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THE HIDDEN CRISIS OF REAL PROPERTY RIGHTS IN GUATEMALA: A PROBLEM OF LACK OF ACCESS TO JUSTICE, UNCERTAINTY OF THE PROPERTY REGISTRATION SYSTEM, AND ORGANIZED CRIME

CASE STUDY BY: **OBSERVATORIO DE DERECHOS DE PROPIEDAD**

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INTRODUCTION

Guatemala is a republic located in the north of Central America. It has a territorial extension of 108,890 square kilometers and a population of 17,357,886 inhabitants. Currently, it is the largest economy in the Central American region. It has access to both oceans (Pacific and Atlantic) and is next to the world's largest market, the United States–Mexico–Canada Agreement (USMCA). The geographical position, access to two oceans, and size of its economy give Guatemala the necessary advantages to position it as a logistics center par excellence.

Unfortunately, Guatemalans' living standards are still much lower than most other countries. Guatemala is among the 40% of countries with the lowest per capita income worldwide¹. As explained in the study called *Investment in Guatemala: Structural or Circumstantial Problem?*², foreign direct investment in Guatemala is structurally low, and this has a very negative impact on economic growth since this is one of the most important engines of economic growth in economies with little saving capacity.

One of the fundamental elements for attracting foreign investment or generating local investment is protecting the human right to property provided by the country where the investment is to be made. The protection of the human right to property generates confidence for individuals and businesses to invest and expand job

opportunities since this is a guarantee that the investment made is not at the mercy of the arbitrariness of an individual or government.³

In Guatemala, current regulations guarantee the human right to property. Comprehensively, the Guatemalan legal system seeks to protect this right from a constitutional, civil, criminal, administrative, and tax perspective. However, despite vast existing legislation on the matter, the country has structurally failed to guarantee this right. Proof of the beforementioned is that Guatemala's rating has fallen continuously in the International Property Rights Index (IPRI). Over the past five years, Guatemala's IPRI score has decreased from 5.008 out of 10 (2018) to 4.02 out of 10 (2022). Globally, Guatemala's position in the IPRI is 103 out of 129 countries, falling eight places compared to 2021 and 32 in the last six years.

This case study addresses the causes of the lack of protection of real property rights in Guatemala. These causes explain the rating obtained by the country in the IPRI sub-indices. The Guatemalan government has structurally failed to protect the human right to physical property rights due to lack of access to justice and lack of certainty and security of the property registration system. Moreover, organized crime structures that operate in the country benefit from violations of real property rights.⁴

1. In this case study, when we speak of real property rights, we refer specifically to real estate in its broadest sense, including but not limited to arable land, non-arable land, industrial farms, warehouses, factories, houses, and apartments, among others. This case does not seek to refer to the ownership of movable property or intellectual property.

LACK OF ACCESS TO JUSTICE

Gerald P. O'Driscoll Jr. and Lee Hoskins^{iv} argue that the two essential elements of property rights are the exclusive right of people to use their resources as they see fit if they do not violate the rights of another person, and the ability of people to transfer or exchange those property rights voluntarily. Therefore, when an owner cannot exercise one of these powers, his property rights are violated.

Suppose the owners do not have a justice system that quickly restores the full enjoyment of their property rights when these are violated. In that case, this institution gradually ceases to exist until reaching anarchy, where everyone fights by force to own property until someone else takes it away. Thus, a lack of access to justice exists when citizens fear the justice system, perceive it as inefficient, see it as alien, or do not access it because they consider that accessing it will not have a positive outcome. A lack of access to justice also exists when there are high levels of impunity. There is impunity when a citizen seeks the justice system, and it

does not respond, acting inefficiently and leaving unpunished those who commit crimes.

As already stated, the current Guatemala regulations guarantee broad property rights protection. Despite this vast legislation, the fundamental problem lies in lack of access to justice and little certainty of punishment in Guatemala.

A person can commit six types of crimes in Guatemala against the real property rights owner. All these crimes involve the attempted or illegal occupation of real estate owned by a third party. The general technical name with which these crimes are called is "usurpation," which are popularly known as "land invasions related crimes."²

Between 2017 and 2021, the Office of the Attorney General reported 20,596 criminal complaints for land invasions-related crimes. This data represents an annual average of 4,119 criminal complaints in this matter.³ The average number of yearly complaints has remained in these ranges for over a decade.

