LECTURE DELIVERED BY JOSEPH WHITTAL, COMMISSIONER, CHRAJ, AT THE 70TH NEW YEAR SCHOOL AND CONFERENCE ON THE TOPIC: "STRENGHTENING ANTI-CORRUPTION STATE INSTITUTIONS IN GHANA" AT THE UNIVERSITY OF GHANA, LEGON ON 15TH JANUARY 2019

Dean of the SCDE, Prof. Michael Tagoe,

Distinguished Members of Faculty

Distinguished Participants

Cherished Students

Members of the Anti-Corruption Community

Members of the Media.

Permit me first of all to appreciate the honor and privilege done me by the Leadership of the University of Ghana and in particular the School of Continuing and Distance Education (SCDE) for the invitation to share some thoughts on a very important governance theme "Strengthening Anti-Corruption State Institutions in Ghana" within the context of the theme of Conference – "Building Strong Institutions for Democratic Consolidation". The timing and theme of this New Year School and Conference coming shortly after our nation has chalked twenty five years of constitutional democratic governance under the 1992 Constitution, gives all of us an opportunity for sober and honest reflection and re-examination of our nation building effort with a view to strengthening our constitutional democratic project.

Mr. Chairman,

The theme of the New Year School and Conference "Building Strong Institutions for Democratic Consolidation" recalls to mind what the 43rd President of the

United States of America Mr. Barack Obama said when he addressed the Parliament of Ghana. He said:

"In the 21st Century, capable, reliable and transparent institutions are the key to success – strong Parliaments and honest Police Forces; independent judges and journalists; a vibrant private sector and civil society. Those are the things that give life to democracy, because that is what matters in people's lives.

Make no mistake, history is on the side of these brave Africans, and not with those who use coups or change constitutions to stay in power. Africa does not need strong men, it needs strong Institutions".

America will not seek to impose any system of government on any other nation – the essential truth of democracy is that each nation determines its own destiny. What we will do is increase assistance for responsible individuals and institutions, with a focus on supporting good government – on parliaments, check abuses of power and ensure that opposition voices are heard; on the rule of law, which ensures the equal administration of justice; on civic participation, so that the young people get involved; and on concrete solutions to corruption like forensic accounting, automating services, strengthening hotlines and protecting whistleblowers to advance transparency and accountability."

These are very sobering words from Barack Obama spoken on the floor of Ghana's Parliament when he addressed the August House in 2012. They certainly ring true and useful as a measure in the context of Ghana's democratic consolidation with an emphasis on the need to build strong Institutions for our democratic consolidation and not to fixate on strong persons in our nation building efforts.

Mr. Chairman,

My approach to the topic "Strengthening Anti-corruption State Institutions in Ghana" will be to examine the legal framework within which Anti-corruption State Institutions in Ghana perform their mandates contrasted against accepted international standards for the establishment and functioning of such Institutions globally; to examine the text and context of the 1992 Constitution with respect to corruption and the Institutional arrangements for the prevention and combatting of corruption; examine statutory laws passed by Parliament establishing anti-corruption institutions; examine some seminal judgments of our Supreme Court on Anti-corruption State Institutions all with a view to determining what needs to be done to strengthen and make our anti-corruption State Institutions stronger, more "fit for purpose" with the objective of making recommendations so that these State anti-corruption institutions can be made more capable of effectively prosecuting their functions of preventing, investigating and prosecuting corrupt persons and ridding or reducing to the barest minimum in the Ghanaian society of the canker of corruption.

In our democratic consolidation as a nation it is about time to stop sloganeering and politicizing the fight against corruption. Examples all over the world show that strong, independent, well-resourced anti-corruption state institutions working in collaboration with civil society organisations within an enabling anti-corruption

legal framework are the best method in the prevention, investigation, prosecution and sanctioning of corrupt persons.

Chair,

What does "strengthen anti-corruption state institutions" mean? The Merriam Webster Dictionary defines "strengthen" as "to make stronger", "to become stronger" whiles the Cambridge Dictionary defines "strengthen" as "to make something stronger or more effective, or to become stronger or more effective". Thus, impliedly the topic requires of me to detail out the measures, which when taken together will make anti-corruption state institutions stronger or more effective in the discharge of their functions.

