

**How Can the Law Help Reduce  
Group-Based Inequalities?**

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**Confronting Racism From  
Within the Guatemalan State:  
the challenges faced by the *Defensoría*  
of Indigenous Rights of Guatemala's  
Human Rights Ombudsman's Office**

Roddy Brett

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Centre for Research on Inequality, Human Security and Ethnicity, CRISE  
Oxford Department of International Development,  
Queen Elizabeth House  
University of Oxford, 3 Mansfield Road, OX1 3TB  
Tel: +44 1865 281810; Fax: +44 1865 281801

**Roddy Brett.**

**Principal Professor.**

**Department of Political Science.**

**Universidad del Rosario, Bogotá, Colombia.**

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**'How Can the Law Help Reduce Group-Based Inequalities?'**

**Confronting Racism From Within the Guatemalan State: the challenges faced by the Defensoría of Indigenous Rights of Guatemala's Human Rights Ombudsman's Office.**

Introduction.

This paper analyzes the experience of the State Office of the *Procuraduría de los Derechos Humanos* (Human Rights Ombudsman, PDH), established in the 1985 Political Constitution of the Republic (articles 273-275), and focuses in particular on the development, role and internal challenges faced by the *Defensoría de los Derechos de los Pueblos Indígenas* (Defender of the Rights of Indigenous Peoples, DDPI), a unit created in 1997 to address the inequalities and discrimination suffered specifically by Guatemala's approximately 45% indigenous population.<sup>1</sup> In this regard, the DDPI, whose mandate is to consolidate and guarantee the exercise of the rights of indigenous peoples in post-conflict Guatemala, can be seen to represent a State-led legal initiative that, in theory, is oriented towards the reduction of group-based inequalities, in this case those stemming from ethnic group membership. The PDH and DDPI are institutions developed initially within the context of Guatemala's political transition (1982-

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<sup>1</sup> Guatemala's indigenous population is made up of Maya, Garífuna and Xinca peoples, the latter two groups populating the Caribbean and Eastern parts of Guatemala respectively, and the Maya concentrated in the highland regions and urban areas of the country, due to the rural exile initiated in the 1980s. The Maya population itself includes twenty-two ethnic groups and constitutes over 90 per cent of the indigenous population, while it is estimated that only approximately 197 people speak Xinca. Guatemala's population includes four distinct *peoples*: ladinos, or non-indigenous (approximately 55%); the *Garífuna people*; the *Xinca people*; and the largest indigenous group, the Maya. The twenty-two Mayan languages and groups are: Chuj; Akateko; Jakalteko; Q'anjob'al; Ixil; Uspanteko; Tektiteko; Awakateko; Sipakapense; Takaneko; Mam; Tzutujil; Kaqchiquel; Sakapulteko; Q'eqchi; Achi; Poqomchi'; Pokoman; K'iche'; Itza; Chortí; Maya-Mopan.

85) and peace process (1987-1996) respectively, although which subsequently came to represent *seemingly marginal* elements of the country's post-conflict reconstruction process.

The establishment of the DDPI, along with other related State institutions, demonstrates important and unprecedented advances in the transformation of a historically genocidal Guatemalan State through the consolidation of institutions mandated with the protection of indigenous peoples' rights, marking an apparent shift toward a multicultural, multi-ethnic and plural State. Such mechanisms, on the surface, appear to provide indigenous people with historically unprecedented access to forms of legal redress for human rights violations carried out against them, including of both their individual and collective rights, at the same time as providing a space in which to debate and from which to disseminate indigenous peoples' concerns. However, as the case study will show, given the structural, interpersonal and institutional racism that plagues Guatemalan State and society, the degree to which the impact of said measures may be enduring and effective remains as yet unclear. Inadequate institutional funding, racist acts directed towards indigenous officials within the PDH itself and lack of evident institutional will to train functionaries to understand, identify and process violations of indigenous peoples' specific and collective rights have, since its establishment, impeded the DDPI from being able to carry out effectively its mandate. In this way, more subtle forms of exclusion and marginalization have in fact been institutionalized at the level of the State, ironically through the consolidation and legitimization of an apparently *multicultural* post-conflict State, so lauded as it has been by the international community.

The Guatemalan PDH was the first of its kind to be established in the Latin American region, mandated to promote the effective administrative function of government within a human rights framework through the reception and resolution of complaints regarding human rights violations and the monitoring of the State in terms of compliance with its institutional obligations in this regard. The institutional framework of the PDH is constituted by a series of instruments through which the State and its distinct entities shall be monitored in terms of their adherence to standard human rights norms, procedures and practices. However, the PDH also provides an important structure through which human rights violations (and abuses by non-state

actors) may be denounced by individuals and at the level of communities and collective groups, and has the subsequent obligation to investigate such complaints and present institutional resolutions and recommendations.

The particular socio-political, economic and cultural issues engaged with and the distinct individual and collective rights protected and promoted by the DDPI may perhaps at first sight appear to be of minimal importance in comparison with other elements central to Guatemala's peace process, such as the demobilization of guerrilla, paramilitary and military forces, fiscal, political and economic reform and the Historical Clarification, or Truth Commission. However, and significantly, the systematic violation of indigenous peoples' rights, including of collective rights to land, the broad range of rights relating to indigenous autonomy and self-determination and of those rights aimed at protecting individuals and groups from suffering racism and ethnic discrimination – rights covered in theory in the mandate of the DDPI – has historically been a central causal factor in institutionalizing acute inequality in access to political and economic resources from an ethnic group perspective,<sup>2</sup> in other words, in normalizing horizontal inequalities between indigenous and ladino populations.

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<sup>2</sup> As documented in the United Nations Human Development Report (2005), the following statistics define the gap between indigenous and non-indigenous populations in human development terms: Human Development Index: Non-indigenous Population: 0.699, Indigenous Population: 0.534; Health Index: Non-indigenous Population: 0.733, Indigenous Population: 0.608; Education Index: Non-indigenous Population: 0.712, Indigenous Population: 0.457; Income Index: Non-indigenous Population: 0.652, Indigenous Population: 0.548. Acute levels of malnutrition continue to predominate in the poorest, least educated and rural households, which are of predominantly indigenous origin. In this regard, those departments with the highest indices of poverty and extreme poverty, including Huehuetenango, El Quiché and Alta Verapaz, are departments with majority indigenous populations, which enjoy less coverage of public services and a proportionately lower State-assigned budget. The level of general and chronic malnutrition of indigenous children is in fact almost double that of non-indigenous children, due both to the poverty those households suffer and to the lack of access to State public services. Moreover, public services and programmes are carried out in Spanish, and the majority of indigenous households speak Spanish as a second language, meaning, in many cases, a *de facto* exclusion from such services. Similarly, with the important exception of several departments in Eastern Guatemala, maternal and infant mortality is highest in those departments with indigenous majority populations, particularly Baja and Alta Verapaz and Huehuetenango; the lack of access to State public services and the lack of programmes in indigenous languages is once more a principal causal factor here. In this regard, the infant mortality rate amongst the indigenous population declined from 64 per 1,000 live births in 1995, to 49 per 1,000 live births in 2002, whilst amongst the non-indigenous population the infant mortality rate declined from 53 per 1,000 live births in 1995, to 40 per 1,000 live births in 2002. Similarly, with regard to levels of child mortality, amongst the indigenous population deaths declined from 94 per 1,000 live births in 1995, to 69 per 1,000 live births in 2002, whilst amongst the non-indigenous population the child mortality rate declined from 69 per 1,000 live births in 1995, to 52 per 1,000 live births in 2002.

The paper, based upon prolonged fieldwork carried out with the DDPI between 2004 and 2007,<sup>3</sup> frames the analysis of the case study within the historical context of Guatemala's peace process. An understanding of the peace process, in particular of those rights – in this case a range of *universal* and *individual* rights – that conceptually undergirded the process and the accompanying negotiations and accords, and were thus negotiable and permissible therein, is key to analysis of the impact of legal initiatives aimed at reducing group-based inequalities. Systemic obstacles to the implementation of the provisions of the peace accords have impeded profound advances in addressing horizontal inequalities in Guatemala, including those covered by the DDPI's mandate. However, lack of progress in the reduction of horizontal inequalities is not due solely to the piecemeal and stunted implementation of the accords or the ineffective operation of State institutions, including the judicial system. Rather, it is also necessary to question the degree to which the design of the legal provisions apparently aimed at redressing group-based inequalities arising from ethnic group membership might indeed have been adequate to impact profoundly upon horizontal inequalities, *even with* their subsequent effective implementation. Absence of serious debate over and negotiation of the structural causes of Guatemala's internal armed conflict during the peace process and, significantly, the *invisibilization* of the collective rights of indigenous peoples as rights *central to* democratization in a multi-cultural, multi-ethnic and pluri-lingual country, in effect profoundly limited the possible subsequent impact of legal initiatives aimed at reducing horizontal inequalities. The protection and promotion of collective rights then was not perceived of by the parties to the negotiating table as being integral to the rights that should undergird the new democratic polity, directly limiting the possibilities to redress horizontal inequalities effectively. The case of the DDPI is illustrative of this argument given that, whilst persistent pressure from the indigenous movement guaranteed that its mandate be framed to include collective and specific rights, internal problems and resistance within the PDH as an institution has systematically prevented this mandate from being carried out. In short, almost without exception, attention to individual and universal human rights has been prioritized over and above collective and specific rights, severely weakening the DDPI's possible impact.

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<sup>3</sup> All interviews cited were carried out in Guatemala City between August 2004 and February 2005.

The paper is divided in the following manner. Firstly, we discuss briefly the ethnic dimensions of the internal armed conflict, political transition and peace process, setting the contextual framework for the research. Secondly, the historical development of the PDH and DDPI is documented and we present the experience of the DDPI in detail. Finally, we present some tentative conclusions arising from the research.

### The Ethnic Dimensions of Guatemala's Armed conflict.

The ethnic dimensions of Guatemala's armed conflict were complex. As Francis Stewart has argued, horizontal inequalities "were...an important element in provoking and sustaining the long civil war in Guatemala" (2005: 27), a proposition shared in the research. However, whilst Guatemala's historically unjust system of land distribution and tenure, extreme poverty and lack of access to formal political channels had been at the core of the internal armed conflict between the Guatemalan military and the guerrilla army the *Unidad Revolucionaria Nacional Guatemalteca* (National Guatemalan Revolutionary Unity, URNG), it is questionable as to whether the conflict can be defined as a direct or conventional ethnic conflict where the parties involved in hostilities struggled over or sought to rectify deep-rooted horizontal inequalities based solely upon ethnic group membership (Brett 2007). Nevertheless, whilst the conflict appears not in fact to have stemmed from an *indigenous uprising* or *ethnic mobilization* as such, nor was it waged exclusively on ethnic lines, it did possess an acutely ethnic dimension, as did the country's ensuing peace process in which context unprecedented legal mechanisms relating to indigenous peoples' rights were established, including the present case study.

Guatemala's brutal and genocidal internal armed conflict was shaped and sustained by the unequivocal bias in the control of economic and political resources by a racist non-indigenous, Spanish-descended oligarchy, a caste system of privilege that was historically protected by the country's security forces and managed by a closed lineage-based political and economic elite (Casaús Arzú 2007). The first guerrilla insurgency composed of rebellious ladino military officers that arose and was defeated in the 1960s had sought to challenge this system. Nevertheless, it did not do so in the name of nor did it represent directly indigenous Guatemalans or a specific ethnic group. Rather, the guerrilla was a Marxist-Leninist inspired

insurgency that confronted the foundations of oligarchic economic and class exploitation from a traditional classist perspective, at this time commanding no direct indigenous participation.

The armed conflict intensified once more after the 1970s as other armed insurgencies formed and emerged with the aim of challenging the racist oligarchy on classist terms. As has been broadly documented, this conflict culminated in a genocide against the country's indigenous Maya population between 1978 and 1983,<sup>4</sup> as the military sought to eliminate what was increasingly perceived to be the guerrilla's principally indigenous social base, above all in the highland and jungle regions of the country, where the guerrilla had implanted itself in indigenous communities with the objective of building-up a broad base of support for its *prolonged popular war*. Initially the guerrilla did not as such then represent an *indigenous insurgency* or "*indian*" *uprising* per se – its leaders were on the whole *ladinos* struggling for a series of objectives that were not defined as exclusively ethnically determined issues, nor were their demands articulated through an ethnic identity or indigenous rights framework.<sup>5</sup> As the conflict evolved, however, certain factions of the URNG, in particular the *Ejército Guerrillero de los Pobres* (Guerrilla Army of the Poor, EGP), began to represent and engage seriously with indigenous peoples' issues more directly and intentionally, although the command structure continued to respond to an ethnically-based hierarchy: ladino commanders and indigenous foot-soldiers. By the late 1970s, however, the EGP's command structure had begun increasingly to reflect more directly its overwhelmingly indigenous social base and combatant forces and it began to frame its demands in terms more amenable to indigenous peoples, including utilizing discourses oriented towards anti-colonialist and anti-racist struggles (Brett 2007).

