

National Network for the Defense of Human Rights
(RNDDH)



**Analysis of the September 8, 2004 Order in Council:
Scope and Limitations of the ULCC's Powers**

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SUMMARY

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I. INTRODUCTION

1. For some time now, the Unit for the Fight Against Corruption (ULCC), under the pretext of investigating facts of corruption, carries out highly publicized actions, summons citizens, carries out arrests, launches research notices and likes to equate his investigative work with a judicial investigation.

2. The National Network for the Defense of Human Rights (RNDDH), which actively participated in the many exchanges that led to the establishment of the ULCC in 2004, believes it appropriate to publish this analysis on the Decree establishing the Unit to Fight Corruption (ULCC) with the aim of sharing its reflections on the current functioning of the ULCC, put in parallel with the provisions of the aforementioned Decree.

3. In this sense, the following document reviews the context of the creation of the ULCC, briefly presents the Unit, describes its method of recruitment and the special status of its sworn agents, analyses the scope and limits of the institution's powers before revealing the RNDDH's conclusions.

II. CONTEXT FOR THE CREATION OF ULCC

4. The Anti-corruption Unit (ULCC) was created in 2004 under the provisional presidency of Judge Boniface ALEXANDRE in a context where, in recent years, particularly under the presidency of Jean Bertrand ARISTIDE, the organization Transparency International periodically published damning but eloquent reports, pointing to the very high level of corruption in Haiti.

5. When, in October 2003, Haiti was ranked third after Nigeria and Bangladesh respectively second and first, among the most corrupt countries in the world¹, it proved important to address the issue. In this sense, the provisional government of Gérard Latortue considered it appropriate to provide the country with a technical arm to help fight corruption in all its forms. And, because of the vacuum created by the vacancy of legislative power, the Decree of September 8, 2004 establishing the Unit for the Fight against Corruption (ULCC) was adopted.

6. The creation of the ULCC was praised by all the healthy sections of the Nation, including, in the front row, the RNDDH, in particular because of the crime of corruption to social security, progress and development.

7. This enthusiasm was also justified by the fact that all progressive sectors of the country were and still are unanimous in seeing corruption as a crime against social justice and development in the sense that it deprives the State of significant resources and funds destined for the equitable distribution of wealth, the creation of jobs, the construction of roads, schools, hospitals, social housing, among other things, which could contribute to the improvement of the living conditions of the population.

III. PRESENTATION OF ULCC

8. The Decree establishing the Anti-corruption Unit (ULCC), composed of twenty-three (23) articles, is divided into five (5) chapters which, respectively, set out the name and mission of the ULCC, establish the headquarters and mandate of the ULCC, describe its organisation and operation and provide for special provisions.

9. The ULCC is an administrative body under the supervision of the Minister of Economy and Finance. It has jurisdiction over the entire national territory. (Article 1).

10. With the mission of working to fight corruption and its manifestations in all its forms within the public administration, the ULCC is called among other things to protect public and collective property, to promote transparency in the management of public affairs, to establish a climate of trust to promote private investment and to moralize public administration and public life in general. (Article 2).

11. The mandate of the ULCC is to define an anti-corruption strategy, compile existing texts on corruption, evaluate these texts and, if necessary, propose amendments. It must also work to establish an integrity pact that will lead citizens to commit to renouncing corruption or any other unethical behavior in public procurement and the execution of service contracts.

12. Finally, in the chapter on the mandates of the Unit, it is also called to ensure compliance with the Inter-American Convention against Corruption and to address, as a priority, contracts relating to major infrastructure projects of the Haitian State. In addition, the Unit is responsible for setting up an integrated information and monitoring system and a permanent alert system. (Article 4).

13. If the administration of the Unit is entrusted to a Board of Directors composed of three (3) members, its day-to-day management is however ensured by a Board of Directors composed of a Director General, a Director of Operations and an Administrative and Financial Director (Article 5).

14. The tasks of the Board of Directors are multiple. They are listed in section 7 of the Order. However, it should be noted that this Council has, among other obligations:

- Exploit information and investigate complaints or complaints about suspected corruption and related offences ;
- Refer to the judicial authorities, following an investigation into facts likely to constitute corruption offences, with a view to initiating and monitoring legal proceedings.

IV. RECRUITMENT MODE AND SPECIAL STATUS OF ULCC OFFICERS

15. The method of recruitment and the status of the staff of the Unit are set out in the third chapter of the Decree entitled Organisation and Functioning.