Chair,

Ghana practices the multi-system approach in the fight against corruption and not the single Institutional approach as happens in other countries. Thus, the institutions most relevant in the fight against corruption are the CHRAJ (Commission on Human Rights and Administrative Justice), EOCO (Economic and Organized Crime Office), the Ghana Police Service, the Attorney-General's Office, Internal Audit Agency, the Public Procurement Authority, Controller and Accountant General's Department, the Bureau of National Investigations and the Public Accounts Committee of Parliament. Within the Judiciary, Ghana has established Financial and Economic Crime Courts. The others are, the Auditor-General and the Audit Service as well as the Financial Intelligence Centre (FIC) and the Office of the Special Prosecutor. For the purposes of the topic under discussion these are the State Anti-corruption Agencies.

The overarching principle of State Policy otherwise also called Directive Principle of State Policy undergirding the establishment and functioning of these anti-corruption State Institutions can be found in Article 34(1) and (7) of the 1992 Constitution.

These Principles are as follows:

34(1)
"The Directive Principles of State Policy contained in this Chapter shall guide all citizens, Parliament, the President, the Judiciary, the Council of State, the Cabinet, political parties and other bodies and persons in applying or interpreting this Constitution or any other law and in taking and implementing any policy decisions, for the establishment of a just and free society."

34(7)
"The State shall take steps to eradicate corrupt practices and the abuse of power."

As a result of this Constitutional imperative to take steps to eradicate corrupt practices the state institutions listed above have been established by Parliament in the course of the years. Again, Parliament in 2015 adopted the National Anti-Corruption Action Plan (NACAP) a ten year National Action Plan with four strategic objectives to (a) build capacity to condemn and fight corruption and make its practice a high risk, low gain activity; (b) institutionalize efficiency, accountability and transparency in the public, private and not for profit sectors; (c) engage individuals, media and CSOs to report and combat corruption; and (d) conduct effective investigations and prosecutions. These strategic objectives each have accompanying specific activities spanning the short, medium to long term.

Chair,

Effective implementation of the NACAP especially strategic objective (4) and the set of activities set down will surely lead to strengthened Anti-corruption State Institutions in Ghana. But I will return to this later.

INTERNATIONAL ANTI-CORRUPTION STANDARDS

Chair,

Ghana is an active member of the Committee of nations and to that extent has ratified some international Conventions on the prevention and combating of corruption. Thus on the 9th December 2004 Ghana signed the United Nations Convention against Corruption (UNCAC), ratified it on the 16th December 2005 and deposited its instrument of ratification on 24th June 2007. What remains to be done now is to bring Ghana's domestic law to the standard of the Convention by way of new legislation or amendment of existing laws. On the Regional front, Ghana has also ratified the Africa Union Convention on Preventing and Combatting Corruption (AUCPCC) on 27th June 2007. Again it now remains for Ghana to domesticate the provisions of the Convention in its national laws since Ghana is a dualist State and these conventions do not have direct application.

One of the effective ways of strengthening the legal framework for preventing, investigating and prosecuting corruption and thereby strengthening the operations of anti-corruption state institutions will be to follow-up on the recommendations by the Conference of State Parties (CoSP) to the UNCAC when Ghana was peer-reviewed during the first Review Cycle of the Implementation Review Mechanism of Chapter III of UNCAC on **Criminalization and Law enforcement**. Some of

the salient recommendations made by the Review Mechanism which form the basis of the Road -Map to follow are: See Appendix for details of recommendations
This year, 2019, Ghana will undergo the second cycle of Implementation Review this time on Prevention and Assets Recovery. Another batch of recommendations will be made by the CoSP to Ghana on the Chapters of UNCAC on Prevention and Assets Recovery. If Ghana is able to effect the necessary amendments to its law, we will witness a more robust anti-corruption legal framework in the country which will enhance and strengthen the operations of anti-corruption institutions.