The high component of indigenous guerrilla combatants and its logistical support base, a result of both voluntary indigenous participation and violent coercion of indigenous peasants by the insurgents, was mirrored by the forced recruitment by the armed forces of poor indigenous peasants into the infantry and paramilitary groups, or *Patrullas de Autodefensa Civil* (Civil

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<sup>4</sup> See Arias (1984), Black et al. (1984), Barry (1986), Falla (1988; 1992), ODHA (1998), Schirmer (1998), Taylor (1998), CEH (1999), Sanford (2003), Brett (2007), Casaus Arzú (2008).

<sup>5</sup> Significantly, the international normative framework relative to the rights of indigenous peoples was not consolidated until the 1970s, signifying that rights language conducive to struggles involving indigenous peoples was not available for the framing of such struggles during the 1960s.

Defence Patrols, PACs). At the level of combatants, indigenous people were pitted against indigenous people, stuck between and subject to the whims of the distinct armed groups, becoming and representing what many Guatemalan indigenous leaders have called *carne de cañon*, or cannon fodder (Brett 2007: chapters two and three). Indigenous people also bore the brunt of the conflict given that, according to the final report of the *Comisión de Esclarecimiento Histórico* (1999), they represented approximately 83% of the conflict's victims, not only as victims of hostilities, but above all as victims of the military's brutal and genocidal counterinsurgency campaign, victims of massacres, forced disappearance, assassination, torture, rape and intimidation (CEH 1999; Brett, 2007: chapter two). To a degree then, whilst it can be posited partially that indigenous people were the victims of a non-indigenous war waged between ladinos elites, indigenous communities did participate directly in the hostilities and were not simply victims or pawns, exercising agency and choice in the decisions that they made, shaping the EGP and impacting on the subsequent peace process (Brett 2007; conclusion).

### The Political Transition.

The political transition took place whilst the genocide was still raging, and ended with the restoration of an albeit militarily controlled civilian government. Various factors precipitated the crisis of governability that led to the political transition in Guatemala in the early 1980s: the economic recession; the alleged imminent threat of revolutionary victory prior to the strategic defeat of the guerrilla in 1982; the rise in guerrilla forces (and civilian support for the insurgents); growing social mobilisation and organisation; fraudulent elections (in 1978) and increasing state corruption (Palencia Prado 1996: 6). The historical tension between the private sector and the military (intensified in the 1970s when the military became an autonomous, semi-professional and income-generating institution) exacerbated the crisis of governability (McCleary 1999: 2-16). Moreover, State revenue necessary for the counterinsurgency was sparse, given the high levels of capital flight and tax evasion within Guatemala, and the country's negative international image – meaning that international funds were almost impossible to procure. As a result, it is widely believed that the military adopted a strategy of slowly returning the country to civilian rule, albeit under its own scrutiny and control: political

and economic instability made the need for domestic reorganisation and the survival of the military institution a priority. It is in this context then, that Guatemala's political transition took place as a means of regaining international legitimacy, reconciling the military and the private sector and retaining the military's political prerogative within the context of legal civilian governance. The plan was purportedly designed by experienced high-level military officers including General Lobos Zamora and General Alejandro Gramajo and implemented under the *proyecto político-militar* (Political-Military Project), implemented in April 1982 under the *Plan Nacional de Seguridad y Desarrollo* (National Plan of Security and Development).

The project began with the overthrow of President General Romero Lucas García in a *golpe de estado* (coup d'état) on March 23 1982, by high-ranking military officials. The military *junta* was made up of General Efraín Ríos Montt, General Horacio Egberto Maldonado Schaad and Colonel Fernando Gordillo. The *junta* declared that it intended to confront corruption, consolidate the counter-insurgency offensive, generate confidence for the business sector, and modernize public administration. However, in just over a month, Ríos Montt assumed the Presidency, and the *junta* was dissolved. Soon afterwards, violence in Guatemala City decreased, although rural violence, including massacres and genocidal military activity against the Mayan population escalated, in the framework of the military's strategic campaign *Victory 82*. Due to the de facto administration's pro-human rights discourse (in reality nothing more than words), articulated during the genocide itself, it won the support of newly elected Ronald Reagan in the United States, bringing with it renewed US economic assistance, previously halted under the Carter administration. However, Ríos Montt was himself deposed through a military coup on August 8 1983, allegedly due to his divergence from the *military project*, and General Mejía Victores was imposed as the president who would return Guatemala to civilian rule.

There was initially little democratic substance to the political transition. In fact, what prevailed were the continuation of the counterinsurgency and the gradual military defeat of the guerrilla, the pacification of the population and the embedding of national security within a national doctrine of civilian affairs (Schirmer 1998: 31 - 34). However, as Jonas argues, after the writing of the 1985 Constitution and the return to civilian rule in 1986, as the peace process developed

the political transition shifted away from the civilian-led politics of counterinsurgency and what had been an “authoritarian transition” became, more broadly, a “democratic transition” (Jonas, 2000: 105). The role of organized civil society and the international community in the ensuing peace process was a critical factor in this process.

### The National Constituent Assembly and the 1985 Constitution.

In June 1984, a National Constituent Assembly (ANC) was convoked as an integral component in the transfer of power from military to civilian rule. The National Constituent Assembly was called to discuss the reform of Guatemala’s Constitution and also had powers to propose national legislation. However, as political analyst Hector Rosada has stated, “During this time, despite overtures of regime change, in 1984 the political apparatus of the state continued to be dominated by the military institution” (personal communication, August 2004). Furthermore, the counterinsurgency war continued to determine Guatemalan politics and military strategy, as indigenous communities in the western highlands were subjected to severe military control and hundreds of thousands of refugees and over a million internally displaced people, primarily from the highland and jungle regions, fled from the violence (Brett and Delgado 2005).

The authoritarian political environment, restrictions in the political options available, the narrow agenda of the individuals elected and the political parties represented in the ANC, meant that it did not achieve the necessary inclusiveness to create a fully representative and progressive Constitution. However, the new Constitution did establish the Human Rights Ombudsmans Office (PDH), the Supreme Electoral Tribunal (TSE) and the Supreme Court of Justice and the Constitutional Court, instruments that, to differing degrees would later become a focus of the struggles of organized civil society. After various months of negotiations, the ANC concluded its work on May 31 1985, with the finalisation of the 1985 Constitution and two new laws: the Law of Elections and Political Parties and Law of Appeal, Habeus Corpus and Consitutionality.

Above all, the new Constitution of 1985 was a contradictory document then, and did not, given the epoch in which it was written, include profound reference to the collective rights of

indigenous peoples. Rather, the principal conceptual rights framework, a framework that was to undergird the PDH itself, was characterized by the inclusion of universal and individual rights, itself unprecedented in the Guatemalan context. The Constitution did serve to legitimize the political transition and, between 1984 and 1985, the military gradually withdrew from directly governing the country. Moreover, the Constitution demonstrated politically and represented legally the shift from an authoritarian regime to democratic governance, with special emphasis on the generation of a system that emphasized the respect for and protection of civil and political rights as its guiding principal. In spite of this, and given the time in which it was written, the Constitution was not able to include the ideological, cultural and social developments and norms that were later to be generated by the peace process, in particular those related to the collective rights of indigenous peoples.

#### The Peace Process.

Significantly, despite the waging of what appeared to be an unconventional ethnic conflict, certain indigenous issues and rights were to become a central aspect of the subsequent peace process, resulting in the adoption of unprecedented measures within the peace accords aimed at redressing integrally the historical marginalization, discrimination and social, political, economic and cultural exclusion of the indigenous population. Such measures were borne of a series of important factors, including without doubt the consequences of the genocide itself, which, at the international level perhaps more than at the national level, dramatically urged the need to address indigenous peoples' affairs as an element central to the peace settlement. However other factors also played a key role, including the struggles of the increasingly visible indigenous movement in Latin America and, specifically, in Guatemala, where, by 1992, it had consolidated its presence as a national political actor, later influencing, in turn, the content of the peace process (Brett 2006; 2008a). Moreover, in the aftermath of the end of the Cold War and in the context of a range of diverse ethnic conflicts at the global level, the international community would impose its own terms upon Guatemala's peace negotiations, including emphatically the inclusion of multiculturalism, ethnic identity and indigenous affairs as key to a democratization process in what would subsequently be defined in the accords as a *multicultural, multi-ethnic and pluri-lingual* Guatemala (Bastos and Cumes 2008; Brett 2008a).

Finally, the increasingly ethnically focused demands of the guerrilla itself in the aftermath of the genocide – which sought to represent the demands of the indigenous population in the negotiations, albeit from an acutely ethnocentric perspective and above all as a result of pressure from the indigenous movement upon the guerrilla – also played a role in this process. It was this set of factors that established the conditions that would later guarantee that engagement with indigenous issues, including those pertaining to horizontal inequalities, would be a central aspect of Guatemala’s peace process and post-conflict reconstruction.

The prolonged and internationally monitored peace process took place between 1987 and December 1996, when the last of the seventeen peace accords was signed. As a result of the peace process and the accords signed therein, a series of unprecedented legal provisions, processes of dialogue and public policy recommendations were proposed and established. Said initiatives were aimed at confronting a broad range of issues, including, in theory, the historical exclusion, marginalization and racism suffered by indigenous populations within a broad range of areas; in theory, those conditions that had sustained the deep horizontal economic, political and social inequalities between indigenous and non-indigenous populations.<sup>6</sup> However, in practice, it is questionable as to whether the provisions of the accords did provide an adequate framework through which to address horizontal inequalities.

As has been convincingly argued by Caumartin, “from the perspective of correcting horizontal inequalities” (2004: 56), the two most relevant accords signed during Guatemala’s peace process were the *Agreement on the Identity and Rights of Indigenous Peoples* (AIRI) and the *Agreement on Socio-Economic Aspects and the Agrarian Situation*, signed in 1995 and 1996 respectively. The AIRI – based closely on International Labour Organisation Convention 169 Concerning Indigenous and Tribal Peoples in Independent Countries which was ratified in 1996 by the Guatemalan Congress – sought “recognition of the identity of indigenous peoples, elimination of discrimination against them, and the guarantee of the cultural, civil, political and social, as well as economic rights of indigenous peoples” (2004: 56). In its second chapter, *The Struggle Against Discrimination*, the Agreement contemplated the establishment of distinct legal entities charged with the defence of the rights of indigenous peoples and of indigenous

women in particular, as well as the passing of a law that would typify “ethnic discrimination” as a crime. The provisions in the chapter also called for the derogation of any other laws that might institutionalize discriminatory practices against indigenous peoples. It was this chapter that would later represent the cornerstone for both the typification of discrimination as a crime in the reform of the Guatemalan Penal Code in 2002 (although *not* at this time as a separate law on said theme) and for the establishment of the DPPI.

With regard to the *Agreement on Socio-Economic Aspects and the Agrarian Situation*, its provisions relating *apparently* to the resolution of horizontal inequalities included to increase tax revenue in order to support increased social expenditure relating directly to public services; to introduce a register for land tenure and a trust fund from which peasants would be able to borrow money in order to purchase underused land; and the introduction of conflict resolution mechanisms for the resolution of land disputes.

As many analysts and academics, including both Stewart (2005) and Caumartin (2004), have correctly pointed out, systemic problems in the meaningful implementation of the provisions of Guatemala’s peace accords relating to the redressing of horizontal inequalities have been widespread and long-term, impeding any serious progress in these areas, an opinion shared in this paper. Subsequent and systematic limited financing of State institutions and structures, such as the PDH and the judicial system, has profoundly restricted the effective implementation of legislation and the institutionalization and execution of mandates relating potentially to the redressing of horizontal inequalities. Moreover, obstacles embedded in Guatemala’s endemically weak and corrupt legal system have also played a key role in neutering those initiatives that appeared, at least initially and in theory, to present potentially unprecedented possibilities in this regard, despite public and strategic litigation initiatives developed by victims’ and vulnerable groups to secure their rights.<sup>7</sup>

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<sup>6</sup> See Brett (2006; 2008), Jonas (2000) and McCleary (1999) for a detailed discussion of the peace process.

