations were not enough, Myanmar dealt another *coup de grâce* with its unexpected *volte-face* in not allowing the UN envoy Ibrahim Gambari to brief the regional leaders on developments in the country after the host had already announced that such a briefing was slated to take place.

## **The Adoption of the Charter**

These events notwithstanding, the ASEAN Charter was formally adopted by ASEAN leaders on 20 November 2007. A media release from the ASEAN Secretariat noted that "for the first time after 40 years of regional organisation, ASEAN Member

states have codified organic Southeast Asian diplomacy, and listed key principles and purposes of ASEAN.”<sup>15</sup> With 13 Chapters, 55 Articles, and 4 annexes, the new Charter has essentially laid out the legal and institutional framework of ASEAN. But while the adoption of a Charter is certainly a watershed in ASEAN’s history, many observers have questioned how much has actually been achieved with the formal adoption of the Charter.

The former ASEAN Secretary-General, Mr Ong Keng Yong, had declared that “the Charter will serve the organization well in three interrelated ways: (1) formally accord ASEAN legal personality, (2) establish greater institutional accountability and compliance system, and (3) reinforce the perception of ASEAN as a serious regional player in the future of the Asia-Pacific region.”<sup>16</sup> This section will now examine each of these issues based on the provisions of the ASEAN Charter.

### **1. Legal Personality of ASEAN**

*ASEAN will, for the first time after 40 years of existence, be conferred a legal personality of an inter-governmental organization.*

This is perhaps the most significant achievement of the Charter. ASEAN officials have explained that the Charter would establish the association as a “juridical personality and a legal entity”, which in turn will bring about a number of advantages.<sup>17</sup> For one thing, the Charter would grant ASEAN status under international law and would, therefore, allow ASEAN to enter transactions in its own right. Similarly, with this legal personality, domestic laws of ASEAN member states would have to recognize ASEAN’s new status and would allow ASEAN to take advantage of certain privileges under domestic law, for example, tax exemption. More significantly, having a charter would be useful in providing a legal framework for incorporating ASEAN decisions, treaties and conventions into the national legislation of member countries.

Moreover, the Charter has established and outlined the institutional structure of the association and created new ones. Aside from delineating the specific functions of the respective bodies, it has also outlined the relationship among each of these institutions and explained their decision-making processes. The Charter has also put in place a number of important institutional changes to ASEAN. These include:

- convening of ASEAN Summit not once but twice a year;
- establishment of an ASEAN Coordinating Council to be served by the ASEAN Foreign Ministers;

- appointment of each member state's Permanent Representative to ASEAN to form a Committee of Permanent Representation;
- single Chairmanship for key high-level ASEAN bodies; and
- establishment of an ASEAN Human Rights Body.

## **2. *Establish Greater Institutional Accountability and Compliance Systems***

It has been argued that having a Charter will make ASEAN a more rules-based organization. As pointed out in an article written by the Singapore team represented in the HLTF that drafted the Charter, "The ASEAN way ... will not be done away with. It will be supplemented by a new culture of adherence to rule ... a culture of taking our obligations seriously ... will put in place a system of compliance monitoring and, most importantly, a system of compulsory dispute settlement for noncompliance that will apply to all ASEAN agreements."<sup>18</sup>

While the prospects of turning ASEAN into a more rules-based organization have been hyped up before the release of the formal document, particularly after the EPG Report had suggested the idea of instituting certain measures such as possible sanctions,<sup>19</sup> the lack of provision for any effective compliance mechanism in the Charter has become a major point of contention across the different sectors of the ASEAN community. The argument is, absent any explicit legally binding provision for compliance and/or credible dispute settlement mechanism, ASEAN will not be able to carry out any measures nor effectively implement many of the regional agreements — in economics, politics, security, and other functional areas — that have been agreed upon by member states. In the current institutional design, neither the ASEAN Secretary-General nor the ASEAN Secretariat has the mandate to authoritatively call for compliance. We also note that the ASEAN practice of compliance has, so far, been largely voluntary in nature. Encouraging members' commitment to obligations has been carried out through persuasion and bargaining. Instead, what the Charter has provided is that questions of discipline regarding cases of non-compliance on provisions of agreements would be referred to the ASEAN Summit.<sup>20</sup>

The above provisions have, therefore, raised a number of questions. Firstly, why is there a reluctance to create a mechanism for monitoring and compliance especially at a time when ASEAN is: (1) reorganizing itself, (2) embarking on a number of initiatives such as the establishment of a three-pillared community based on the creation of the ASEAN Economic Community (AEC), ASEAN Security Community (ASC), and ASEAN Socio-Cultural Community (ASCC), and

(3) currently facing systems overload with a small, over-burdened Secretariat? The lack of progress in moving ASEAN Free Trade Agreement (AFTA) forward, due largely to weak implementation and backsliding of commitments by some member states, should have been sufficient to boost the case for instituting credible mechanisms with more teeth to move agreements beyond declarations to action.