16. Under the provisions of Articles 8 and 10, sworn agents and all other agents of the ULCC shall be appointed by the Director-General, who shall himself be appointed by Presidential Decree of the Council of Ministers.

17. In addition, Article 10 of the Decree confers sui generis status on the sworn agents of the Unit, because of the singularity of their functions, they cannot be classified in an already listed category. However, these officers do not constitute judicial police authorities contrary to public and legal community misconceptions.

18. Vested with the mission of combating corruption, all ULCC executives must themselves be above suspicion of corruption. This is why, before integrating this structure, their personal and professional careers must be scrutinized. It is in this sense that section 16 of the Order provides that “No executive shall integrate the ULCC as a Director or sworn agent of the Unit without a prior investigation into the integrity and morality of the applicant (...)”.

V. AUTHORITY AND LIMITATION OF ULCC

19. Article 11 of the Decree of September 8, 2004 gives sworn officers of the ULCC the power to observe corruption offences, to gather evidence of them, to seek the perpetrators and to refer them to the judicial authorities. This article reads as follows: In the exercise of its functions, the Director-General shall have the power to authorize, by written mandate, sworn agents of the Unit to conduct investigations and research into suspected cases of corruption. It has the power to identify corruption offences, to gather evidence, to seek out the perpetrators and to bring them to justice. In case of need, it may directly request the assistance of the public force. In any case, these provisions do not exclude any form of cooperation with the various entities with judicial police powers, in particular the Public Prosecutor’s Office, the National Police.”

20. These responsibilities, often misunderstood by more than one, appear to cause most executives of the institution to want to overstep their authority.

21. For this reason, it should be pointed out with regard to this article that even if the examining magistrate does not have to seek the evidence, but only the clues and the charges and to measure them in the light of his discretion to determine a non-place or a referral to the court of judgment, it is even less up to the ULCC to seek evidence.

22. Let us recall in the sense that according to the Larousse dictionary ², the evidence constitutes a material element that demonstrates, establishes, proves the truth or the reality of a situation of fact or law while the index relates to the objects, facts, signs that put on the trace of something. Similarly, for the Lexicon of Legal Terms ³, evidence in a broad sense is the establishment of the reality of a fact or the existence of a legal act, and in a narrower sense, the

process used for this purpose. On the other hand, the indices constitute a set of known facts on the basis of which it is established, by inductive reasoning, that a fact whose proof is not directly possible exists.

23. Being unsuitable here, the term evidence is easily ambiguous and is likely to lead to excesses.

24. Similarly, it is not up to the Unit to identify corruption offences or the perpetrators. It can only investigate suspected corruption and identify the alleged perpetrators. Until court decisions clarify this text and make use of jurisprudence, the Constitution and the Code of Criminal Instruction are the only real bulwarks to the aforementioned excesses.

25. However, the last paragraph of this section clarifies how ULCC officers are to proceed. In any case, the latter must seek to obtain «any form of cooperation with the various entities with judicial police powers, in particular the Public Prosecutor’s Office, the National Police».

26. In addition, the Article 7 referred to above in point 14 of this document provides, if necessary, details of how the ULCC should conduct an investigation. Composed of nine (9) paragraphs, it specifies in its paragraphs 1 and 5 that the main tasks of the ULCC Board of Directors are:

- Exploiting information and investigating complaints or complaints relating to suspected corruption and related offences;
- To refer to the judicial authorities, following an investigation into facts likely to constitute corruption offences, with a view to initiating and monitoring legal proceedings.”

27. The last paragraph of Article 11 of the Decree establishing the ULCC therefore refers to Article 9 of the Code of Criminal Instruction, which states: The judicial police will be exercised, according to the provisions that will be established, by the Public Prosecutor, by the investigating judges, by the justices of the peace, by the officers of the rural and urban police and by the officers of the social police of the Haitian Institute of Welfare-be Social and Research. They will be competent to verbalize and carry out all acts of information concerning flagrante delicto. They shall take all measures likely to ensure the stability of the family and the sustainability of the social order and, if necessary, shall refer to the courts the violators of the laws relating to morality. They will demand the public force directly in the performance of their duties.”

28. Under the terms of this article, judicial policing is exercised by the Public Prosecutor’s Office, investigating judges, justices of the peace, rural and urban police officers and social police officers of the Institute of Social Welfare and Research (IBESR).