<sup>7</sup> In 2008 and 2009, the United Nations Office of the High Commissioner for Human Rights initiated a project to develop processes of strategic litigation in the area of the rights of indigenous peoples, building upon those previous legal cases such as the genocide case against the military high commands of the 1970s and 1980s and the case for the assassination of anthropologist Myrna Mack, legal cases that, whilst not necessarily strategic litigation as such, did have some important strategic impact within Guatemalan society and the Guatemalan legal system.

However, this research also questions fundamentally the degree to which certain legal provisions pertaining to group-based inequalities arising from ethnic group membership established during Guatemala's peace process – including those linked to the PDH itself – might in fact have been expected realistically to impact upon horizontal inequalities, even if they had been effectively implemented. This is the case for two reasons. Firstly, in certain critical respects, Guatemala's peace process and the content of the peace accords therein did not respond directly or adequately to the underlying structural causes of the internal armed conflict, including of historically embedded horizontal inequalities. In this regard, Stewart has argued that policies oriented towards the resolution of horizontal inequalities in situations of conflict and post-conflict must address “the main factors which led to the onset of the conflicts” if they are to be successful in redressing such inequalities (2005: 21). This was not the case in the Guatemalan peace process, where the negotiation of highly sensitive themes such as land reform, a *direct cause* of the armed conflict, meaningful measures relating to transitional justice, and indigenous autonomy, was indeed bluntly sacrificed in order to lower the resistance of the parties to the accords to sit at the negotiation table. Insistence upon such themes would have prolonged and, most likely, derailed, the fragile peace process, as it did on several occasions when key issues were discussed (Brett 2008a; chapter two). Secondly, it is argued in this paper that in order to seek to redress horizontal inequalities adequately in the Guatemalan context, it would be necessary to guarantee the respect, promotion and exercise not only of those universal and individual liberal rights essential to citizenship and key to the Guatemalan peace process, but also of those collective cultural rights enshrined within the international normative framework relative to indigenous peoples' rights and of which indigenous peoples are legal subjects.<sup>8</sup> The Guatemalan peace process was conceptually undergirded by individual and universal rights, a package of rights agreed upon by the Guatemalan elites with the insistence of the international community, and consolidated in a series of peace accords, including the *Global Human Rights Accord*. In contrast, a series of collective and specific indigenous rights were neither permissible nor negotiable as components of the package of rights to be introduced as part of the peace settlement: the majority of collective rights of

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<sup>8</sup> See Brett and Rodas (2008) and Brett (2009, forthcoming) for a discussion of citizenship and its relationship to ethnicity and the rights of indigenous peoples.

indigenous peoples remained largely invisible during the peace negotiations and in the post-conflict reconstruction phase.

Acutely unequal patterns of land distribution and the related multi-faceted economic inequalities arising from such patterns, a fundamental cause of the conflict, were not engaged with meaningfully during the peace process. Land reform was not a negotiable theme during the peace process; rather, neo-liberal policy recommendations, such as the trust fund and loans to peasants, became the central tenets of the peace accords in this regard. It was permissible to negotiate *individual property rights* relating to property ownership (encapsulated in the introduction of loans to buy land), rights previously enshrined in the 1985 Constitution. The promotion of said rights was subsequently imposed over and above any reference to collective rights or title to land in the peace accords, although collective rights to land were cultural rights already consecrated in international law – including ILO Convention 169 – ratified by the Guatemalan State. Whilst land reform was strictly excluded as an *economic* issue during the peace negotiations, it was also excluded when framed as a cultural rights issue. For example, platforms of peasant organizations such as the National Indigenous and Peasant Coordinator (*Coordinadora Nacional Indígena y Campesina*, CONIC) that argued that collective land ownership was an essential component of indigenous culture were systematically rejected by the parties to the conflict (Brett 2006: chapter six; 2008a: chapter six).

Similarly, political and fiscal decentralization was a key theme in the peace accords – as well as the subject of three important subsequent laws after 2002 – and was supported by the parties to the conflict and, emphatically, by the international community. However, decentralization in this regard did not include ceding regional or territorial political or fiscal autonomy to indigenous peoples, as it had done in the reformed Colombian Constitution of 1991. Rather decentralization aimed to consolidate State control at the municipal level, albeit with the unprecedented caveat of local government's subjection to norms and procedures of citizen audit and improved procedures and norms governing local citizen participation. Significantly then,

whilst not itself a direct cause of the armed conflict as such,<sup>9</sup> indigenous peoples' political and territorial autonomy was also marginalized as an issue during the peace negotiations, preventing the legitimization of any possible future claims to territorial autonomy or the control and management of natural resources by indigenous authorities and communities, and subjecting such claims to the arena of State control. Once again, individual universal rights (to participation and representation) were imposed over and above legitimate claims to collective cultural rights (to political autonomy).

Certain demands and configurations of rights then were amplified over and above others during the peace process: individual and universal human rights and citizenship rights and certain limited indigenous rights won an unprecedented degree of institutional recognition. Those rights that were acceptable at the negotiating table and were institutionalized within the peace accords included universal and individual civil and political rights and some collective cultural rights that appeared not to threaten directly the economic status quo and historical relations of power. For example rights to education in one's own language, the right to wear traditional indigenous dress, the right to practice indigenous spirituality were all included in the *Indigenous Accord*. The degree to which these rights could have impacted profoundly upon horizontal economic and political inequalities, however, should be questioned. Demands articulated to the negotiating parties by social movement organizations that supported cultural rights that *evidently* challenged historical elite interests, such as collective rights to land and political and territorial autonomy, were thus perceived of as a threat to said interests and were met with systematic institutional closure. Proposals on these themes from the *Asamblea de la Sociedad Civil* (Civil Society Assembly, ASC), the formalized body established in 1994 to present proposals to the parties to the negotiation table and which represented a broad array of social sectors, were excluded from the final accords. In fact, although the overall content of the AIRI reflected the initial proposal presented by the ASC to the negotiating table, the ASC itself could not agree on a unifying proposal for land reform or indigenous political autonomy, substantially weakening its bargaining position and thus automatically precluding said themes as proposals to the parties to the negotiation.

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<sup>9</sup> Lack of formal access to political channels was, however, a key causal factor of the internal armed conflict, as the political system was closed to citizen participation at all levels and violent repression was directed at those

Importantly, the administrative instruments and conceptual framework of rights undergirding and the objectives of the Guatemalan peace process viewed from this perspective fall neatly into the concept of the *contemporary liberal peace* as proposed by Oliver Richmond, where “peace processes have increasingly been seen as opportunities for establishing new forms of governance” (2007: 15). Richmond argues that a series of institutional, constitutional, governance and civil society mechanisms are imposed upon the transitional state through the multiple interventions of a broad network of international and transnational actors, such as the World Bank, the International Monetary Fund, the United Nations, the Inter-American Development Bank and interested governments. “Peace” is thus negotiated and legitimized through the conditional imposition of a package of instruments and normative frameworks upon the country in question, based upon the premise of democracy and the (universal and individual) liberal rights that undergird it:

“democratization has become a cornerstone of the emerging consensus on the liberal peace as has been illustrated in much of the relevant UN documentation...the construction of the liberal peace revolves around education, consensus, non-violence, sustainable economic and social development, human rights, social equality, democratic participation, pluralism...neoliberal economic reform and free trade...elections...constitutionalism” (2007: 67-69).

This universalist approach to the construction of peace, and the accompanying “*technicalization*” of the concept of peace, forms the discursive, methodological and conceptual framework for the blueprint of action of the international community in peace-building missions, as was the case in Guatemala. However, there may be inherent contradictions to this model, particularly in the context of multi-cultural societies characterized by extreme economic horizontal and political inequalities exacerbated by grave levels of structural and institutional racism. As Stewart has pointed out:

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individuals and groups seeking to influence politically the Guatemalan State.

“It is important to recognize that the normal economic policy package of liberalisation and promoting market forces is not generally sufficient to reduce HIs, or even to prevent them widening. What’s more, democratic institutions are often not sufficient to prevent political horizontal inequalities arising. As far as economic HIs are concerned, long-lasting privileges for some groups relative to others puts them in a stronger position to exploit the market (for example, through better education and/or more access to capital). As far as political HIs are concerned, majoritarian democracies can discriminate against minorities, such that even with ‘shared’ power at the top inequalities may persist at lower levels” (2005: 8).

In this regard, and with serious attention to the Guatemalan case, the question arises as to whether the provisions of the peace accords were indeed sufficient to address effectively deep-rooted horizontal inequalities, given their formulation and articulation within the above liberal peace paradigm and the evident emphasis on the construction of neoliberal economic policies as a defining characteristic of the settlement itself. In other words, it is for this reason that the successful reduction of economic horizontal inequalities would have required more profound reforms relating to land ownership and the establishment of power-sharing mechanisms, and based upon the implementation of the collective rights of indigenous peoples, rather than the introduction of neo-liberal policy packages as central to the peace settlement. As we shall see with reference to the case study of the DDPI, lack of progress in reducing horizontal inequalities in Guatemala relating to ethnic group membership stems not only from the severe problems in financing, executing and institutionalizing accord implementation and mandate execution then, but also from the commonplace tendency to prioritize individual and universal rights within State institutions.

The following sections of the paper present the experience of the PDH and DDPI, institutions borne of the context defined above, and themselves shaped indelibly by it.

The Guatemalan Case: The *Procuraduría de los Derechos Humanos* and the *Defensoría de los Derechos de los Pueblos Indígenas*.<sup>10</sup>

In 2002, United Nations Special Rapporteur on the Fundamental Freedoms of Indigenous Peoples, Professor Rodolfo Stavenhagen, highlighted with serious concern the daily racism suffered by the indigenous populations in Guatemala, focusing in particular upon racism stemming from institutional practices. More recently, Doudou Diene, UN Special Rapporteur on the Theme of Racism, signaled emphatically that: “The roots of racism are profound in Guatemala...Guatemala has lived too much violence provoked by discrimination” (*Prensa Libre*, 03/07/04). Moreover, one of the most serious concerns presented by the United Nations Verification Mission in Guatemala (MINUGUA), prior to its exit from the country in November 2004, were the daily practices of racism and discrimination in Guatemala. In the Secretary General’s report of August 2004, Koffi Annan stated that, despite evident advances in the peace process in general and the human rights situation in particular, the most important challenge facing the country was the struggle against racism (MINUGUA 2004). Whilst racism was a fundamental motor behind Guatemala’s genocide, today State racism has taken on a different form, articulated as it is from within a purportedly “plural” State, supported broadly by the international community, and lauded publicly by successive governments as multi-cultural. It is within this context that the PDH now functions.

As previously stated, the PDH was consecrated in Guatemala’s 1985 Constitution. According to the subsequent *Law Establishing the Congressional Human Rights Commission and the Human Rights Ombudsman’s Office* (1987), the PDH is mandated to “promote the efficiency and the streamlining of governmental administration in the area of human rights, in addition to investigating and reporting administrative conduct detrimental to the interests of the people” (Congressional Decrees 54-86 and 32-87, Article 13, paragraphs a and b). The law states that the institution of the PDH is to be constructed around a single individual, in short, the institution *is* the Ombudsman. In this sense, the PDH has been a historically centralized

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<sup>10</sup> Research for this section was carried out between 2004 and 2007. Thirty-five interviews were carried out with *ladino* officials of senior and medium rank within the *Procuraduría de los Derechos Humanos* and with all indigenous staff of the *Defensoría de los Derechos de los Pueblos Indígenas*, where eight months of fieldwork was carried out. See Brett (2008b).

institution, with its myriad of units, including the DDPI, built around a single legally and constitutionally legitimate political figure to whom they are therefore subject and who is elected by Congress. Any attempt to democratize or decentralize the institution or to reform it through the introduction of more participatory, inclusive or transparent mechanisms or procedures, which do not depend solely upon the goodwill or political trajectory of the Ombudsman, have always had to confront this centralist tendency and thus failed in their attempts to reform the institution. In this regard, the PDH has been and remains an institution whose policies and political positions are shaped almost exclusively by the Ombudsman himself with the partial contribution of his advisors.

As early as 1986, civil society organisations began to lobby around the newly drafted 1985 Constitution and the instruments that it had established, in particular the PDH. The establishment, although far from institutionalizing State practices based on human rights standards, at least in part created an albeit weak institutional framework and broadened the legal instruments available to civil society. In theory, the PDH gave civilians a legal structure through which to denounce human rights violations and seek resolution of said cases. Through the institutional framework provided by the PDH, civilian actors could denounce illegal acts (human rights violations and abuses) carried out against them, which continued under the government of Vinicio Cerezo Arévalo (1986-1991).