2. In this study, we refer to this category of crimes as land invasions, regardless of the type of real estate involved.

3. Figures 1 and 2 reflect the distribution of these criminal complaints by the departments of the Republic of Guatemala.

Criminal Complaints of Land Invasion Crimes 2017 – 2021

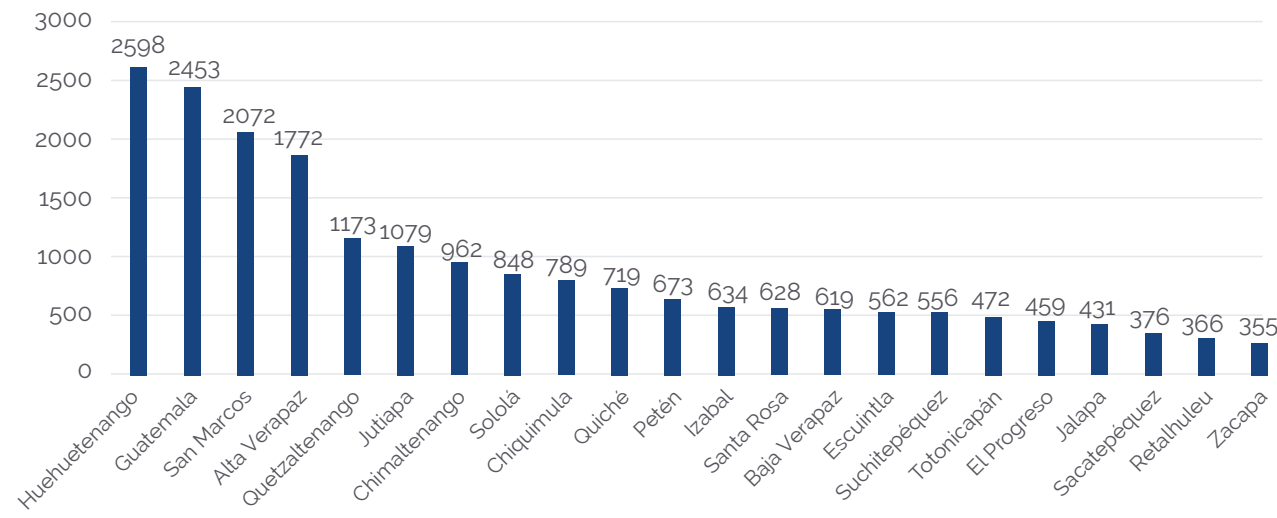


Figure 1: The territory of Guatemala comprises 22 territorial subdivisions known as departments. This chart reflects the number of criminal complaints for land invasion crimes reported in the last five years by each department.