29. It is therefore clear that ULCC officers themselves do not have judicial policing powers. If that were the case, we would read the various other entities and not the different entities.

1. On the arrest, detention and issuance of wanted notices by the ULCC

30. According to the provisions of Article 24.2 of the Constitution, "Arrest and detention, except in the case of flagrante delicto, shall take place only on a written warrant of a legally competent official." In the Haitian judicial system, this legally competent official, is the investigating judge, in his capacity as judge of warrants. It therefore represents the only judicial police authority that has the power to issue a written warrant outside of cases of flagrante offence (flagrante delicto).

31. Thus, even as the sworn officers of the ULCC had the status of judicial police authority, they would be empowered to take measures depriving or restricting freedom only in cases of flagrante offence (flagrante delicto) on the same basis as the other judicial police authorities, with the exception of the investigating judge.

32. In the context of an investigation for corruption where there is no flagrante delict, the Unit, without exceeding its powers, is not empowered to issue a warrant or a search notice against a person in question.

33. Among the judicial police authorities listed in Article 9 of the Code of Criminal Investigation, as we have seen above, only the Central Directorate of the Judicial Police (DCPJ), in case of flagrante delicto and in this case only, may issue an APB against a person. Consequently, even in cases of flagrante offence (flagrante delicto), the Unit, finding a suspected fact of corruption, under article 11 of the Decree of September 8, 2004, does not have to act on its own initiative especially as it cannot acquire custody. It is the assistance of the public force that it must request, that is to say the DCPJ, to the effect of issuing, on its request, a notice of search.

34. Article 19 of the Code of Criminal Investigation specifies for the Unit how to proceed in cases where it acquires knowledge of a suspected fact of corruption: 'Any constituted authority, official or public officer, who, in the performance of his duties, shall acquire knowledge of a crime or offence, shall be required to give immediate notice thereof to the Government Commissioner within whose jurisdiction the crime or offence has been committed or in which the accused may be found and to transmit to that magistrate all information, minutes and acts relating thereto.'

2. On ULCC Investigation Strategies

35. According to the spirit of Articles 9, 18 and 19 of the Decree establishing the ULCC, a person under investigation should not even be made aware of the investigations carried out against him. These articles provide respectively:

36. Article 9: "The Director General of the ULCC shall be vested with the powers of the Tax Inspectors and the agents of the ULCC. However, it may keep the results of its investigations and investigations confidential until the case is closed and its transmission to the judicial authorities for legal proceedings».

37. Article 18: Any violation of the confidentiality and secrecy of the ULCC by one of its employees entails a sentence to be pronounced by the Correctional Judge either of a fine of up to 250,000 gourdes or of two (2) to five (5) years in prison. A breach of confidentiality or secrecy is any leak by an officer revealing the identity of a person under investigation and facilitating the disappearance of evidence or evidence that could undermine the integrity of an investigation conducted by the ULCC.”

38. This spirit is so present in the mind of the legislator that it specifies, in article 19 of the said Decree that "The Director General ensures that:

- the identity of the persons involved and of the witnesses in connection with a disclosure is protected;
- mechanisms to ensure the protection of information collected and linked to a disclosure are in place;
- there is no reprisal against a whistle-blower or witness.”

39. As part of its work, the ULCC can gather testimony and denunciations, and explore any avenues deemed useful for the development of its report and conclusions. To this end, it must prepare effective investigative techniques without giving itself powers that it does not have under any law.

40. It is clear from the above that the ULCC is not a prosecution authority or a specialized prosecutor in matters of corruption as it tends to make it appear. Nor is it a Criminal Investigation Chamber charged with investigating corruption offences. As a result, it does not have to summon a person under investigation or who would be suspected of corruption.

41. Today, the ULCC likes to equate its investigative work with a judicial inquiry. However, the Unit’s investigation is an administrative and not a judicial investigation. Only the investigation conducted by a judicial authority deserves this qualification.

3. The ability of the ULCC to conduct searches

42. In some of its discussions made public and in order to display its powers, the ULCC cited Article 12 of the Decree of September 8, 2004 stipulating that “Sworn officers of the ULCC may conduct a search in accordance with the provisions of the Code of Criminal Procedure (...)”.