Individuals who participated in civil society organizations in the late 1980s have revealed how they began to use the relative space provided by the PDH (for example, in the capital city or in the regional offices of the PDH in Santa Cruz del Quiché) to file for habeas corpus or denounce human rights violations, including massacres, forced disappearances, torture or forced military recruitment by both the armed forces and military commissioners and the civil patrols. However, interviewees explained that access to and the impact of the PDH at this time was extremely limited. Despite the legal framework provided by the institution therefore, the PDH's actions were largely ineffective, due both to a lack of central State support and funding and the limited scope and will of the representatives of the PDH, including an entrenched fear to investigate cases, at this time. Inevitably, in its first few years, during the ongoing armed conflict and only three years after the genocide, the PDH had to struggle against an

authoritarian political culture adverse to human rights institutions, in which a culture of fear and accompanying violent repression influenced and severely restricted the actions of human rights defenders. Human rights discourse was still seen by many, both military and civilian alike, as tantamount to communist or revolutionary discourse; the support given by the new civilian administrations was symbolic.

As previously stated, the majority of victims of the internal armed conflict were indigenous – hence a large proportion of individuals who began to appear at the offices of PDH in the 1980s with the aim of denouncing human rights violations were themselves indigenous. However, staff members of the PDH at this time were, almost without exception, *ladinos*. According to current staff members of the DDPI, for over a decade, the unrepresentative nature of PDH personnel limited the effectiveness of the PDH and weakened its legitimacy from the perspective of indigenous victims, at the same time as restricting indigenous peoples’ access to the institution, given that the majority of PDH staff did not speak indigenous languages. The current personnel of the DDPI insist that, with the establishment of the DDPI at the end of the 1990s, these practices and perceptions began to change and indigenous victims of human rights violations began increasingly to perceive themselves to be better represented within the institution. However, as we shall see below, severe limitations with regard to the filing and investigation of cases still persist, and there remains an acute struggle relating to the successful articulation of and engagement with competing rights claims.

From the mid-1980s, civilian actors – notably the diverse range of social movements representing victims that emerged in the relative space accompanying the peace process – began to utilize the discourse and practices of human rights as a political and legal framework through which to denounce and seek to resolve what had happened to them during the internal armed conflict and as a measure to try to put an end to ongoing human rights violations under the government of Vinicio Cerezo Arévalo. Said actors were supported by a broad *international human rights regime* (Sieder and Witchell 2001) and “transnational advocacy networks”, in the terminology of Keck and Sikkink (1998), including Human Rights Watch, Amnesty International and the Kennedy Centre and the Carter Centre. In the context of the return to civilian rule, the discourse of human rights provided a legitimate discourse through which

people could articulate their past and present suffering and grievances within a legal framework that was accompanied by domestic and international State obligations in this regard. In combination with the work of human rights organizations in human rights education, increasing recourse to the State legal system, and to the PDH in particular, contributed to an incipient awareness of human rights practices and discourse within Guatemalan society, although albeit within a restricted social and political sector and within a systemically weak legal system. In the late 1980s, these factors led, importantly, to the creation of an emerging “rights culture”, as both Foweraker (1995) and Dagnino et al (1998) have described, which would be strengthened gradually with onset of the democratization process.

However, despite the content of the 1985 Constitution, which made an albeit abstract reference to specific indigenous rights, the activity of the PDH during this period and indeed up until 1998, was and has been focused emphatically upon the protection and promotion of individual and universal civil and political rights. In Guatemala, as has been the case in other countries, there is a disproportional bias in the balance between two conceptualizations of rights and the related practice of them: in other words, in Guatemala there has been an overbearing discursive focus upon universal and individual civil and political rights, to the detriment of the practice of collective and specific rights of indigenous peoples (of cultural rights) and, of course, to economic and social rights.

This was the case for several reasons, including:

- the national political context that, up until the regional processes relating to the continental indigenous mobilization beginning in Latin America in 1992 (the same year that Rigoberta Menchú won the Nobel Peace Prize) and the negotiations for the Accord Concerning the Identity and Rights of Indigenous Peoples and for the ratification of ILO Convention 169, was not receptive to the articulation of the discourse of collective cultural rights. After this date, a broad network of indigenous Latin American actors began to articulate economic, cultural and social rights in their struggles;
- the immediate needs articulated by social movements representing victims of the armed conflict, which, in the early years of their emergence, focused their demands upon and articulated the discourse of universal human rights, a framework that was broadly supported by

the international community. In other words, the focus of social movements at this time was upon supposed *first generation rights*, until the national political context changed and the violence of the armed conflict diminished comparatively, providing a space in which to articulate broader and more integral demands (see Brett 2008; chapters two and conclusions);

- the partial invisibility of the discourse and practice of economic, social and cultural rights (ESCR) as a legal instrument at the regional level and the difficulty of implementing State obligations enshrined in national legislation and international law in this regard.

### The Unit for the Defence of the Rights of Indigenous Peoples (DDPI).

As we have seen, the PDH was established in a national and regional historical context that was receptive to and shaped by the framework of fundamental individual and universal rights, over and above those instruments and discourses more directly linked to the protection of indigenous peoples' collective and specific cultural rights. In the 1980s, the framework of individual and universal civil and political rights then was prioritized by State institutions in Guatemala, at least in theory. At the same time, however, the PDH faced then and continues to face now severe struggles with regards to its institutionalization. The institution has been and remains systematically underfunded and constantly subject to criticism for its political and legal positions regarding human rights violations from recalcitrant military and civilian sectors, as well as from Congress and other State units and agencies. Emerging as it has from within a historically racist and authoritarian State, therefore, its institutional evolution, as of that of other legal institutions in the Guatemalan other post-conflict contexts, should not have been expected to occur rapidly or without encountering severe entrenched problems (Gonzales 2005). The institution emerged *after* the return to democracy in 1986 and within a "schizophrenic State" *in extremis* (O'Donnell 1993: 1361), a State that was only to complete a prolonged peace process a decade later. The evolution of the PDH has taken place in parallel to that of other State institutions, such as the Public Prosecutor's Office, encountering similar structural and attitudinal problems and obstacles, in particular the prevalence of anti-democratic, racist and authoritarian practices, as well as systematic lack of funding. Furthermore, as would be expected to be the case with legal institutions, so key as they are to democratic transition and consolidation as Pinheiro et al (1999) have argued, it has represented both a "target" of

democratization, being subject to the transformations occurring as a result of the democratic transition, as well as being a partial “motor” for it.

Significantly, neither the law establishing the PDH nor its constitutional basis addressed in detail the inclusion, participation or specific representation of indigenous people within the institution. As a result, despite being the population most marginalized and historically subject to serious violations of their rights (including civil, political and ESCR), it is evident that the mechanisms for vindicating directly the specific rights of indigenous peoples and their direct representation within the PDH were not institutionalized as practices within the institution for almost its first decade. Struggle to institutionalize even civil and political rights encountered grave difficulties, as previously stated; engagement with other conceptualizations of rights, particularly those challenging Guatemala’s *ethnocracy*, would inevitably not be easy. However, it is important to clarify that, whilst the PDH did not address or engage with the specific rights of indigenous peoples in a direct or visible way until 1993 – i.e. through protecting and promoting the rights inherent indigenous peoples by way of their being indigenous – this does not mean that the PDH did not work with or respond to indigenous peoples during this time. Rather, between 1985 and 1993, the rights of indigenous peoples were defined, promoted and protected as universal rights that, rather than stemming from cultural or ethnic belonging or group membership, *from being indigenous*, were inherent to the individual by way of his or her *being human*. The PDH during this time would investigate cases of violations of the universal human rights of indigenous people, without articulating or comprehending them within a legal framework that took account of cultural membership or belonging, and without relating them to or framing them within the national and international norms relative to their ethnic or cultural particularity and identity. Such a *universalizing* legal framing *invisibilized* the legal implications that would otherwise have been relevant and appropriate through the normative framework relative to indigenous peoples’ rights.

It was not until 1993, as a consequence of transformations within the PDH itself, and externally as a result of a series of factors including the socio-political changes accompanying the peace process and the continental mobilization of indigenous movements (1992), that cultural rights began to become more visible and directly perceived of as a possible instrument in the rights

struggles leveled within civil society towards the State.<sup>11</sup> Said process influenced the evolution of the PDH.

From interviews with the current Director of the DDPI, Martin Sacalxot, and former Deputy Ombudsman Dr. Augusto Williamson, in 1993, under the leadership of then Ombudsman Dr. Jorge Mario Garcia Laguardia, and as a result principally of the systematic process of lobbying carried out by Williamson, the *Program of Assistance to Indigenous Peoples* was organized for the first time within the PDH. Williamson, appointed as Head of Program by the Ombudsman, initiated a series of consultation processes with indigenous organizations, as well as specialized studies on the subject of the protection and promotion of the specific rights of indigenous peoples. However, due to the lack of financial resources or formalized institutional budget designated to the program at that time, it was not possible to stabilize or institutionalize the Program within the PDH and advances were temporarily stalled. With some exceptions, including both García Laguardia and Williamson, the establishment of a program directly related to promoting the rights of indigenous peoples was not then seen by PDH functionaries as a State priority, generally, nor specifically as a priority within the PDH itself.

Other factors external to the PDH also hindered the establishment of the DDPI at this time, despite the obligations consecrated in the provisions of the *Indigenous Peoples Accord* signed in 1995. According to Narciso Cotjé, ex-Deputy Director (*Defensor Auxiliar*) of the DDPI, an important factor compounding institutional resistance were the differential and at times contradictory interests shown by various sectors and organizations of the Mayan and

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<sup>11</sup> For a detailed discussion on the historical development of social movements within Latin America see Urban and Scherzer (1991), Assies and Hoekema (1994), Van Cott (1994), Brysk (1996; 2000), Stavenhagen (1996), Díaz Polanco (1997), Yashar (1997; 2005), Warren (1998; 1998a) and Brett (2006; 2008a). Significantly, in Guatemala, although the broader cultural and collective rights framework has been available to social and political actors since the mid-1990s, its utilization as a instrument of struggle has been limited and has not in fact spread broadly to the indigenous movement, perhaps at a first sight a “natural ally” of such a framework of rights. Those global factors mentioned above partly explain the reasons for this phenomenon. However, the Guatemalan post-conflict reality, and the impact and consequences of the internal armed conflict, particularly upon the indigenous and broader social movement, have profoundly shaped the alliances within and nature of social mobilization in the country. While the human rights movement, the feminist movement and the peasant movement have over time adopted and adapted to the universal and individual human rights framework as an instrument of struggle, and have utilized the institution of the PDH as integral to their activity, this has not taken place to the same extent with the indigenous movement. The indigenous movement has not utilized said institution or indeed the normative framework relative to indigenous peoples’ rights in the same way.

indigenous movements regarding the establishment of the DDPI. Such differences of opinion influenced and perhaps slowed down the processes shaping the establishment of the DDPI. In the words of Cojtí:

Indigenous people did not see the Ombudsman as a starting point, and so we did not pay attention to it initially. I was working during the first year of the Peace Accords in the Commission of Sacred Sites. At that point we wanted to create an entity to defend directly and independently the rights of Indigenous Peoples with regard to the issue of spirituality. Furthermore, the aim was to create another body that would be dedicated to the issue of education, but these were not seen as related issues, but rather as distinct themes. As a result, there was no movement towards supporting a body that would engage integrally with these issues, such as the DDPI. Consequently, the person in charge of the process at the time had two problems. Firstly, that the support of the indigenous population towards the process was not entirely evident or unquestioning, and a viable mechanism through which to establish the DDPI could not be found. Secondly, it is pretty clear that, from the point of view of the State authorities, there was not much interest at all. I remember that personnel within the PDH itself would say that the DDPI was not in fact necessary, that the mandate proposed for the DDPI could actually be carried out by the existing staff of the PDH. So, where the State was concerned, there was an absence of funding, invisibility and lack of interest in the DDPI.

With the election of Dr. Julio Arango to the position of Ombudsman, however, the process of establishing a permanent program for indigenous peoples took off once again. Systematic lobbying and proposals made by various civil society organizations, particularly the *Fundación Maya* (FM) – whose Director at this time was former indigenous commander of the URNG, Pablo Ceto – were key in pushing forward this process. Thus, in 1997, as the result of a proposal from the FM, an initial and brief consultation with indigenous organizations was carried out. The consultation culminated in a meeting between civil society organizations and four lawyers, Martin Sacalxot (in this period working on the FM), Emilio Sequen, Carmela Qurup and Rolando Lopez-Godinez.