INSULATE ANTI-CORRUPTION STATE INSTITUTIONS FROM EXECUTIVE CONTROL

Chair,

Anti-Corruption State Institutions as far as practicable perform better when they are insulated from Executive Control. As accountability Institutions they hold the Executive accountable to the people through their various roles of investigation and prosecution for corrupt practices. The natural tendency would be to make them pliable and to work under the thumb of an overbearing Executive which would like to protect itself or its appointees.

The framers of the 1992 Constitution resolved this by ensuring that whiles the President has the power to appoint the Commissioner and his Deputies in case of CHRAJ and the Auditor-General, their operational independence is guaranteed. Thus in the case of the CHRAJ, Article 225 provides as follows:

> Article 225: "Except as provided by this Constitution or by any other law not inconsistent with this Constitution, the Commission and the

Commissioners shall, in the performance of their functions not be subject to the direction or control of any person or authority."

Again, in the case of the Auditor-General, Article 187(7) (a) provides as follows:

"In the performance of his function under this Constitution or any other law, the Auditor-General –

(a) Shall not be subject to the direction or control of any other person or authority."

Two identical constitutional provisions which have had and continues to have a salutary effect in insulating these two constitutional anti-corruption state institutions from Executive encroachment in particular and any other authority in general.

The Office of the Special Prosecutor Act, 2017, Act 959 has used the same language quoted supra to insulate the Office of the Special Prosecutor from the direction and control of any person or authority. Thus Section 4(1) of Act 950 provides as follows:

4(1) "Except as otherwise provided in the Constitution, the office is not subject to the direction or control of any person or an authority in the performance of the functions of the office."

This is a good provision which would make the Office of the Special Prosecutor start its operations without undue interference from any quarters. But what about

the other statutory anti-corruption state institutions such as the EOCO, FIC, Ghana Police Service, etc. These anti-corruption state institutions have no similar insulation from Executive control or direction. Indeed the EOCO can only prosecute subject to a fiat by the Attorney-General on case by case basis. I believe the decision to grant a fiat or to withhold it by the Attorney-General has the tendency to be used to control or direct the EOCO and this has to be addressed in order to strengthen the prosecutorial powers of the EOCO. I would recommend the permanent delegation of authority to prosecute from the Attorney-General to the EOCO as has been done to the OSP in Section 4(2) of Act 959.

4(2) "subject to clause (4) of Article 88 of the Constitution, the office shall for purposes of this Act be authorized by the Attorney-General to initiate and conduct the prosecution of corruption and corruption related offences."

STRENGTHEN THE TENURE OF HEADS AND MEMBERS OF ANTI-CORRUPTION STATE INSTITUTIONS

Presently, it is the President who appoints all anti-corruption state institutions Heads and Members. That in itself is not problematic provided the appointments are made through transparent processes with clear criteria for qualification for appointment; certainty of tenure and clear grounds and procedures for removal from office already set out in law.

The 1992 Constitutional provisions in the case of the CHRAJ Commissioner and Deputies and that of the Auditor-General linking the terms and conditions of service of the Commission Members to respective judicial positions of High Court

and Court of Appeal judges and removal grounds and procedure are protective enough.

Section 13 of the Office of the Special Prosecutor has followed the tenurial arrangements of the CHRAJ and Auditor-General in the 1992 Constitution with regards to qualification, appointment processes, terms and conditions as well as removal processes of the Special Prosecutor.

But this is lacking in the case of EOCO, FIC, Ghana Police Service, Internal Audit Agency, etc. leaving the office holders to serve at the pleasure of the President. This is not a good arrangement for any anti-corruption state institutions. The lack of certainty of tenure and expressly stated grounds for removal from office will make such office holders overly careful not to displease the appointing authority. For instance, Section 11 of the Economic and Organized Crime Act, 2010, Act 804 provides as follows:

> 11(1) The President shall, in accordance with Article 195 of the Constitution appoint an Executive Director for the office.
>
> (2) The Executive Director shall hold office on the terms and conditions specified in the letter of appointment." This is completely an unsatisfactory and precarious tenure for the office holder of such an important office. Left like this, there is a high probability for such an office to be used to do the bidding of any President in power.