Second, why the reliance on the Summit? It is difficult at this point in time to imagine how the Summit will act decisively on issues of compliance. The recent incident at the Singapore Summit certainly does not bode well for such a provision. The fact that at this Thirteenth ASEAN Summit, ASEAN leaders had to suffer the embarrassment of having to withdraw their invitation to UN Special Envoy Ibrahim Gambari to talk to them because of strong opposition from Myanmar makes the logic of relying on the Summit to address issues of non-compliance, not only of regional agreements but also of norms of acceptable state conduct towards its citizens, obviously flawed. One would recall how ASEAN leaders have had to put up a brave face in the face of criticisms, both within and outside the region, of the Association's lack of credibility in handling Myanmar with kid's gloves after the regime's brutal treatment of demonstrators at a time when the Charter was going to be launched. It also did not help that among the reasons given for such display of solidarity was that "[they] did not want to come across as being too confrontational in a situation like this".

More importantly, given the standing ASEAN practice of decision-making by consensus, which has also been reinforced by its codification in the Charter, any move towards instituting a credible enforcement mechanism is severely hampered. While the Charter states that "when consensus cannot be achieved, the ASEAN Summit may decide how a specific decision can be made", the lack of any clear reference as to how such a decision could be reached, either by majority vote or some other formula, raises more questions. To be sure, this is a significant setback to the EPG recommendation for ASEAN to relax or do away with its style of decision-making by adopting an "ASEAN Minus X" formula that would allow decisions to be reached without full consensus. Hence, one can argue that sticking to the principle of decision-making by consensus effectively negates any effort at establishing possible sanctions for non-compliance.

On the positive side, the rigidity of decision-making by consensus has been slightly modified for matters pertaining to economic agreements through the "ASEAN Minus X" formula and "2+X" formula. Even before the Charter, the "ASEAN Minus X" formula had, in fact, been practised. The rationale was to allow for some kind of flexible participation — such as giving members the option to delay their participation and/or commitment to economic agreements like

lowering tariff barriers if they feel they were not ready. But this only happens when there is prior consensus to apply the “Minus X” formula. Similarly, the formula encourages other members to proceed ahead with economic agreements through the “2+X” formula to facilitate ASEAN’s goal of an economically integrated single market and production base with the “free flow of goods, services, and investment”. Nevertheless, the jury is still out on whether such formulas help or hamper ASEAN’s efforts to realize its vision of an economic community.

Finally, there remains the question of a mechanism for dispute settlement. The Charter states that disputes pertaining to economic matters will be referred to the 2004 ASEAN Protocol on Enhanced Dispute Settlement Mechanism. It is unclear, however, how other matters including security issues will be handled. The provision on this in the Charter points to the enhanced role of the ASEAN Secretary-General and the ASEAN Chair — that is, the “ASEAN Chair and the Secretary-General can be requested to provide good offices, conciliation or mediation in a dispute”. Note, however, that the provision only calls for an intermediary role since unresolved disputes shall be referred to the ASEAN Summit for decision. Once again, reservations arise on how the ASEAN leaders will resolve disputes given the embedded practice of decision-making by consensus.

In brief, the real issue is not so much one of lack of trying, but more of ASEAN officials not having done enough of what could have been done, given the right time and the perfect opportunity to institute the much-needed institutional reforms for ASEAN. Since the adoption of the Bali Concord II that outlined plans for ASEAN to build the three-pillared community — AEC, ASC, and ASCC — the message conveyed to the regional community was that ASEAN needs to change. And change here meant rising above or working around obstacles in the way of closer cooperation and deeper commitment, given the urgency to respond to an array of security, economic, and development challenges, which require no less than a collective responsibility. Realizing the goals of the ASEAN three-pillared communities, therefore, meant going beyond the ASEAN way of informality and consensus decision-making modalities to adopting clear strategies, decisive measures and credible mechanisms — even if these meant impinging on the internal affairs of member states. Hence, the absence of those elements in the Charter that was unveiled was a big let-down to many groups in the region, specially the CSOs that had joined and actively participated in the consultative processes of drafting the Charter. Among the negative sentiments that emerged was the statement of a prominent member of the ASEAN-ISIS network who described the Charter as “void of the vision, progress and courage that is needed to guide ASEAN to face the future”.<sup>21</sup> Given the perceived “mediocrity”

of the Charter, he urged the Indonesian Parliament not to ratify the Charter while urging ASEAN to “go back to the drawing board to come up with a more modest document commensurate with the state of affairs in ASEAN”.<sup>22</sup> Similarly, civil society groups who participated in the EPG consultative processes had openly criticized ASEAN’s “weak” Charter and declared that they were going to come up with their own people-oriented Charter.