### The Pro-Consensus Committee.

As a result of a process of coordination between the PDH, FM and the Coordinating Body of Organizations of the Mayan Peoples of Guatemala (*Coordinador de Organizaciones del Pueblo Maya de Guatemala*, COPMAGUA) three indigenous representatives, Martin Sacalxot, Bertha Aj Alvarez and Victor Garcia, assumed the responsibility of finalizing a proposal for the creation of what would later become the DDPI. The proposal was sent to the PDH and various civil society organizations. This same group formed the *Pro-Consensus Committee* within the PDH, demonstrating at last a formal institutional commitment to proceed with the proposal, after years of internal struggle. The central provision of the proposal was to conduct this time a lengthy consultation process with Mayan and indigenous organizations, both in the capital city and in the interior of the country. The consultation would collect and systematize opinions and recommendations concerning how such organizations perceived the requirements related to a possible mandate of a State body to protect indigenous peoples' rights. Thus, the establishment of the DDPI was based on a collaborative process with civil society organizations, demonstrating that there were several points of convergence between the PDH and DDPI and the indigenous movement itself, which included goals and shared agendas.

The Pro-Consensus Committee began its activities in 1998. It worked formally with criteria and an institutional framework agreed on November 9 1998, and was inaugurated officially as an office within the PDH on December 3 of that same year. While the final profile of personnel to be employed had been agreed upon as a result of the consultation process, it was under the institutional responsibility of the PDH that staff were to be selected. Sacalxot and Alvarez were selected as responsible for consolidating the program within the DPH, but Bertha Aj Alvarez stepped down in January 1999 due to health problems.

Their main objectives were threefold: consult with indigenous peoples in order to reach a final consensus concerning the establishment of the DDPI, and subsequently to structure and develop the office. In this context, work included collecting materials and producing policy documents mapping out the possible directions of the office, meeting with PDH officials and

Mayan organizations and, significantly, to pave the way for a national-level consultation with the Maya people contemplated within the framework of Article 6 of ILO Convention 169.

According to Martin Sacalxot the formal consultation process – the first of its kind to be carried out with indigenous peoples in Guatemala – was prepared during 1999 through three assemblies that took place in the capital city and the cities of Quetzaltenango and Poptún, El Petén. These assemblies themselves extended the coverage to a total of eight departments in the country – San Marcos, Quetzaltenango, Escuintla, El Petén, Guatemala, Alta and Baja Verapaz and Izabal. Approximately thirty organizations were consulted in each department, with a total of 189 organizations and their social bases consulted over all. The consultation aimed to come up with the main structure and profile of the Director of the office, the profiles of the accompanying team and a framework of work objectives. This consultation process ensured that the formation of the DDPI was based on dialogue and consultation with indigenous communities and movements in both rural and urban areas and, moreover, demonstrated the first significant achievement relating to the normative obligations assumed by the Guatemalan State in the framework of ILO Convention 169. Consequently, it must be emphasized that the establishment of the DDPI represented not only the successful implementation of a key aspect of Chapter Two of the AIRI, but also, and significantly, of international human rights law relative to indigenous peoples.

As stated in the Final Report of the Pro-Consensus Committee, and in a reflection of the views gathered during the consultation process, the main objective of the DDPI was “to increase the capacity of the PDH with regard to the attention to cases of violations of *specific rights*....(and)...to protect the specific rights of indigenous peoples whose situation has been one of constant risk and vulnerability” (1999:1; emphasis added). In other words, the mandate of the DDPI was intimately linked to the overall broader mandate of the PDH, whilst at the same time engaging directly with collective and specific rights, representing as such the first unit of the PDH established to do so. According to Martín Sacalxot, this significant achievement came from the pressure of the indigenous movement upon the PDH to include such rights in the office’s mandate.

### Operating Procedures of the DDPI.

From 1999, the DDPI began to function formally within the PDH with a staff of two people: Martin Sacalxot a lawyer and Director of the office (*Defensor*), and Ingrid Quic, in the post of Secretary. However, according to Martin Sacalxot, the obstacles faced, both externally and internally, were severe and prevented the effective functioning of the office from the very beginning. Difficulties encountered included splits within the Mayan movement concerning the choice of Sacalxot as Director, despite prior lengthy consultation with a wide range of indigenous organizations concerning the establishment of the DDPI. Internal problems included the lack of adequate institutional budget, demonstrating an absence of State will to institutionalize the DDPI. The lack of institutional resources had meant that initially the PDH did not provide funding to the office, nor was it possible for the DDPI to command physical space within the PDH's central offices. Consequently, during the first few months of its existence, the DDPI was located in the offices of FM in Zone 7 of the capital city, far away from the main offices of the PDH. The FM, an NGO, also provided Sacalxot and Quic with a salary.

Significantly between 1999 and April 2003, the staff of the DDPI was limited to the posts of *Defensor* and Secretary, and there was no formal representation at the regional offices of the PDH.<sup>12</sup> However, in April 2003 as a consequence of a project of the Swedish International Development Agency (SIDA) (which in fact ended in April 2006), there were opportunities to expand the Ombudsman to other departments in the interior of the country, and the posts of Deputy Director and Assistant Regional Directors of the DDPI were also established.<sup>13</sup> The project permitted the establishment of representatives in the following offices of the PDH: Guatemala (working from the headquarters in the capital and covering the east and south-east of the country); the Verapaces (Alta and Baja Verapaz); Chimaltenango; Sololá (also covering

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<sup>12</sup> Since its formation, the PDH has established regional offices in all 22 departamentos of the country, with a more pronounced presence in El Quiché (in Santa Cruz, Nebaj, and the Ixcán); Huehuetenango (with offices in both the departmental capital and the municipality of Nentón); the Petén (in Santa Elena and Poptún); and in Quetzaltenango (with offices in Quetzaltenango and Coatepeque).

<sup>13</sup> According to Narciso Cojtí, after 2006, the personnel of the DDPI in the regional offices have had to work *ad honorem*, due to the termination of funding from the Swedish government.

the department of Sacatepéquez); Quetzaltenango (covering the departments of Totonicapán and Retalhuleu); El Quiche; and San Marcos.

Logically, due to the dramatic limits on resources up until 2003, the DDPI's ability to meet its institutional mandate was severely restricted, a pattern inherent to efforts to guarantee the promotion and protection of the rights of indigenous peoples from within the Guatemalan State more broadly. In 1999, the DDPI was able to relocate to within the central headquarters of the PDH; however, it had to share office space and typewriters with the Unit for the Defense of Women's Rights, limiting the capacity of both offices to respond to their institutional mandates. Over and above the issue of resources, however, other obstacles impeded the capacity of the DDPI to develop a functional autonomy within the PDH. According to Sacalxot:

Initially we encountered resistance. People within the PDH said "how can we possibly want an office for indigenous affairs here? It will divide the PDH and precipitate other claims for preferential treatment. This is not possible". These comments came from people who saw nothing positive in the indigenous struggle, but rather felt threatened by it. Comments and resistance from minor level employees in the PDH were very tough. As a result, the Ombudsman arranged a day when everyone employed in the PDH, from the caretakers to the Ombudsman himself, had to take part. We were able to define publicly how the office would be useful as a means of addressing the political and historical exclusion suffered by indigenous peoples. It was explained that the office itself had its basis in the Constitution of the Republic and the Indigenous Accord, and in the historical problems of abandonment, insecurity, and marginalization of indigenous peoples. These issues just could not and must not be hidden from Guatemalans. It was determined in the meeting that the DDPI would not address all human rights violations, *but only the violation of the collective and specific rights of indigenous peoples. The big challenge, however, was how to define those rights institutionally.*

A concern of the DDPI from its inception was resistance to it from the personnel of other PDH units. According to Sacalxot, the Ombudsman made a major effort to inform all staff, including

high-level personnel, about the DDPI, and to advise on the nature of its mandate and particular objectives. All other units were asked to provide the DDPI with any assistance that it might need. Furthermore, based on a recommendation from Sacalxot, the Ombudsman emphasized to his staff that the DDPI had a legitimate mandate and capacity to carry out institutional interventions of the highest level. This was, according to Sacalxot, in order to try to avoid the risk that the DDPI would be seen as “an office attending to issues of folklore, staffed by exotic spiritual advisors”. According to Sacalxot, the reaction of many PDH staff at all levels was initially that the personnel of the DDPI were oracles “who could tell people their destiny”. These measures then were aimed at educating the staff of the PDH as a means of anticipating possible misunderstandings of the DDPI and to seek to foster a collaborative working environment. However, according to all members of the current staff of the DDPI, attitudes of resistance and discrimination have been commonplace since the establishment of the unit. In the words of Jeny Alonzo, the DDPI’s accountant:

There has been very little cooperation from people. When we need support from another unit they say to us: “okay, but later, not right now, we’re busy”. “No, we need it now”, we say, but they answer saying “no, it can’t be done. It will be ready tomorrow at such and such a time”. However, when units ask us for support, we are told, “we need this right now, without fail”. I think that simply they are not interested in our activities. We are also overloaded with work and we always managed to cover all activities and help all of the units we need to, which shows that if someone wants to assist another unit, it is possible. It just appears that people here are not interested in indigenous rights. That is why it is so important to educate staff on indigenous issues.

According to all staff of the DDPI, it has as a consequence, therefore, been of paramount importance to clarify and maintain the institutional distinction between the specific mandate of the DDPI and the work of other offices within the PDH. This has been the case not only to avoid duplicating the work of the institution, but also to try to anticipate the criticisms likely to be leveled at the DDPI. At the same time, according to Sacalxot, it was important to emphasize that a central axis of the creation of the DDPI was in fact the strengthening of the overall work of the PDH, in this case in particular through the protection and promotion of the collective and

specific rights of indigenous people. Consequently, the office has been characterized as carrying out work that is both autonomous/independent and transversal in nature, leaving the DDPI to seek to cut a fine balance between competing responsibilities.

#### The DDPI's Mandate.

As has been documented, the DDPI established its institutional objectives through a lengthy process of consultation with indigenous communities and organizations, as well as dialogue with colleagues in the PDH; such objectives have remained effectively consistent to date. The objectives have two principal orientations, externally towards Guatemalan society in general, and internally within the PDH itself. The rights framework that was adopted, that of collective and specific indigenous rights, reflected an important achievement with regard to the impact of the consultation process carried out with indigenous organizations. However, serious resistance to the DDPI from within the institution itself also accounts for formulation of the specific mandate of the DDPI, in terms of the fact that other units preferred to push the DDPI away from working on “their issues” (universal and individual rights) and towards issues that were quite evidently sidelined within the institution as a whole (collective rights). Lack of institutional attention to training in this field and the almost non-existent budget for the DDPI has ensured that collective rights and indigenous issues remain marginal themes within the PDH to this day.

Externally, the main objective of DDPI is to promote and protect the rights of indigenous peoples through the institutions of the PDH, thus in theory strengthening simultaneously the work of the PDH in this regard. The DDPI has the institutional mandate to work with the demands and complaints filed by indigenous victims of violations of their specific and collective rights and to investigate, confirm, support and seek resolution in such cases.<sup>14</sup>

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<sup>14</sup> The principal legal and political instruments (binding or non-binding legally) that are utilized in the work of the DDPI to protect and promote the rights of indigenous peoples include the following: The 1985 Constitution (especially Articles 57-58, 66-70); Article 202 bis. of the Penal Code (the definition of discrimination as a crime); Ordinary legislation, including The National Language Law (2002) – which imposes obligations upon the State regarding the provision of public services to indigenous peoples in their own languages; The International Convention for the Elimination of All Forms of Racial Discrimination (ratified by Guatemala in 1983); The Agreement on the Identity and Rights of Indigenous Peoples (signed in March 1995); Convention 169 of the International Labor Organization on Indigenous and Tribal Peoples in Independent Countries (ratified by Guatemala in 1996).

However, and significantly, according to Martin Sacalxot, the Office confronts three serious and systematic problems in the reporting of violations of the rights of indigenous people. The first two problems are external to the institution and precipitate an institutional response, ostensibly a program of human rights education: 1) indigenous peoples' lack of understanding and knowledge of their human rights; and 2) fear to report such violations because of the possible repercussions for the victims by the perpetrators. The third problem is inherent to the workings of the PDH itself: 3) the lack of technical capacity within the PDH in the definition and systematization of violations of collective and specific rights. This problem demonstrates the inherently disparaging attitude towards indigenous rights within the structure of the PDH, and that defence of said rights is not an institutional priority.