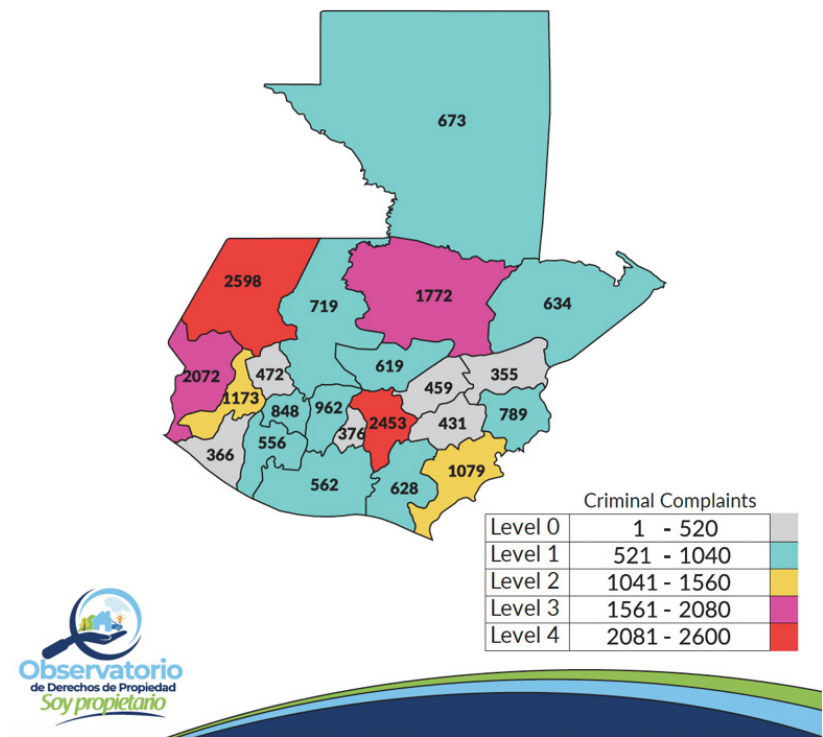


Figure 2: The map highlights the departments of the Republic of Guatemala, taking into consideration the incidence of land invasions-related crimes over the last five years (2017-2021). The higher the level, the greater the incidence of criminal complaints.

The main problem is not in the number of complaints but in the inefficiency and ineffectiveness with which the criminal justice system responds. For example, between 2017 and 2021, for every 100 criminal complaints filed regarding land invasions-related crimes, only 28 cases were closed on this type of crime. A "closed case" means the judicial proceedings ended; this can happen because of a judicial sentence or because the criminal process stopped due to an alternative solution.

More alarming than the low rate of cases closed per year is that a closed case does not necessarily imply the restitution of the possession of the usurped property to its owner. When a land invasion occurs, the Guatemalan penal regulation⁴ establishes that the authorities should proceed

with the immediate eviction and capture of the illegal occupants without it being necessary to wait for a sentence to be reached in the criminal process. However, in the last five years, only 68 evictions have been carried out, according to information from the Attorney General's Office and the Ministry of the Interior.

As mentioned, the annual average of criminal complaints for land invasion-related crimes is 4,119, while the yearly average of evictions is 14.⁵ This means the chances of being evicted after trespassing on real property are practically nil in Guatemala. In other words, any owner of real property is at high risk that, if affected by an invasion, it is unlikely he will ever regain possession of the affected real property.

Land Invasions Related Crimes vs. Evictions Yearly Average 2017 – 2021

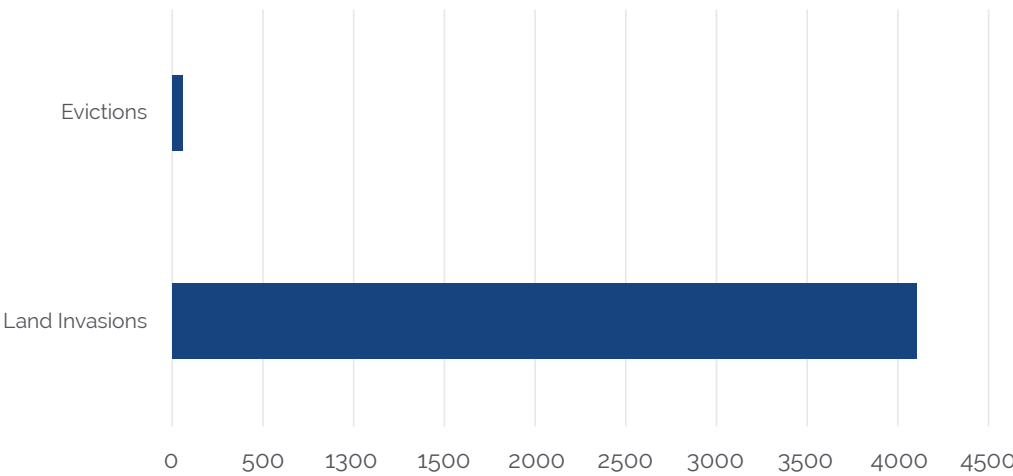


Figure 3: Information from the Attorney General's Office and the Ministry of the Interior.

4. Criminal Code of Guatemala, Article 256.
5. See Figure 3.

What is evidenced in this section coincides with the information presented in the Second Findings Report of the Judicial Observatory of the Criminal Justice System. According to Guatemalan law, the criminal process should last 251 to 341 days. However, currently, it can last an average of 817 days.⁶ What is more serious is that evictions do not tend to be carried out, even though the law indicates that they must be carried out from the moment the authority becomes aware of the land invasion.

6. Each complaint seeks to restore the possession of the property to its legitimate owners.

The exposed data leads to an important conclusion. If an efficient and effective justice system does not process large numbers of complaints⁶ filed for violations of real property rights, the problem of protecting property rights in Guatemala will only continue to get worse.

