AYUA, THE 'LAKAYANA' SYNDROME AND THE SUPREME COURT

- Itse Sagay

In supposed response to my review or critique of the Supreme Court judgment on the so called Resource Control case, Professor Ignatius Ayua, released a two part article published in the Guardian, on Monday July 1 and Tuesday July 2, 2002. I would not have considered it necessary to respond to his article if Professor Ayua had maintained the cherished academic and scholarly culture of restrained, dispassionate, and courteous language and rational arguments. Unfortunately, Ayua's outburst has been surprisingly vitriolic and personal; and what is worse, his presentation is to put it simply a basket of errors and misconceptions, which expose his complete ignorance of international law.

The very title of Ayua's article; "In Defense of the Supreme Court" is provocative and inciting and designed to create the impression that the Supreme Court had been "attacked", and that Ayua, the courageous Knight in White shining armour has risen stoutly to the Court's defence. Indeed he used such terms as "vilification of the Supreme Court" to describe my article.

Professor Ayua's mannerisms remind me of a passage in an English Reader used in Lower Primary Schools of the forties and early fifties which had a passage somewhat like this:

"See me Lakayana with my spear, the spear which my mother gave me; my mother who ate my yam, the yam which my father gave me; my father took my hoe, the hoe which my Teacher gave me", and so on. We might transpose this into the Ayua pantomine saying, "Supreme Court, see me Ignatius with my pen, my pen which I used in savaging Professor Sagay, Professor Sagay who criticized your judgment. Look me well Supreme Court. Remember me in the dispatches of August or September 2002. Look me, well well, I am your defender."

Ayua had to manufacture an attack in order to set up a defense.

Since when did a critique of a judgment of the Supreme Court or any Court for that matter, constitute an attack on that Court, representing" a frontal attack on the rule of law and judicial independence" What haughty intolerance is this? Is Ayua striving to re-institute the tyranny and terror of the Abacha regime, which regime he served with relish and great profit to himself? How are law and learning to move forward, if even scholars dare not comment on a Court's judgment? Even a layman is entitled to comment on a Court's judgment. How much more a Professor of International Law? Does my identity as an indigene of the Niger Delta disqualify me from commenting on a judgment that profoundly affects my Region and my people? What sort of academic culture is Ayua fostering at the Institute of Advance Legal Studies? Is it a barrack room regime of "the Director-General knows everything?" What about democracy and the diversity of views which comes with it? It is clear that Ayua is uncomfortable in an environment of democracy and academic freedom. He is obviously out of place at the Nigerian Institute of Advanced Legal Studies.

In the same spirit of assessing the work of the Supreme Court, I wrote a 300 page book published in 1990, entitled, A Legacy for Posterity: The Work of the Supreme Court, 1980 - 1988. This is a book in which the work of the Supreme Court was assessed through its judgments. The following passage from the introduction in the book speaks for itself.

"Since, roughly, 1980 the Supreme Court as an entity has embarked on a policy of promoting the Rule of Law, the Independence of the Judiciary, Human Rights and, indeed, Social Justice in our body politic, through its Judgments, Rulings and Pronouncements. Anyone reading the knowledgeable, formidably well researched, progressive and socially conscious Judgments and Rulings of the Court in recent years is bound to have a feeling that these are testaments for posterity; judgments on specific issues and human problems, but which are at the same time establishing a profound code of conduct for social interaction between man and man on the one hand, and man and government and its agents on the other hand. These judgments have brought and

are continuing to bring about a revolution in our social and political culture whose benefits have permeated all the social strata of this Nation"

What a way to vilify, and attack the Supreme Court and undermine the rule of law!

In his article contained in only two pages of the Guardian, Ayua, managed to refer to me or my arguments in the following terms:

1) Fallacious analysis
2) Sagay's flawed analysis
3) A vilification of the Supreme Court
4) Confusing arguments
5) Misleading
6) Ludicrous
7) Gross distortion of international law
8) Unwarranted criticism
9) Unguarded criticism
10) Self-seeking criticism against the judiciary
11) Convoluted fit of emotional outburst
12) Frontal attack on the rule of law and independence of the judiciary
13) Running down important national institutions just to satisfy parochial and selfish interests.

In the light of all these denigrating statements and the shaddy motive behind Ayua's article, I cannot ignore it. For to do so could be taken to mean an admission of his preposterous assertions and the parade of ignorance and bile that accompanied it.

Now to the misconceptions and unlimited errors in Ayua's so called defence.

Ayua says it is a fallacious analysis for me to say that Nigeria's claim to a territorial sea, contiguous zone, Exclusive Economic Zone and Continental Shelf is based on the continued presence of the coastal states as a part of Nigeria. Is that not self-evident? If

the coastal states pull out of Nigeria, will what is left of Nigeria have a coast? If it does not have a coast, can it have a territorial sea, a contiguous zone, an Exclusive Economic Zone or Continental Shelf? Can Nigeria have any maritime territory in the absence of the coastal states? Are they then not the real owners of Nigeria Maritime territory? Is the Federal Government's authority in these areas not directly derived from the presence of the coastal states as part of Nigeria? It is infantile to deny such an obvious fact which even laymen can appreciate.