In the case of the Financial Intelligence Centre, the Chief Executive Officer is appointed under Section 14 of the Anti-Money Laundering Act 2008 as amended by the Anti-Money Laundering (Amendment) Act, 2014, Act 2014.

Section 14 provides as follows:

> "The President shall, in accordance with Article 195 of the Constitution appoint Chief Executive Officer for the Centre.
>
> 14(2) The Chief Executive Officer shall hold office on the terms and conditions specified in the letter of appointment."

With regards to the tenure of the IGP and other Police Chiefs including the Director-General of the CID, it is the President who appoints and indeed promotes these senior Police Chiefs.

The President is head of the Executive branch of Government and it is the same President's appointees and Ministers who are to be investigated and prosecuted by these anti-corruption State Institutions. With such weak protection of tenure and removal processes left to the discretion of the President it is not difficult to imagine why the institutions will be reticent in taking up cases perceived to have Executive interest.

I will recommend therefore the amendment of the appointment and tenure as well as the removal criteria of all statutory anti-corruption state institutions to reflect what is in the Office of the Special Prosecutor Act in order to strengthen their independence and to insulate them from undue Executive interference.

ADEQUATE BUDGETARY AND HUMAN RESOURCES

One key area of concern impeding the performance of anti-corruption state institutions is the inadequate budgetary provision given each year from the Ministry of Finance. Indeed out of the meager allocation in the Appropriation Act not all is released at the end of year. Some years, out of four quarters only two or two and a half quarters are released to the institutions. Investigations entail a lot of expenditure if we truly want these state anti-corruption institutions to perform their broad mandates it is very essential to resource them appropriately.

In the case of the CHRAJ, its services are free and it is not to charge any internally generated fees (IGF) that means that it is expected to subsist on Government subvention. When these resources are also not being released, it becomes too much to expect them to perform to expectation of the members of the public.

It is also the case that whiles governance institutions budgets are being slashed, funds are being sent to other institutions to spend on recurrent expenditure to the neglect of the services being provided by anti-corruption state institutions.

The Supreme Court had the occasion in the case of **William Brown v. Attorney-General** to interpret Article 187(14) of the 1992 Constitution and to determine whether the administrative expenses of the office of Auditor-General including all salaries allowances, gratuities and pensions payable to or in respect of persons serving in the audit service being a charge on the Consolidated Fund does not require that the budget of the audit service be subjected to Ministry of Finance

budget ceilings, hearings and cuts by the Minister of Finance before presenting the Audit Service budget to the Special Budget Committee of Parliament.

Article 187(14)

> "The administrative expenses of the office of the Auditor-General including salaries, allowances, gratuities and pensions payable to or in respect of persons serving in the Audit Service shall be a charge on the Consolidated Fund."

This same provision is repeated in the case of the CHRAJ and some other Independent Constitutional Bodies such as the Electoral Commission, National Commission on Civic Education (NCCE), National Media Commission (NMC).

For instance Article 227 provides in the case of CHRAJ as follows:

> "The administrative expenses of the Commission including salaries, allowances and pensions payable to, or in respect of persons serving with the Commission shall be charged on the Consolidated Fund."

The Court unanimously held among other reliefs that the Minister of Finance has no discretion in reviewing downwards the estimates determined by the Audit Service Board provided those estimates deal only with the administrative expenses.

Dotse JSC stated "what should be noted is that the framers of the Constitution must be deemed to have intended the Constitutional provisions for the protection and insulation of the institutions of state in mind."

Dotse JSC

> "Any such conduct (by the Minister of Finance) should be considered as unconstitutional unwarranted and in clear breach of the 1992 Constitution and the Standing Orders of Parliament."

Dotse JSC

> "It is clear that the Constitution 1992 clearly intended to oust Executive or Ministerial control of the process that will approve the administrative expenses of the Audit Service. The reduction therefore by the Ministry of Finance of the annual administrative expenses of the Auditor-General including salaries, allowances and gratuities of persons serving in the Audit Service before submission of same to Parliament and the presentation of the said estimates to Parliament for approval by Finance Minister are unconstitutional."