3

LACK OF CERTAINTY AND SECURITY OF THE PROPERTY REGISTRATION SYSTEM

In Guatemala, there is a public property registration system and an entity in charge of keeping control of such registration. Under the Civil Code of Guatemala, the system starts by assigning each real estate an identification number that acts as the "name of the property." Then, for each real estate property, the Property Registry creates a file. This file contains the entire history of the property. The record includes: who its owners have been over time, who owns it currently, the contracts that have been in force on that property, the mortgage guarantees that the real estate has supported, and any other act or agreement related to the real estate.

The Property Registry is the public entity in charge of making all the annotations or inscriptions on each property file. Essentially, the function of carrying out the registration of acts or contracts that affect a property is that they take effect against third parties from the date of their presentation to the Registry to publicize said acts and guarantee the certainty of property rights.

A notary must authorize the contracts registered in the Property Registry. Under the Guatemalan Notary Code, any act authorized by a professional from this field is covered by a presumption that the entire content of the contract is authentic, genuine, faithful to the parties' will, legitimate, and legal. The latter is known as "notarial public faith". It is worth mentioning that in Guatemala, any natural Guatemalan of legal age, domiciled in the Republic, and with a university degree in this matter, registered before the Supreme Court of Justice, can practice as a notary.

7. See Figure 4.

For example, if person A wants to sell his house to person B, they only have to make their contract in writing in front of a notary who attests that the will of the parties is to do that business. In this case, the Property Registry does not have to verify if the contract's content is authentic or if the signatures are genuine because they assume that the notary who authorized the document has already done this verification work.

For years, criminal structures have increased in Guatemala dedicated to carrying out activities to illegitimately seize real estate by falsifying documents registered in the Property Registry. These criminals pose as notaries who have already died or are associated with notaries who unscrupulously authorize fraudulent contracts, simulate the content of the agreements, process bizarre entries in the Land Registry, and subsequently carry out business with said properties.

The crimes described above are called crimes of ideological and material falsehood. These crimes are characterized by the preparation of a false public document or inserting false statements in a document, which may harm a third party due to said falsification or alteration.

Between 2016 and 2020, approximately 566 complaints were filed annually for falsehood crimes. 2020 registered the highest number of complaints (649) in one year. This year compares to 2016 when the people filed only 509 complaints.⁷



Criminal Complaints for Forgery Crimes 2016 – 2020

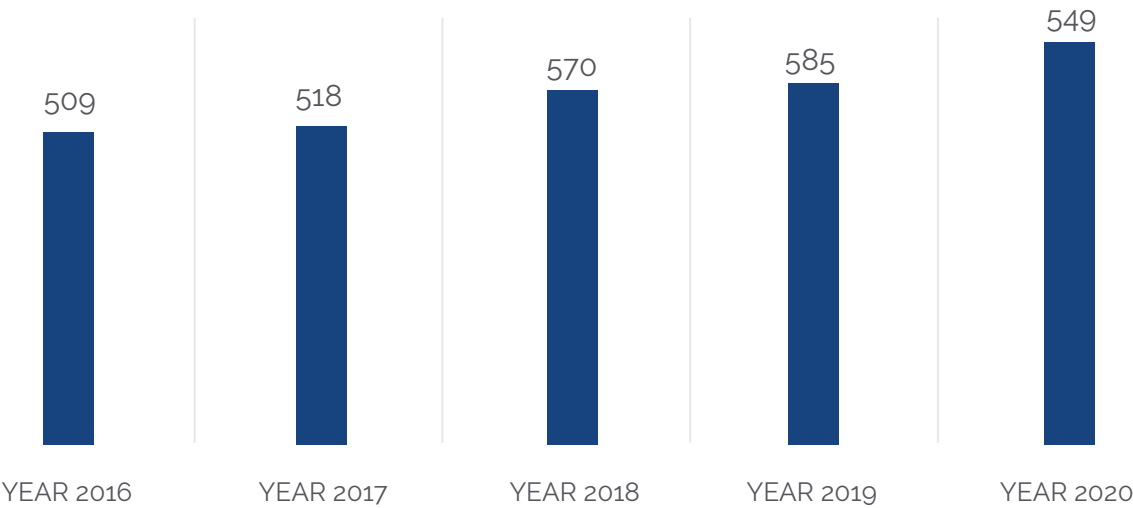


Figure 4: Information from the Attorney General's Office.