After displaying much 'learning' by copiously lifting large portions of the 1982 Law of the Sea Convention, whose provisions he barely understands, Ayua comes to the conclusion that since the Convention was between states, (which he ignorantly calls "Nation-States") it is illegal to apply their provisions to the coastal states of Nigeria, the latter not being "nation-states".

Here, Ayua displays not merely his ignorance of international law, but demonstrates what a poor lawyer he is. The concept of prolongation of land territory is a physical one. If it is applied to define the rights of a state in the sea areas. That same principle is available to be applied in determining the rights of coastal states within a country in the sea areas. The key at all times is coastal land. If you have coastal land, then you automatically have maritime territory. The two go together. They are inseparable regardless of the context, i.e., whether domestic (within a state) or international. A coast line is an essential element of every state projection seawards. So in the international context, as against other countries, the Federal Government is the authority recognized for the protection and sustenance of Nigerian maritime territory. However when it comes to the internal or domestic arena, the coastal states are the owners of their continental Shelves. The domestic regime of the Territorial Sea and Exclusive Economic Zones differ because of defence and other international activities. However, the radical title of the coastal states to these two zones, i.e., the Territorial Sea and Exclusive Economic Zone remain valid though dormant, until the question of withdrawal from the country arises. Let me stress for the education of Ayua, who is a commercial Lawyer pretending to be an international lawyer, that a coastal state, regardless of its international status, is the owner of its maritime territory. The latter can

never be legitimately taken away from the coastal state. Its rights can be illegally frustrated by superior physical might, but such brute force is illegal. In the Nigerian domestic context, the Federal Government is land locked. It has NO maritime territory. All of Nigeria's maritime territory belong to the coastal states. This logic of common sense also happens to be the logic of international law. To say that this is contrary to international law is an embarrassing betrayal of ignorance of international law.

The assertion that 1985 Libya v. Malta judgment of the International Court of Justice some how does away with the concept of natural prolongation of territory under the sea is laughable. What the court stated in that case infact promotes the rights of coastal states in the continental shelf to an impregnable status. Indeed it says that A COASTAL STATE IS AUTOMOTICALLY ENTITLED TO TWO HUNDRED MILES LENGTH OF CONTINENTAL SHELF, EVEN IF IT DOES NOT HAVE A NATURAL PROLONGATION OF ITS LAND UNDER THE SEA. Once an entity is a coastal state it can claim 200 miles of continental shelf, regardless of its geological or geomorphological factors. It is when a coastal state claims more than 200 miles of continental shelf, that it must establish that it has a natural prolongation of its land under the sea in the area beyond 200 miles, up to a maximum of 350 miles. So in effect all coastal states have an automatic right to 200 miles of continental shelf regardless of the type of land under the sea. Thus the claim of coastal states to the continental shelf is infinitely strengthened by the 1985 Libya Malta case, rather than the other way round. But it is understandable, that a commercial Lawyer may have difficulty in appreciating this fact, although standing the clear implication of that development on its head, is going rather far.

Ayua also accuses me for "attacking" the supreme court judgment on the ground that it concentrated on colonial boundaries of Nigeria and old discarded English cases, without relevance to the issue before the court. Unfortunately, he is unable to show how these were relevant to the case and thus prove me wrong. His reference to the Truman Proclamation of September 1945 is truly amazing because the Truman Proclamation rapidly led to a new rule of customary international law. It was NEVER part of English common law. Perhaps, tragically, Ayua does not know that there is a wide gulf between

customary international law and English common law. They are not related. One is domestic or municipal and the other is international. I repeat; the continental shelf regime has nothing to do with Nigeria's colonial boundaries or the English common law.

Ayua's reliance on the provisions of the Nigerian Constitution and other Federal Laws to establish Federal ownership of Nigerian mineral resources misses the whole point of the argument . Although such claims of ownership imposed on the Constitution by the controlling majority ethnic groups is equivalent to illegal expropriation of minority rights to their natural resources, the crucial question in the matter before the court was whether the true ownership of the southern minorities is acknowledged by an appropriate provision on derivation. So our immediate disagreement with the judgment of the Supreme Court is the denial of the application of the derivation concept to the minerals in the coastal states' continental shelves. So the Federal Government can claim to own all mineral resources and still pay a reasonable percentage of the proceeds to the natural owners. So section 44(3), the Petroleum Decree 1969, etc are irrelevant to the issue of derivation.

Obviously, these oppressive laws will be repudiated and removed by a National Conference which is clearly inevitable now. It is significant that in the only constitutions freely negotiated by Nigerians between themselves, the 1960/63 constitutions, it was clearly stated in line with international law that for the purposes of derivation of minerals, the continental shelf of a state was owned by that state. Time will tell whether the present oppressive state affairs will survive.