Against the range of questions and reservations that had emerged, it was not surprising that doubts were once again raised about the prospects of ASEAN becoming a key player and leader in the wider Asia-Pacific region.

### ***3. ASEAN as a Serious Regional Player in the Future of the Asia-Pacific Region***

The standing of ASEAN as a key player in the region can be assessed at two levels. One is how ASEAN is regarded within the region, while the other is ASEAN’s standing in the international community.

At least prior to the adoption of the ASEAN Charter, much of the rhetoric in the region had revolved around a number of themes such as community building, regional identity, inclusiveness, and being people-centred. Interesting also had been the discourses on the “shared vision and common values to achieve peace, stability, democracy and prosperity in the region”.<sup>23</sup> The latter had significantly raised expectations that ASEAN was at the cusp of a normative transformation. The sense that emerged was that after forty years, ASEAN would finally have a Charter that would spell out clearly its institutional norms and values, which in turn would commit member states to the promotion of democracy, protection of human rights and human security.

Arguably, such optimism within the region was warranted given that the discourses and ideas that were prevalent during that period were in fact further reinforced by the release of the EPG report that called for “the active strengthening of democratic values”, as well as official declarations that urged adherence to “the promotion of democracy, human rights and obligations”.<sup>24</sup> In sum, these developments if pushed to their its logical conclusion could have indeed been a milestone in ASEAN as they signalled that democracy and human rights were the next policy frontiers.<sup>25</sup> But as events unfolded, it became clear that the hopes were not quite realistic. From the release of the EPG report to the time when copies of the Charter were “leaked” just prior to the start of the Thirteenth ASEAN Summit, the reported differences among ASEAN officials saw the watering-down of plans to push for the establishment of a normative framework for ASEAN.

Two factors in particular explain the pessimism that ensued. First was the decision to go ahead with the Singapore Summit and adopt the Charter despite the violence that took place in Myanmar. Myanmar's attendance at the Summit and as a signatory to the Charter that professed "to strengthen democracy, enhance good governance and the rule of law, to promote human rights and fundamental freedoms"<sup>26</sup> was seen as a big blow to ASEAN's credibility and thus severely compromised its standing not only in the eyes of its own people but of the international community that witnessed the brutal treatment of Burmese demonstrators by the regime's military junta. Moreover, the cancellation of a scheduled briefing by Ibrahim Gambari at the Summit in the face of strong objections from Myanmar reflected the lack of gumption by other ASEAN leaders to assert the observance of human rights.

The second was the promise of establishing a human rights body. While the Charter stated that a regional human rights body was going to be established, it did not go far enough to operationalize how this regional body was going to be constituted and how it was going to function. Absent too was any provision for sanctions or punitive mechanism on violations of norms of democracy. Perhaps the only interesting thing that came up during the adoption of the Charter at the Singapore meeting was the statement issued by Philippine President Gloria Arroyo. In what was perceived as an act that went against protocol, President Arroyo announced that her country would be hard pressed to ratify the Charter unless the situation in Myanmar improves. The strong stand taken by the Philippine leader was not entirely unexpected. Apparently, acting in her capacity as the ASEAN Chair of the Twelfth ASEAN Summit, Gloria Arroyo had insisted that the provision on establishing a human rights mechanism be included in the draft Charter despite the reservations by other leaders of ASEAN. It was also Arroyo who insisted that the ASEAN Convention on the Rights of Migrant Workers be adopted at the Twelfth ASEAN Summit. Thus, Arroyo's statement on the Charter was seen as a sign of the tricky path ahead in its ratification by each of the ASEAN members given the possibility that other democratic states in the region like Indonesia and Thailand may follow the Philippine stance.

As far as ASEAN's image outside the region is concerned, the developments before and after the adoption of the ASEAN Charter had certainly cast doubt on the ability of the grouping to seriously take up its role as a pivotal actor in the wider Asia-Pacific region. The conservatism and perceived rigidity reflected in the Charter, as well as the differences that emerged among members, highlight the obstacles faced by ASEAN in pushing ahead with its vision of building a dynamic three-pillared community. Instead, what has come to light is the fact

that even with an ASEAN Charter, it is still pretty much “business as usual” in ASEAN in which the usual features — of decision-making by consensus, working on the lowest common denominator, strict adherence to the principle of non-interference and reticence towards any form of sanction for non-compliance — remain unchanged.