43. Because of the excesses that the ULCC is already showing itself capable of through the actions of some of its senior managers and for an essentially educational purpose, it is urgent to specify that in the current state of affairs, this article is not applicable. This is an article that provides for the future and that will have to wait for the entry into force of the Code of Criminal Procedure which is called upon to set the conditions under which sworn officers of the ULCC will be empowered to carry out searches.

44. The ULCC must therefore avoid putting the cart before the horse because, for the moment, it cannot carry out any search without committing a violent excess of power and committing its responsibilities.

VI. COMMENTS AND RECOMMENDATIONS

45. In Haiti, we have repeatedly left at the head of Republican institutions, apprentice dictators who, for the most part, blithely abused their powers. Although, like the ULCC, these institutions have been desecrated, they have lost nothing of their intrinsic value, nobility and prestige. This is why, a work of decantation between an institution that wants to be permanent and its ephemeral leaders is always necessary.

46. The Anti-corruption Unit (ULCC) is one of those noble and prestigious public institutions whose work we must promote and encourage by urging its executives to carry out their tasks with strict respect for their responsibilities.

47. The RNDDH believes that the Unit is still far from being able to meet the noble objectives for which it was created. And one of the biggest problems she faces is the lack of awareness of her responsibilities by some of her senior managers, who too often commit excessive power.

48. The RNDDH points out that contrary to some misconception in the public and even in the legal community, the sworn officers of the ULCC are not judicial police authorities. While the founding text says quite the contrary, this confusion is such that it has already been given to see some directors general of the Unit assign to themselves both the functions of the police, the prosecutor's office and those of the investigating judge. It is on the basis of these findings that RNDDH draws everyone's attention to the fact that the summons of a person under investigation conducted by the ULCC is akin to a form of haggling, a window that opens up to corruption and arbitrariness. For the RNDDH, these are acts of intimidation and persecution, which may aim to silence a target person or even an institution whose actions seem disturbing.

49. For the RNDDH, the Decree of September 8, 2004 is clear: it is at the investigating firm that a person prosecuted for corruption should know for the first time that he or she had been the subject of an investigation by the ULCC because the fact that the Unit called a person is polluting the environment of the investigation and taking away that-its mandatory confidentiality.

50. The RNDDH considers it inconceivable that the Unit has never complied with the provisions of Article 16 of the aforementioned Decree that all sworn officers of this structure be subject to certification, because they must be placed at the above any suspicion of corruption.

51. Furthermore, the RNDDH believes that the Decree of September 8, 2004 establishing the ULCC has made its way. Sixteen (16) years later, it has enabled us to draw lessons capable of rethinking it through legislation that will better define the powers of this structure by clearly specifying the scope and limits of the powers of its officers in the performance of their duties.

52. The RNDDH considers that, among other important points to be addressed by Parliament, recruitment methods should be revised. For example, it would be clearly beneficial for the Unit to appoint its Directors General on a competitive basis, for a specific mandate, in order to guarantee its independence.

53. In addition, the RNDDH considers it inconceivable that an institution called on to fight corruption within the Public Administration falls under the supervision of the Ministry of Economy and Finance, a possible high place of state schemes, embezzlement and squandering of the public treasury. Worse still, the Minister of Economy and Finance is, according to Article 5 of the Founding Decree of September 8, 2004, the President of the Board of Directors of the ULCC.

54. Finally, if in 2004, the creation of a simple unit seemed conducive to fight corruption in the country, today, the RNDDH believes that the country would benefit from having an independent body, subtracted, in the same way as the Office de Protection du Citoyen (OPC), of any hierarchical control of an administrative authority and, above all, of the supervision of any political or administrative institution.

55. On the strength of all of the above, the RNDDH recommends that the ULCC Board of Directors:

- Reflect on the desirability of making this structure independent;
- Make formal instructions for the Unit to finally focus on the main task assigned to it to effectively combat corruption;
- Demand that the ULCC immediately stop acts of intimidation and persecution directed at citizens of the country and institutions;
- To invite the ULCC to transmit to the judicial authorities, the conclusions of its investigations, for legal reasons;
- Make every effort to comply with the ULCC Sworn Officer Recruitment Procedures and to require their certification.

MLA Format Works Cited

¹ Robin, HODESS, dir., *Transparency International, Rapport mondial sur la corruption 2003*, Paris, Karthala, 423 p.

² <https://www.larousse.fr/dictionnaires/francais/indice/42580?q=indice#42484>

³ *Lexique des Termes Juridiques*, 14^{ème} édition, Dalloz, 2003, 619 p.