In this regard it is surprising to hear a student of constitutional law describing federalism in which there is greater autonomy politically and financially for the Regions or states as an example of the tail wagging the dog. So the 36 States of Nigeria, including the Niger Delta States which provides the money on which the Federal Government survives, are the tails to the Federal dog. Are the states and ethnic nationalities who want their autonomy and self-government restored expected to accept this situation for ever? Can the center be stronger and more powerful against the wishes of the states that actually constitute the Federation, and whose agent, the Federal Government really is? Can a

nation of peoples within a Federal set up be compelled to accept a semi-unitary constitution against its wishes and interests indefinitely? Time will tell. Ayua has done a service to the minorities and other nationalities who want true federalism including fiscal federalism by calling them tails of the Federal dog. Realization of their slave status in Nigeria, may stimulate them to seek a change of that status. Of course in line with the sort of arrogance in which ignorance is celebrated, Ayua joins Bala Usman in asserting that the oil in the Niger Delta is the result of sediments brought from his homeland in Benue down to the Niger Delta by the Benue and Niger Rivers. Therefore the hydrocarbons in the Niger Delta belong to the Northern peoples living along the two great rivers. Perhaps Ayua will extend this claim to Garbon and Saudi Arabia, in order to lay claim to the oil and gas resources of those countries.

In his conclusion, Ayua describes my critique of the Supreme Court judgment as "Unwarranted and self-seeking - criticism against the judiciary especially the Supreme Court." He talks about my convoluted fit of emotional outburst representing a frontal attack on the rule of law and the independence of the judiciary. He concludes that we must resist the temptation to run down important national institutions just to satisfy parochial and selfish interests.

I have already noted that it is the right of any citizen to criticize or comment on a Court judgment. However, such a criticism should not be intemperate or insulting or abusive. It is not surprising that Ayua could not highlight a single passage in my article which had the lurid colour he tried to paint it in. For it was a dispassionate and rationally argued presentation, based on extensive and painstaking research.

Whilst I do not object to my criticism being faulted in terms of arguments, facts and law, I object to being used as vessel for seeking the favours of Supreme Court Judges. Ayua cannot compare himself to me in the sphere of international law. I cannot be self-seeking because I have long ago established my position in legal scholarship. I studied international law for four years in the University of Cambridge. (1966-1970) obtaining my LLM (then called LLB) and Ph.D. in International Law in that time. I studied under Professors Lauterpacht, Bowett, Jennings Lipstein and Clive Parry. Jennings later

became the President of the International Court of Justice. I was examined in my Ph. D. orals by Professor Ian Brownlie, the current Chichele Professor of International Law at Oxford. I have written two books on subjects of International Law and published articles, too numerous to recount.

I have been a U.N. and O.A.U. Consultant on International Law matters on many occasions. I have never held any public office other than Professor of Law and Dean. I enjoy a very successful legal practice and consultancy in addition to University teaching and research. What is left for me to self-seek? I have received far more recognition here and abroad than I ever dreamed of. I am a fulfilled person.

On the other hand Ayua has licked the boots of every Military Dictator that has been inflicted on Nigeria since 1985. He was so close to Abacha, that he lobbied hard for and got the position of Director-General of the Nigerian Institute of Advanced Legal Studies when the incumbent, Professor M.A. Ajomo who had a year left in his contract, was away in the Caribeans on an official visit. He learnt on his way back that young Ayua, half his age, had taken over his office, even with his personal effects still in that office.

Again in 1994, the same Professor Ajomo who was and still is, President, Nigerian Society of International Law and myself were selected by Dr. Olu Onagoruwa, to join same selected English International Lawyers to defend Nigeria against Cameroon in the so called Bakassi case. Soon after Dr. Onagoruwa left office as Federal Attorney-General!, Ayua, commenced lobbying for our removal and for his own inclusion in the team. Soon after, we (Professor Ajomo and myself) were removed for being enemies of Abacha's regime, Ayua, a commercial Lawyer! and another fellow who specialized in Islamic law! were put in the team to defend Nigeria **IN AN INTERNATIONAL LAW SUIT BEFORE THE INTERNATIONAL COURT OF JUSTICE**! No doubt, some day Ayua will tell Nigeria, what Memorandum and Articles of Association, the objects clause, pre-incorporation contracts, Salomon v. Salomon and the Rule in Foss v. Harbottle have to do with international law. When I assessed Ayua's research publications in 1986 and recommended him for promotion to Associate Professor, I expected him to excel in his

field, not to go junketing and perhaps shopping at the Hague when serious business was going on within international court. It is obvious that his numerous trips to the Hague since 1994 have not rubbed a little international law on him.

Junketing to the Hague, does NOT an international lawyer make, out of a commercial lawyer. Whatever position or honour and privilege Ayua seeks to achieve by his savage and dishonest reaction to my properly articulated critique of the Supreme Court Judgment on the resource control case, I hope he gets it. But will that stop him from further acts of unbridled opportunism and the demonstration of utter lack of principles. I fear not.