But as the EPG Report and other ASEAN officials’ statements have already noted, the stakes facing ASEAN to remain relevant are high. If ASEAN wants to build a security community, it needs to have a stronger and more effective organization with enough institutional capacity to address a wide range of security challenges, both the traditional and non-traditional. If ASEAN wants to deepen and widen its economic integration process with the aim of building an economic community, it needs to build a culture of compliance with a credible system in place to settle disputes and address issues of non-compliance. Last but not least, if ASEAN wants to build a community guided by a set of norms, rules and principles of behaviour, and with the “shared vision and common values to achieve peace, stability, democracy and prosperity in the region”, then ASEAN has to move away from its characteristically top-down approach to regionalism and make way for a more inclusive and participatory process which allows not only for engagement of civil society organizations in the regional processes but also the promotion of democracy and respect for human rights. Thus, absent these features in ASEAN’s first and historic legal document, ASEAN’s credibility as a regional leader, and its relevance to continue to be in the driver’s seat are seriously compromised.

In view of these concerns, was the Charter a futile exercise?

## **Looking Beyond the Charter**

Whatever one thinks of the issues surrounding the Charter and their implications, the fortieth anniversary of ASEAN was certainly marked by a number of defining moments of tremendous potential consequence for the future of regionalism in Southeast Asia. Human rights, democracy and the need to address ASEAN’s institutional development to deal with a number of emerging security challenges have reached a threshold where ASEAN elites and civil society groups are now pressing for these issues to be addressed and no longer swept under the carpet. While one cannot deny the weaknesses found in the Charter, there are, however, spaces that can be found to push the agenda for change in the region.

One of these is the very fact that ASEAN now has a Charter that has — for all intents and purposes — finally codified its key principles and purposes. Part

of these key principles and purposes include ASEAN's adherence to democratic values, human rights, and fundamental freedoms.<sup>27</sup> Having signed on to the Charter, therefore, makes it imperative upon member states to commit to the spirit of the Charter. In turn, the Charter has now become the legal basis for putting any member state to task if it is seen to be in egregious violation of these principles. In this regard, until the situation in Myanmar improves, one can be sure that Myanmar will be pressured regularly by its own neighbours to become accountable for its actions and address political problems at home.

Similarly, while it is unfortunate that the provision for establishing a human rights body lacks specific details, the fact that this is now incorporated in the Charter makes it incumbent on ASEAN members to act on this — sooner, if not, later. In the next year or so, ASEAN will have to come up with its blueprint of the ASC.<sup>28</sup> In this regard, among the things that one would expect to see are details on how the human rights body would be constituted given that protection of human rights is one of the key components embedded in the ASC.

It has been argued that a Charter is a living document.<sup>29</sup> Despite its imperfections, there is nothing that can stop the states and societies of this region from wanting to amend and/or add more provisions to the Charter, as and when the need arises and given the growing demand for regional institutions to be responsive to new and emerging challenges. In this regard, the adoption of the Charter is in itself a step, albeit small, in the right direction. One can therefore argue that despite what appeared to be a lost opportunity in having a good Charter, at the end of the day the Charter still does matter. The momentum in pushing ahead with change that is already gaining ground in the region should not be wasted. The Charter can thus still provide an opportunity for change that should not be missed.

The developments recounted in this chapter have highlighted the huge challenges ahead in endowing ASEAN with legal force while reforming its normative framework. To be sure, domestic politics inside the member countries have been and will continue to be of particular importance in the realization or failure of such visions. Nevertheless, the stage appears to have been set for greater engagement and more contestation — not less. In fact, we are already beginning to witness the dynamics of regionalism being pried open beyond the traditional confines of closed-door diplomacy. Thus, as one reviews the developments that took place at different points over the course of the two years that it took to draft and finally adopt the Charter, one discerns the winds of change in the nature of state-to-state and society-to-state interactions in the region.