The latter point demonstrates a disturbing aspect of the internal policies of the PDH with regard to the evident lack of will shown by the institution to carry out training to staff concerning how to comprehend, identify, classify, address and resolve the violations of the specific and collective rights of indigenous peoples. In this regard, according to interviewees, over a period of five years almost no serious training programs to PDH personnel were carried out concerning the identification and comprehension of collective and specific rights of indigenous peoples, demonstrating a lack of will on the part of the PDH to consolidate an institutional response to the pattern of violations of said rights. Training has, however, focused consistently upon the identification and development of the normative framework relative to universal and individual rights, those rights that undergird the work of the majority of units within the institution. Furthermore, and significantly, the lack of institutional and technical capacity to identify and seek to resolve violations of the rights of indigenous peoples has meant that when said violations are reported to the PDH, they are systematically misclassified and misinterpreted. Reports have been consistently imprecise in their identification of patterns of violations, thus underplaying the actual dimensions of the violations indigenous peoples suffer, contributing to the generation of an unrealistic image of the actual conditions of indigenous peoples' rights. According to Sacalxot, for example, it was for this reason that, in the PDH *2003 Annual Report on the Human Rights Situation*, only 18 cases relating to the violation of the specific rights of indigenous peoples were identified, a severe underrepresentation according to Sacalxot (PDH 2004: 63).

The work of reception and addressing of complaints relating to human rights violations is combined with the systematic role of educating Guatemalan society in those issues relating to the human rights of indigenous peoples. The DDPI disseminates information on the rights of indigenous peoples, multiculturalism, racism and discrimination in society at large through workshops or training sessions, geared to both indigenous and non-indigenous populations, State and non-State actors, using material developed by the DDPI itself. An important component here is to raise the general public's awareness with respect to cultural rights, including the right of indigenous peoples to establish their own forms of political organization, consultation processes and conflict resolution, specifically in relation to the indigenous legal system. In this regard, the DDPI also seeks to expand access to justice for indigenous peoples in two complementary ways: 1) seeking formal and official recognition of and promoting the practice of the indigenous system of justice and 2) extending access to the State justice system for the indigenous population by supporting and investigating specific cases and publishing the office's decisions and proposing recommendations to the competent authorities. In an interview, ex-Deputy Director Narciso Cojtí noted that the fact that DDPI personnel are indigenous and speak a wide range of indigenous languages is extremely important. Personnel are able to gain the confidence of alleged victims of violations and enjoy legitimacy from the viewpoint of the victims. In fact, he explained that there had been an increase in complaints filed from indigenous victims since the establishment of the DDPI precisely for that reason.

The DDPI will accompany specific legal cases, providing support and observations as far as is permitted by the mandate of the PDH. For example, the DDPI supported the legal case that resulted in a lawsuit and legal sanction against five individuals for acts of discrimination against Rigoberta Menchú during the events in July 2003 known as "Black Thursday", by providing expert cultural opinions or special witness reports, known as *Peritajes Culturales*.<sup>15</sup> The DDPI may also emit oral or written rulings or advice, presenting a particular legal or political opinion or resolution with regard to the respective case. Resolutions are not legal sanctions, but are legally-binding on the respective party. Finally, the DDPI may also carry out

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<sup>15</sup> A *peritaje cultural* is a specialist witness report concerning an aspect of indigenous culture that can serve as evidence in a legal case.

specific research on issues related to its mandate, such as Mayan culture, indigenous systems of justice and classification of community systems of political participation. These activities and the research itself generate material for the overall internal work of the PDH and which is published for consumption within the public domain.

From the perspective of the socialization of indigenous peoples' rights, or human rights education, the DDPI conducts a series of multiple interventions directed towards the Guatemalan state and society. For example, the DDPI oversees the functions of State institutions, monitoring them with regard to their adherence to international standards relating to indigenous rights. The DDPI also seeks to influence the work of Congress and supports legislative proposals that address indigenous issues, for example the 2006 *Law Concerning Consultations to and Political Participation of Indigenous Peoples*, derived from ILO Convention 169, in which case the DDPI acted as advisor to the parties involved in elaborating the proposal. The office also provided technical support for the codification of discrimination as a crime, which was included in the reform of the Penal Code in 2002. The DDPI also seeks to influence public policy by participating in various committees, including carrying out appropriate actions relating to the implementation of the Peace Accords, or supporting or constructively engaging with public policy proposals generated by State institutions or civil society organizations on issues and rights of indigenous peoples. In this context, the DDPI participates in the Inter-Institutional Coordination of Indigenous Peoples (IICPI), a grouping that includes all the various State units working on any issues relating to indigenous peoples. The mission of the IICPI is to bring together the various institutional units and agencies working on indigenous affairs and to seek a shared vision with respect to the generation of public policy and institutional State response with respect to indigenous issues, adherence to international and national obligations and indigenous rights.

#### The Internal Mandate of the DDPI.

A key component of the work of the DDPI is directed toward the interior of the PDH. In the words of Martin Sacalxot:

An important element of our work is to create a workplace environment that is

respectful of multiculturalism and indigenous peoples; we should thus guarantee that our values are shared by and prioritized within the institution. So, we try to share our knowledge on indigenous affairs with the personnel within the PDH. It was the idea of the Ombudsman Morales to reflect inwards. It would not be of much use to say that externally we have a DDPI within the PDH, if when people come to make use of the public services provided here, they are faced with insensitive personnel within the PDH itself. With regard to the theme of indigenous peoples, we have to work hard within the institution. The Ombudsman calls this “internal training”, which includes many events, such as informal discussions, lectures, indigenous ceremonies, etc., that have the objective of changing the way people think and act.

While between approximately 45% of the Guatemalan population is indigenous, of a total of approximately 500 workers within the PDH, the percentage of indigenous workers is approximately 10% in the headquarters and 17% in regional offices, where the Regional Indigenous Defenders and more employees of the institution are generally indigenous. This includes all staff, such as cleaners and drivers. The PDH has not yet developed a quota or affirmative action system relating to ethnic groups and gender. As of May 2007, the only senior indigenous staff at the headquarters of the PDH were those (four) senior members of the DDPI and no single member of the Council of Advisers of the Ombudsman was indigenous. Such issues are gravely concerning within a state institution mandated to protect human rights in a multicultural, multiethnic and multilingual country. In this context, equally disturbing is the fact that in an assessment of compliance with State progress relating to the peace agreements made in 2005 by the Peace Accords Monitoring Unit of the PDH, the only substantive agreement which had *not* been subject to a specific analysis was the Indigenous Accord; there has been no clear institutional reason offered to explain this.

As we have seen, then, since its establishment, the DDPI has faced financial and operational obstacles that have impeded the development of the office’s capacity to carry out its mandate effectively. There has also been professional and personal resistance to the DDPI, demonstrated at various times by employees of the PDH. Such behavior was the result, at worst, of severe racist attitudes, or, at best, perhaps of fear and ignorance of indigenous culture. It has been in

this context that, with the support of the Ombudsman, the DDPI has conducted awareness-raising programs on the rights and culture of indigenous peoples within the institution as a whole. These programs have two main objectives: to train personnel in theoretical issues framing the issues of indigenous rights, racism and discrimination, with the aim of institutionalizing knowledge relating to said issues; and secondly, to transform a historically racist culture as experienced by ladinos and indigenous peoples, a culture that is brought by PDH staff into the workplace and affects working relations on a daily basis. Such workshops do not represent institutional training in norms and procedures relating to collective and specific rights, however.

While there have been workshops on the history and the rights of indigenous peoples, the DDPI has also held workshops and organized other events such as exhibitions of indigenous dress and handicrafts, and a language course in the K'iche' language. In 2003 and 2004, there were courses on indigenous hieroglyphs attended by many members of PDH staff. A Diploma was also carried out within the institution, in which approximately 45 people participated (whilst the diploma did exclusively cover indigenous issues, a module was devoted to these topics, including the rights of indigenous peoples). According to Sacalxot, "about 60 people initially attended the language course in K'iche'. While the course was completed, many people who attended still greet us in K'iche'".

Significantly, the entire staff of the DDPI stressed that there has been an improvement in their working environment, which is, according to them, the specific result of the training and awareness-raising programs carried out by the DDPI. According to Sacalxot, this improvement demonstrates a clear change of attitude within the institution. However, and of serious concern, what does remain evident is that attitudes and behavior within the PDH have not been completely transformed. On the contrary, it appears that DDPI staff still face everyday obstacles in the execution of their work, rooted as they are in discriminatory attitudes, principally at the personal level, although apparently also at the institutional level. All current DDPI staff explained how they or their colleagues had been at least at one time the subject of racist comments made by members of other PDH units. In the words of Jeny Alonzo:

We have finally been accepted, but it was difficult. I once had a case of direct discrimination within the institution, but that person is gone now. I did not want to file a complaint, but the racism I suffered did a lot of damage to me. Martín Sacalxot explained to me that it was not possible that if we sought to defend the rights of indigenous peoples externally in Guatemalan society, that we ourselves should be subject to such racism within the institution. So I denounced the racism I was suffering and, within a month, the person had been sacked from the institution.

In the next section we elaborate in detail upon the internal working dynamics of the DDPI and the PDH, with particular reference to the issues of racism and discrimination, in order to permit us to understand more fully the internal challenges faced by the DDPI. To assess the relationship between the DDPI and the PDH, a series of interviews with eleven medium and senior-level officials within other units of the PDH were carried out. Interviews focused upon issues related to identity, racism and discrimination, ethnic relations and multiculturalism. Interviews carried out included with the Deputy Ombudsman, the Head of the Monitoring Unit of the Peace Accords, the Director of the Office of Labour Rights, the Director of the Unit for the Rights of Women, Children and Adolescents, the Director of the Unit for the Rights of Displaced People and Migrants. All staff interviewed were ladino. Of the eleven people invited for interview, with a letter of direct support sent by the Ombudsman himself, only six people agreed to take part in the interview process, the remaining individuals demonstrating indifference to the process. The findings of the investigation were later disseminated in a workshop in February 2006. The same questions were later fielded to the personnel of the DDPI.

In general, the responses of non-indigenous officials in the various offices of the PDH were clearly distinct from those of the staff of the DDPI. While the responses of the staff of the DDPI were based closely upon experiences of everyday life, both within the PDH and in their personal lives, the answers and perspectives of the other PDH staff were very abstract and lacked depth. Answers of PDH functionaries presented a theoretical and formalistic reading with reference to issues of racism and discrimination, and were rarely grounded in their daily

lives and experience (professional and personal) or framed within social, ethnic, or gender relations of power. What appears to be the case is that PDH officials have adopted the politically correct discourse of multiculturalism and pluralism and the respect for indigenous rights, but the step has not been made to integrate such theoretical knowledge into their daily lives or personal attitudes.

### Racism and Discrimination.

Interviews with PDH functionaries from outside of the DDPI concerning racism and discrimination shared several important theoretical-analytical elements. Functionaries distinguished theoretically and politically between the two concepts, defining racism as a certain type of discrimination. Several interviewees made reference to rights as a central aspect of the two concepts: that racism violates the dignity of the individual and seeks to prevent or nullify the recognition, enjoyment or equal exercise of human rights. Interviewees also referred to the ideological nature of racism. Consequently, functionaries demonstrated solid theoretical foundations on the issues of racism and discrimination, issues directly linked to the backbone of their work at the PDH. Such responses clearly indicate knowledge of the definitions consecrated in national legislation and international law. Significantly, only one official identified the historical roots of racism:

In our countries, racism has a colonial heritage. European invaders believed the native peoples of these lands to be subhuman and therefore they were subjected to slavery. From this alleged inferiority have emerged prejudices which remain in the twenty-first century and result in continued violation of indigenous peoples' rights.

However, no other ladino PDH functionary presented an analysis of the nature of historical-structural racism, or its link with the State. In contrast, the staff of the DDPI located the experience of racism within a historical framework that emphasized its colonial roots and noted how its discourse and ideology had transformed over time.

The responses of PDH interviewees were interesting with regard to contemporary problems of racism:

Guatemala is one of the most racist countries of the Americas. Racism is perceived in a series of derogatory phrases, and even attitudes through public policies which marginalize indigenous communities, cut off from the country and deny them access to the most basic services.