Despite this very clear declaration by the Highest Court of the land, the Minister of Finance persists in the unconstitutional conduct of setting ceilings, reducing the budget, presenting the reduced budget of the Commission on Human Rights and Administrative Justice to Parliament. Despite calls on Special Budget Committee by CHRAJ to get the Minister of Finance to respect the Constitution, nothing has come out of it so far.

The Commission will advise itself with regards to a similar suit as in the case of the Auditor-General to stop the impunity.

The point here is that, over the years the Ministry of Finance treats anti-corruption state institutions in terms of allocation and release of funds as any MDA. But that is wrong. The nature of corruption investigations and prosecution require availability of funds at all times in order to gather evidence and preserve it timeously and/or secure documents or interview people before they are tampered with. In some countries state anti-corruption institutions budget releases are front-loaded as in releasing funding for two quarters ahead to enable the institution have resources all the time for its work and not to run out of funds.

Strengthening these institutions would require adequate financial resources released on time from the Ministry of Finance and Controller and Accountant-General's Department.

Chair,

The field of corruption prevention, investigation and prosecution is very dynamic. The Corrupt persons are always ahead of the game and if anti-corruption state institutions are to match up with them, the human resource capacity must be constantly improving. More capacity building, investment in ICT improvement in communication technology, innovation etc. There is the need to recruit more professionals and to replace staff who continue to separate from the institutions due to death, retirement and resignations. Therefore, for effective strengthening of state anti-corruption institutions the need to recruit competent professionals and to pay them well in order to retain them in the organisations for long and to give them competitive remuneration is a sine qua non.

PRACTICE ACCOUNTABILITY AND ETHICAL BEHAVIOUR INTERNALLY

Chair,

Anti-corruption state institutions must practice accountability and ensure staff and members are held to high standards of integrity in the discharge of their functions. If these institutions are to effectively investigate and prosecute persons alleged to be corrupt, they should have strong moral compass and integrity otherwise they will fail. Codes of conduct should be rigorously applied and enforced because corruption has a way of compromising those who fight it. Accounting for resources given to anti-corruption state institutions and the use of those resources is a practice that should be attended to with diligence and the highest standards.

Enforcing discipline and the respect for rules within the institutions will strengthen the institutions and give credibility to the outcomes of the institutions work.

NATIONAL ANTI-CORRUPTION ACTION PLAN (NACAP)

The NACAP has set out in Strategic Objective 4 which deals with conducting effective investigations a host of activities meant to be carried out within the short, medium to long term for the strengthening of state anti-corruption institutions. These include:

1) Amend the definition of corruption as provided in Act 29 to conform with provisions of the UNCAC and the AU Convention on Prevention and Combating Corruption
2) Enact Witness Protection Law
3) Acquire communication and information technology equipment to support investigations
4) Provide and furnish office accommodation for anti-corruption agencies

5) Recruit Prosecutors and Investigators for ACAs
6) Build the capacity of EOCO and FIC to undertake intelligence gathering work
7) Operationalize and widen the outreach of CHRAJ and EOCO nationwide
8) Strengthen AGs Department and OSP to facilitate speedy prosecution of corruption cases
9) Recruit Investigators and prosecutors for CHRAJ and EOCO
10) Build capacity of anti-corruption institutions to perform their mandates
11) Harmonise activities of public institutions fighting corruption
12) Strengthen collaboration among anti-corruption agencies
13) Provide constitutional security of tenure of office for the IGP and Heads of Anti-corruption agencies
14) Retrain and sensitise all judges and magistrates in anti-corruption courts etc

CONCLUSION

To conclude, 25 years of constitutional democratic governance gives us cause to celebrate how far we have come as a country. As we embark on our constitutional democratic journey we need to consolidate the gains and strengthen the weaknesses. What works are strong institutions and in the case of anti-corruption state institutions we have identified those factors which when implemented will lead to stronger, effective anti-corruption state institutions delivering on their various mandates.

Thank you