## Notes

- <sup>1</sup> The idea of having an ASEAN charter however began much earlier. According to a Malaysian senior official at the Foreign Ministry, the idea was first articulated at the Seventh ASEAN Ministerial Meeting in 1974. At that time, however, it was considered inappropriate to the ASEAN practice of informal, flexible processes as well as its principles of consensus. See Ilango Karuppana, “The ASEAN Community and ASEAN Charter: Toward a New ASEAN” (manuscript, 2005).
- <sup>2</sup> Ibid.
- <sup>3</sup> The EPG is composed of ten representatives, one from each ASEAN member country, and chaired by Musa Hitam, former Deputy Prime of Malaysia and Chairman of Malaysia’s Human Rights Commission, Suaram.
- <sup>4</sup> See Chairman’s Statement of the 11th ASEAN Summit on “One Vision, One Identity, One Community”, <<http://www.aseansec.org/18040.htm>>.
- <sup>5</sup> See, “ASEAN Civil Society Speaks Out”, in JustWord E-com, at <<http://www.just-international.org/commentary/E%20News%20Jan%2006.htm>>. The Asian Civil Society Conference brings together a number of civil society groups in the region and is coordinated by the Universiti Institut Teknologi Mara (UiTM), Malaysia.
- <sup>6</sup> See Statement of the ASEAN Civil Society Conference to the 11th ASEAN Summit, reproduced in <<http://www.focusweb.org/content/view/774/27/>>, accessed 27 July 2006.
- <sup>7</sup> Ibid.
- <sup>8</sup> “SAPA core group spearheads coming strategies in engaging ASEAN”, <[http://www.forum-asia.org/news/in\\_the\\_news/10Apr06\\_sapa.shtml](http://www.forum-asia.org/news/in_the_news/10Apr06_sapa.shtml)>, accessed 25 July 2006.
- <sup>9</sup> The ASEAN Peoples Assembly (APA) preceded the formation of SAPA. APA was launched in 2000 upon the initiative of ASEAN-ISIS, a Track Two network in ASEAN. For more detailed historical account, see, Mely Caballero-Anthony, *Regional Security in Southeast Asia: Beyond the ASEAN Way* (Singapore: Institute of Southeast Asian Studies, 2005); and “Non-State Regional Governance Mechanism for Economic Security: The Case of the ASEAN Peoples’ Assembly”, *Pacific Review*, 17, no. 4 (2004): 567–85.
- <sup>10</sup> ASEAN-ISIS Memorandum No. 1, The ASEAN Charter, 18 April 2006.
- <sup>11</sup> See *Framing the ASEAN Charter: An ISEAS Perspective*, compiled by Rodolfo Severino (Singapore: Institute of Southeast Asian Studies, 2005).
- <sup>12</sup> See Report of the Eminent Persons Group on the ASEAN Charter, 30 December 2006, p. 2, at <<http://www.aseansec.org>>.
- <sup>13</sup> Ibid. p. 4.
- <sup>14</sup> “Statement by ASEAN Chair, Singapore’s Ministers for Foreign Affairs George Yeo”, New York, 27 September 2007, at <<http://www.aseansec.org/20976.htm>>, accessed 29 November 2007.

- <sup>15</sup> See Media Release, “ASEAN Leaders Sign ASEAN Charter”, Singapore, 20 November 2007, available at <<http://www.aseansec.org/21085.htm>>, accessed 29 November 2007.
- <sup>16</sup> Ibid.
- <sup>17</sup> See Severino, *Framing the ASEAN Charter*, pp. 7–8.
- <sup>18</sup> See Tommy Koh, Walter Woon, Andrew Tan, and Chan Sze-Wei, “The ASEAN Charter”, *PacNet Newsletter* 331, 7 September 2007.
- <sup>19</sup> The EPG Report has gone further to recommend the possibility of “the suspension of rights and privileges” of membership. See EPG Report, p. 31.
- <sup>20</sup> See Section 4 of Article 20, Chapter VII of the ASEAN Charter.
- <sup>21</sup> Jusuf Wanandi, “ASEAN’s charter: Does a mediocre document really matter?”, *Jakarta Post*, 26 November 2007.
- <sup>22</sup> Ibid.
- <sup>23</sup> See the ASEAN Security Community Plan of Action, Vientiane, 29 November 2004.
- <sup>24</sup> “Kuala Lumpur Declaration of the Establishment of the ASEAN Charter”, Kuala Lumpur, 12 December 2005.
- <sup>25</sup> See Mely Caballero-Anthony, “Non-Traditional Security, Democracy, and Regionalism in Southeast Asia”, in *Hard Choices: Security, Regionalism and Democracy in Southeast Asia*, edited by Donald K. Emmerson (forthcoming 2008).
- <sup>26</sup> See Article 1, paragraph 7 of the ASEAN Charter (Singapore, 20 November 2007).
- <sup>27</sup> These three elements are found in three separate places in the Charter — the Preamble, the Purposes, and its Principles. See Koh et al., “The ASEAN Charter”.
- <sup>28</sup> The blueprint for the ASEAN Economic Community was finalized and released at the 13th ASEAN Summit in Singapore.
- <sup>29</sup> See Koh et al., “The ASEAN Charter”.