One interviewee made reference to the relationship between rights and racism, focusing analysis on issues of social structure (including in the national socio-economic structure), rather than exclusively upon issues of social perception: “those most affected (by racism) are members of indigenous peoples, mainly through various forms of limitation on their rights in service delivery, contracting and employment, wages, social exclusion, low levels of development”.

Significantly, whilst all indigenous functionaries interviewed indicated how the genocide had an intimate relationship with racism, no ladino PDH functionary commented upon the Guatemalan genocide when asked about contemporary manifestations of racism or ethnic discrimination, a matter of serious concern.

Responses of PDH interviewees indicated a profound legal and theoretical knowledge of racism, but failed to present specific examples of racism, or to attribute racist patterns of behavior to the State. Consequently, knowledge and perceptions of non-DDPI personnel were extremely abstract and, with two exceptions, failed to mention State racism. Several interviewees mistook the legal nature of high-level discrimination cases, including the case won by Nobel Laureate Rigoberta Menchú, defining them as the crime of racism (as yet not typified as a crime), rather than as discrimination. Knowledge and opinions of racism then were formalistic, and did not indicate a sensitivity or deep understanding of contemporary manifestations of racism. Masked as they are within politically correct and paternalistic language and references to *multiculturalism*, racist attitudes within the PDH persist.

### Inter-Ethnic Relations within the PDH.

The most evident area where significant differences between perceptions of ladino and indigenous PDH functionaries were demonstrated was regarding the issue of inter-ethnic relations within the institution. The question *How would you describe ethnic relations within the PDH?* generated the following responses from non-indigenous officials: ‘respectful, positive, enjoyable and educational; respect of intercultural coexistence, with great respect and cordiality; as a partner or co-worker; normal, without discrimination; indigenous colleagues are seen and treated as peers without distinction of any kind’.

Only a single ladino official responded analytically and critically:

Overall, cordial and respectful, although even within the PDH we need to progress in order to increase the number of indigenous colleagues. The percentage of indigenous colleagues is low. I think here we need greater incorporation of indigenous professionals not only in the DDPI, but throughout the institution. Possibly at the *administrative* level, there *may exist* racist attitudes due to ignorance, but this is a process we are working on and will take some time to eradicate (emphasis added).

The experiences of DDPI staff seriously contradict the descriptions of non-indigenous personnel, given that any possible problems stemming evidently from racism within the institution are painted over, ignored, and put down to isolated individual cases. All current DDPI staff explained that they or their colleagues had been at one time subject to racist comments made by colleagues from other offices of the PDH. The most indicative event occurred when high-level DDPI officials went to an institutional meeting and a co-worker declared out loud: “Ah look here come the new tortilla-makers!” The medium-level functionary involved was suspended and subsequently dismissed by the Ombudsman, but many more incidents have taken place, the majority of which are not reported. Such behavior, manifest throughout the institution, has been a recurrent pattern in the daily lives of the staff of the DDPI. According Odilia Chavajay, lawyer, ex-ILO functionary and DDPI Departmental Officer for Guatemala:

There are many people who do not agree with our presence and it is very difficult for us. We have meetings to integrate, but many people don't accept us. People look at us as fortune tellers and there are those who come and say to me "look I dreamt this, can you tell me what it means".

Similarly, whilst the majority of indigenous PDH employees work as cleaners in the institution, those that enjoy positions as functionaries are continually criticized by their colleagues, for the form in which they write and speak Spanish and their alleged lack of capacity to analyze legal and political issues. Their work is edited and personal style criticized as ignorance of the language. They are expected to work harder than non-indigenous officials in order to avoid criticism from their ladino superiors and possible disciplinary sanction.

Whilst racist attitudes continue then to be manifest, such attitudes have diminished, albeit partially, over the last four years, partly as a result of the work of the DDPI within the institution. However, it is evident that racism is deeply embedded within ladino attitudes and perceptions inside the PDH, and serves to justify the predominance of ladino staff within senior and medium level positions within the institution, despite the politically correct and pluralist public discourse of the PDH (Bastos and Cumes 2008; Brett 2008a).

### Multiculturalism.

As had been the case with the theme of racism, all PDH functionaries demonstrated significant theoretical knowledge of the concept of multiculturalism, although with a general tendency to define the concept simplistically as the "interplay and harmonic coexistence and respect for different peoples and tolerance among different cultures in a given State or society". The answers became more interesting and problematic, however, in response to how multiculturalism may be manifest in Guatemala. Clearly, abstract identification of the concept as such by interviewees did not necessarily require a process of self-reflection or critical analysis of the multicultural nature of their own country, nor precipitate the need to evaluate the daily forms through which such a concept might operate and function. Non-indigenous officials

came against serious difficulties when they were asked to position themselves within that context, and confront sometimes presumed realities. The responses of said functionaries did not generally question the applicability of multiculturalism as an operative concept within Guatemala nor did they mention problems with the operation or practice of multiculturalism itself within the State. Instead, with a definition close to parody, almost all officials interviewed claimed that multiculturalism was manifest in Guatemala through “*various ceremonies or cultural events and clothing*”, an imprecise understanding of the forms through which multiculturalism operates in the country, invisibilizing relations of power. Using terms replicating those consecrated in the AIRI, one official explained that:

Guatemala is a multilingual, multiethnic and multicultural nation where indigenous peoples – Maya, Garifuna and Xinca – represent over half of our population. The State must recognize, respect and promote their lifestyles, customs, traditions, forms of social organization, language, use of indigenous dress.

However, when pushed on how this was manifest within his own society and social relations, he was unable or unwilling to provide an answer. Another ladino PDH official deeply questioned the feasibility of multiculturalism in Guatemala. The functionary argued that the indigenous population has historically been excluded from the State, which in itself does not recognize the plurality of the country in its legislation or institutions:

I do not think that urban ladino society is fully committed to the concept of multiculturalism, nor has it appropriated the norms and practices of said concept. Perhaps in indigenous communities they practice or are more aware of multiculturalism. In other words, more aware of Guatemala as a nation where diverse cultures cohabit. Perhaps from the perspective where we would not go back to living in an exclusionary, discriminatory and patriarchal system, multiculturalism is seen as part of national heritage as the Constitution of the Republic contemplates. However, multiculturalism is not internalized by all the citizens of this country. *This concept then is not put into practice and has not been internalized by society as a whole* (emphasis added).

This analysis led to an impromptu question in the interview to clarify how the State has specifically addressed the issue of multiculturalism. According to the official interviewed, the State continues to lack a comprehensive policy to address multiculturalism, including within the PDH itself, and, at the heart of State policy exists a partial and weak attempt to manage diversity. This interesting contribution (analytically the only one of its kind) was very important because it presented a critique from within an institution of the State itself of the overall lack of State policies oriented toward the issue of operative multiculturalism. The official explained how practices of multiculturalism have not yet been internalized within society or the State and that it was highly possible that the treatment of multiculturalism by the State was above all *symbolic*, relying upon acts of co-optation and “*cosmetic measures*”. Such measures do not engage adequately with the profound problems and contradictions within State and society, and, in the case of Guatemala, the exclusion that has historically accompanied diversity. Significantly, this observation coincided with the comments of the staff of the DDPI. According to Martin Sacalxot:

Needless to say, Guatemala is multicultural, multiethnic and pluri-lingual. They are not concepts, they are realities. What still exists today is a lack of official recognition and acceptance of the plural nature of Guatemalan society. Indigenous culture is seen as rituals, customs, as a thing of the past. Indigenous people are viewed as individuals and communities who want to live in the past. There have been some very recent advances in the field of legal recognition, but society itself does not assume these advances; they are recognized and promoted, but not respected or taken on board. There is in fact a systematic rejection of multiculturalism, to the extent that when one goes to school, or watches the media or the actions of state officials, it is clear that no such policy has been visualized or put into practice. In other words, within the State structure multiculturalism is invisible, and for that reason it has become a critical component of political struggle for indigenous peoples.

In summary then, whilst it is clear that functionaries from both the DDPI and other non-indigenous PDH staff were in agreement as to the theoretical meaning of multiculturalism, read

almost as if from the PDH manual, it was clear that non-indigenous officials had assumed only a partial understanding of what it might mean in practice and when articulated within the very real relations of power embedded within Guatemalan society. Narciso Cojtí offered a very personal analysis of the historical development of multiculturalism and its impact upon the daily lives of indigenous people in the country:

The process began with a demand for rights, not only from intellectuals, but from within indigenous communities, where and when indigenous peoples began increasingly to value their own culture. The ideology that was instilled in us was that of the *Hispanicization*, we all had to think in the same way and to accept that to learn our own language was a step backwards, into the past. If we were to wear indigenous dress, we were anachronistic, it was worthless, and so were we. Now people are saying that there is such a thing as spirituality, that we have a right to bilingual education, rights to indigenous peoples' lands and territories, that we must say *no to discrimination and racism*. We can finally say, "my culture is valid, worthwhile". You know, today, officially, even the State authorities are beginning to say that we are a multicultural, multi-ethnic and pluri-lingual country, and that we should respect it.

### Final Considerations.

The marginalization from the negotiations of genuine debate concerning the structural causes of the internal armed conflict and of the collective rights of indigenous people, in short the *design* of the peace agreements, severely impeded the possibilities of reducing horizontal economic and political inequalities relating to ethnic group membership, even before attempts at implementation were initiated. This phenomenon can be seen as one of the fundamental *birth defects* of Guatemala's democratic transition, representing as it does the exclusion from the negotiations of dialogue over a series of unresolved enduring endemic structural factors that have institutionalized horizontal inequalities. The marginalization of these issues from the peace settlement is indeed likely to limit the future consolidation of democracy in Guatemala and make ongoing social and political conflict more likely. However, it might also be suggested that restricting negotiations to a set of rights and themes that *would not threaten substantially*

historical relations of power and economic interests based upon land ownership and control and international investment, or cede territorial control to traditional indigenous authority structures, actually established the conditions for the birth of a perfect *liberal* democracy, ultimately inimical to the very plurality and multiculturalism that it purported and had the legal obligation to represent. It may indeed be the case then that the chances of radically and effectively reducing group-based inequalities may have been still-born with the liberal peace settlement.

However, even within this context, the establishment of the DDPI unequivocally represents the achievement of important unprecedented advances toward the transformation of the previously genocidal Guatemalan State, demonstrating the, albeit incipient consolidation of a series of institutions mandated with the protection of indigenous peoples' rights developed out of the peace agreements and aligned with the normative international framework relative to the promotion and protection of the rights of indigenous peoples. The genocidal State of the 1980s has been transformed radically, characterized by the evolution of an unprecedented institutional framework. Guatemala's genocide was facilitated by historical institutional and structural racism that determined the actions of the Guatemalan State and defined the norms that shaped interpersonal relations, including those relations between victims and perpetrators of the violence and society as a whole, a society impervious and indifferent to the atrocities that were carried out against indigenous Guatemalans and which did little to prevent them. Such a transformation is of key significance given that indigenous people have suffered centuries of systematic and extreme brutality and marginalization across all spheres of life.

New institutions have begun to develop as part of the *institutionality* of the post-conflict State. The DDPI provides indigenous people with historically unprecedented access to forms of legal redress for human rights violations carried out against them, including of both individual and collective rights. Significantly, as has been argued, indigenous peoples are increasingly utilizing the office of the DDPI to file complaints, encouraged by the presence of indigenous officials who are able to identify with their grievances, speak their language and treat them with dignity and by their increasing knowledge of their right to have rights.

It is perhaps helpful to analyze the impact of the DDPI from a dual-centred approach, akin to that utilized by Foweraker (1995) and Alvarez, Dagnino y Escobar (1998) and other social movement scholars in their analyzes of the impact of social movements. Scholars have framed impact analysis within two arenas: firstly upon the politico-institutional realm in the new democracies, including upon the formulation of legislation and public policy and the establishment of institutional structures and State agendas relating to their rights demands, and secondly upon how the activity of social movements may contribute to the generation of democratic norms, behaviour and practices (Alvarez et al. 1998; Brysk 1994; Foweraker and Landmann 1997). In other words, the activities of social movements can transform political culture within civil society, impacting by extension upon the State and contributing to the wider democratization of society. As a result, analysts have begun to view the arena of civil society not only as the “terrain” of collective action, but, significantly, as its “target” (Dagnino 1998: 56; Foweraker 1995: 21).

In this regard, whilst the establishment and operation of the DDPI in itself epitomizes progress in the politico-institutional realm in the arena of the protection of indigenous peoples’ rights, as an office it has also influenced the formulation and effective functioning of legislation, including the typification of discrimination as a crime and its subsequent implementation in a series of important legal cases. Furthermore, the office has responded in an unprecedented manner to those individual and collective complaints filed by indigenous Guatemalans, pushing for compliance with national and international legal frameworks in this regard and issuing important related resolutions, sanctioning the State and precipitating action from within the Public Prosecutor’s Office. The DDPI also contributed to several consultation processes carried out in relation to the public policies, such as the National Policy for Cohabitation and the Elimination of Racism and Racial Discrimination and the Integral Policy for Rural Development, as well as advising a series of key consultation processes relating to the State’s obligation in this regard as derived from ILO Convention 169. The office has also contributed to the establishment of a *rights culture* pertaining to the rights of indigenous peoples,

empowering individual and group actors to pursue rights claims and shaping debate concerning the rights of indigenous peoples, racism and ethnic discrimination at the national level within Guatemalan society.

However, given the structural, interpersonal and institutional racism that plagues the Guatemalan State in particular, and society more generally, the broader and long-term impact of said measures may indeed remain little more than symbolic. Inadequate institutional funding, racist acts within the PDH itself directed towards indigenous officials, and lack of institutional will to train functionaries to understand, identify and process violations of indigenous peoples' specific and collective rights have impeded the DDPI from being able to carry out effectively its mandate. Within Guatemala's post-conflict multicultural state, therefore, so lauded as it has been by the international community, more subtle forms of exclusion and marginalization have been institutionalized.

At the micro level – the focus of this paper – the office of the DDPI has faced obstacles to the effective execution of its mandate that are two-fold: at the *structural* and at the *attitudinal* level. At the structural level, the DDPI been severely limited in carrying out effectively its institutional mandate due to systematic lack of funding from the State and the sidelining from within the PDH itself of serious and meaningful engagement with the collective and specific rights of indigenous peoples, those priority rights that constitute the principal focus of the DDPI's mandate and, in some cases, arguably represent a path toward the resolution of horizontal inequalities. In the face of competing rights claims then, liberal universal and individual rights have been engaged with at all levels within the PDH as an institution, to the detriment of those rights central to the mandate of the DDPI. Moreover, in the context of the continuing social formations of authoritarianism and racism within the State and society, the DDPI's impact upon Guatemala's weak and corrupt justice system as a whole has been minimal, despite successful litigation in several cases, as indigenous peoples continue to be

discriminated against from within the justice system, as documented in detail in recent reports.<sup>16</sup>

Moreover, whilst the efforts of the DDPI aimed at raising awareness concerning indigenous peoples' rights within Guatemalan society have precipitated important gains within both rural and urban indigenous communities, their impact upon non-indigenous Guatemalans has been less successful. The entrenched structural problems of poverty and authoritarianism have exacerbated racist attitudes toward indigenous Guatemalans and generated an overall and palpable sense of anger within distinct sectors of ladino society. The commonplace accusation in the country today is that it is indigenous people that *discriminate against* ladinos and *have more rights than ladinos*, particularly in the context of affirmative action measures. At a meeting between academics, the international community and members of the Guatemalan Congress in April 2007, the author was told by a Congresswoman belonging to the Guatemalan Republican Front (*Frente Republicano Guatemalteco*, FRG), that "indigenous peoples have benefited disproportionately from the peace process and, consequently, the international community will have blood on its hands in four years for the work it has done supporting the rights claims of indigenous peoples". This backlash against the indigenous population, which generally emerges when historically privileged groups begin to feel direct threats against their interests, is not only evident at the level of the economic, military and political elite, but also within the poorest sectors of ladino society, where urgently needed development programs have not been oriented to the extent that has been necessary.

At the *attitudinal level*, the office has also been and continues to be subject to systemic internal resistance from PDH personnel, resistance that has been shaped by deep-rooted racist attitudes. The case study presented demonstrates that continued resistance at the institutional level of the PDH and by ladino functionaries therein impedes the full consolidation of the DDPI, an integral element in the reconstruction of a multi-cultural, multi-ethnic and multi-lingual Guatemala, where the State has the explicit national and international obligation to protect and facilitate the full exercise of all indigenous peoples' rights in conditions of equality and as

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<sup>16</sup> See, for example, the two reports published in 2008 by the Association of Research and Social Studies (ASIES) and supported by the United Nations Office of the High Commissioner for Human Rights in Guatemala,

determined by their condition as *peoples*. Until this is the case, the DDPI will remain a symbolic institution employed to legitimate the Guatemalan “plural” State, whilst profound engagement with horizontal inequalities remains unrealized.

The resistance of PDH officials to the establishment and operation of the DDPI reflects racist attitudes and patterns that have been expressed, and continue to manifest themselves within the wide range of institutions related to the administration of justice. According to Claudia Gonzales, “Failure to respect the right to access to justice represents serious discrimination against indigenous people in Guatemala... (lack of access to justice violates)... the rights of equality and freedom of action... rights to justice and cultural identity” (2005: 1). Clearly then, the documented resistance within the PDH is not exclusive to that institution.

Discriminatory attitudes remain rooted individually and institutionally and require a lengthy and serious process of education and training to begin to address the problem and permit and facilitate the institutional consolidation of a functional multicultural, multiethnic and multilingual state. In the case of the PDH, for example, it is vital to implement a policy of internal training on how to identify and follow-up complaints related to the violation of the specific and collective rights of indigenous peoples, to assign an adequate budget to the DDPI, allow indigenous peoples to obtain high level positions, introduce affirmative action policies, including a possible *quota* policy relating to indigenous peoples, and sanction continuing acts of racism, if the institution is to take seriously this process.

Despite the establishment of the DDPI and efforts to consolidate progress on a multicultural agenda within the institution, internally PDH officials to varying degrees have not taken on board adequate attitudes or confronted historically racist perceptions and behavior that this would imply. In this regard, it is clear that there is unwillingness on the part of the institution and some of its officials to take seriously the question of the rights of indigenous peoples and develop an institutional response in this regard. Significantly, there appears to be no single level of knowledge or an integral uniform institutional approach for dealing with issues of

racism and the development of a multicultural agenda, indicating the evident absence of an institutional policy oriented towards these themes.

A vacuum exists between anti-racist and anti-discriminatory discourse and everyday practices and labor standards, demonstrated by the perceptions and attitudes of the majority of ladino interviewees. There is then a broad gap between the discourse articulated within wider Guatemalan society articulated by senior officials and the ability or willingness to recognize that within the institution itself there exist serious problems in terms of ongoing racism. Consequently, whilst we may hear the (politically correct) discourses of PDH officials and while officials are evidently aware of the presence and work of the DDPI within their institution, it appears unclear whether said officials have assumed these attitudes in their daily lives. An unequivocal commitment concerning the definition of State financial and human resources would demonstrate political will in this regard.

In conclusion, a long path remains to be trodden by the State in general and the PDH in particular in order to surpass the present symbolic, at worst empty policy gestures, in order to achieve the consolidation of a functioning plural state and the institutionalization of the comprehensive and effective protection of the rights of indigenous peoples. Over the last decade, the incipient tendency toward broader indigenous participation in the Guatemalan State has continued, including in terms of the appointment of indigenous State functionaries (particularly at the local level), the consolidation of State-level institutions mandated to address indigenous issues and the creation of mechanisms for inter-sectoral dialogue concerning indigenous affairs.<sup>17</sup> The consolidation of the Community, Municipal and Departmental

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<sup>17</sup> By 2007, the number of high level indigenous State functionaries had grown to at least fifteen men and women, including Norma Quixtán, Peace Secretary (SEPAZ); Rosalina Tuyuc, President of the National Reconciliation Commission (CNR); Ricardo Cajas, Presidential Commissioner Against Discrimination and Racism (CODISRA); Santos Cuc Morales, Director of the National Immigration Office; Rigoberta Menchú, Goodwill Ambassador for the Peace Accords; Manuel Salazar, Minister of Culture; Celso Chacón Vice-Minister of Bilingual and Intercultural Education; Jorge Sequén, Director of the Secretariat of Strategic Studies; Edgar Ajcip, Director of the Peace Fund (FONAPAZ); José David Son, President of the Indigenous Fund for Guatemala (FODIGUA); and Alfredo Cupil, Advisory Council for Indigenous Peoples' Affairs (CAAPI). Existing institutions include the Office of the Defender of Indigenous Peoples' Rights (within the Human Rights Ombudsman's Office); the Office of the Defender of Indigenous Women's Rights (DEMI); CODISRA; the Prosecutor's Office Pertaining to Indigenous Peoples; the Office of the Defender of Indigenous Peoples' Rights within the Institute of Public Defence (IDPP); the State Inter-Institutional Indigenous Coordination; and the CAAPI. Dialogue mechanisms included the Table for Indigenous People's Issues.

Development Councils has been an important factor in this process, although the effectiveness of participation is somewhat limited to the community level, due to continuing *de facto* and *de officio* control of the other levels by political parties, and ultimately, in financial terms, of the Departmental Governor.

Significantly, the tendency toward *greater* participation in *quantitative* terms does not, as yet, appear to imply either a more profound qualitative political impact asserted by indigenous actors upon and within State institutions or the institutionalization of such mechanisms and processes, ultimately aimed at the consolidation of a plural democratic state. In this context, what appears to exist is *participation without impact*. The impact that such an incomplete process may have upon reducing the historically constructed distrust between indigenous peoples and the Guatemalan State, and vice-versa, remains, therefore, questionable.

Participation in the quantitative sense has not been accompanied by or precipitated the institutionalization of indigenous participation due to a series of factors:

- Firstly, there has been no assignation of a specifically designated budget for indigenous affairs (either at the State or specific institutional level), or an increase in those budgets that profoundly affect or concern indigenous peoples' human development (such as health, education, rural development). However, in 2007, Ex-President Eduardo Stein suggested that, over time, the government would develop a differentiated budget that would assign 160 Million Quetzales focused upon indigenous peoples in a clearer way, in order to allow indigenous peoples to benefit more directly from the State budget. This did not take place and has not done since.
- Secondly, of the 300 staff positions assigned to indigenous peoples within the State by the Executive in 2005, only sixty had in fact been occupied by December 2006. Of these sixty posts, only twelve permitted decision-making capacity. Moreover, in 2007, no State institution had a formalized quota obliging it to employ a specified number of women or indigenous peoples. In this context, and despite the presence of indigenous functionaries, the concepts of multiculturalism and plurality within State institutions have not been broadly incorporated by the institutions as a whole, or by staff in particular, as fundamental

undergirding principles, and thus have been limited in their reach. Racism then remains a key determining factor of social and inter-ethnic relations in these State institutions.

- Thirdly, with the exception of the general State policy relating to the elimination of racism, State institutions have not developed specific and integral policies based upon cultural sensitivity and belonging (*pertenencia cultural*) and oriented towards the indigenous population.
- Fourthly, those agreements (relating to health, education and infrastructure) that resulted from the negotiation process involving the Dialogue Table for Indigenous Peoples' Issues, which published its recommendations in October 2006, represented (or perhaps reiterated) only the *minimum* obligations to which the Guatemalan State had legally been bound since July 1996 as a consequence of the ratification of ILO Convention 169.
- Finally, the ICCPI has grown in membership since 2005 to include 30 different entities. Of those entities, twenty were created to address indigenous affairs. However, only five institutions to date possess a specifically designated budget, which, in all cases, has been deemed by their staff to be inadequate.

In this regard, analysts have talked of 'indigenous windows' (*ventanillas indígenas*), isolated and symbolic manifestations of indigenous participation in and representation by the State, in contrast to an integrated, structured and institutionalized approach to the consolidation of a plural democratic state. Representation in this respect is informal, individual and not collective, generated through contextual opportunity, rather than institutional policy. Such *ventanillas*, moreover, generally occupy a politically and financially marginalized position within their respective institutions, above all permitting the temporary participation of individual indigenous people, as opposed to their delegated and organized participation in the State *as indigenous peoples*. Whilst it would be ill advised to downplay the significant developments in this area and the possibilities that they might imply, it appears that there is a consensus upon the fact that the advances are principally contextual (not institutionalized) and based upon individual goodwill rather than institutionalized policy. Furthermore, the aforementioned forms of participation and representation *do not* question the fundamental existing structure of the state, but rather are adapted to it.

In this context then and until evident State will is demonstrated, whilst representing an important advance in the face of what have been systematic and brutally enforced horizontal inequalities, the DDPI will have a limited capacity to impact upon group-based inequalities based upon ethnic group membership, even in spite of skilled strategic interventions by indigenous officials.

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