The commission of this type of crime is so widespread in Guatemala that in 1997 Congress approved the "Law to Voluntary Immobilize Registered Assets." Anyone who has assets registered in the Property Registry can, for up to three years, ensure their willingness not to want to sell or mortgage their assets so that it is more difficult (but not impossible) to register fraudulent contracts on said assets.

The evidence shows that continuing to delegate the security of real estate traffic to the "notarial public faith" represents a high risk. However, the problem is not the notarial public faith but the lack of certainty of punishment that prevails in the country, which necessarily results in those who commit this type of crime because the probability of going unpunished is considerably high.

On the other hand, another significant weakness of the Guatemalan property registration system lies in the fact that since its origins — at the end of the 19th century — it has been disconnected from a cadastre system that contains the measurements, boundaries, and geographic location of all registered land. In this sense, in the Property Registry, it may be registered that a person owns a plot of land without necessarily establishing the specific geographic space it occupies, and its dimensions and physical limits.

Property registration systems and cadastre are both types of land recording that complement each other and should be united. To solve this problem, Congress created the Cadastral Data Registry in 2005 through the Cadastral Data Registry Law. However, 17 years have passed since the creation of the Cadastral Data Registry. Of the 340 municipalities in the country, only 4.1% have completed the cadastral process. At this rate, it would take 280 years to complete the cadastral process.^{vi}

Finally, another significant problem derived from the property registration system lies in the time it takes to register an act or contract on real estate. In the first half of 2022, carrying out a registry operation took an average of 30 to 45 calendar days. This lack of agility necessarily has economic repercussions since the delay in the registration of these acts or contracts produces a cascading effect. Issues such as the authorization of credit or the disbursement of money for the payment of a sale tend to depend on the registration inscriptions being firm.^{vii}



ORGANIZED CRIME

As indicated in section II) of this case study, crimes related to land invasions have become increasingly frequent, and impunity tends to be the norm.

Crime reports include drug trafficking, land invasion, and even electricity theft in the same regions. Usually the testimonial statements of some of those affected by crimes of land invasion and theft of electricity say that these crimes are committed by criminal groups seeking to destabilize the regions with an ulterior purpose, which tends to be drug trafficking through the national territory.

An example of the above is the case study carried out by Observatorio de Derechos de Propiedad in the Polochic Valley area.⁸ This case study identified that violations of the human right to property are not isolated. Criminal groups with political or economic interests dedicate the promotions of these activities to facilitate the achievement of their goals, since destabilization, conflict, and the lack of State presence are the fundamental factors that must coexist to achieve it.^{viii}

For example, in the Polochic Valley region, it can be seen how criminal groups built clandestine runways in several of the invaded areas for landing aircraft with drug shipments, harvested secret drug plantations, or encouraged access blockades. Criminal groups carried this out to facilitate the transfer of drugs from one point

to another. The interest in drug trafficking in the area is such that they have instrumentalized peasant organizations for their purposes. As the report called "Power Vacuum and Drug Trafficking, El Valle del Polochic" prepared by the Observatory of Conflict indicates,^{ix} *Drug trafficking encourages the invasion of land at strategic points to gain control of strategic resources such as private landing strips, access control, and critical steps in transferring goods.*

It is no coincidence that, in addition to land invasions, in the same areas where drug trafficking operates, there is a tendency to receive testimonies of electricity theft. For this reason, when we refer to drug trafficking, land invasion, and electricity theft, we call it "organized crime." These activities tend to be led by a group created specifically to carry out, in a concerted and directed manner, criminal actions to achieve economic, political, or social power. Organized crime can present levels of structure and complexity in its operations similar to those of a company. Thanks to this, it can circumvent government control and create effective networks of criminal networks, both locally and globally, with international links known as transnational organized crime.^x

To verify the correlation between drug trafficking, land invasion, and electricity theft, the Observatorio de la Propiedad analyzed and compared information from the Ministry of the Interior, the Attorney General's office, the

National Civil Police, and the Secretariat of Strategic Intelligence of the State of Guatemala. Using the information provided by the previously identified official information sources, the Obser-

vatory carried out four "Risk Thermometers" that measure the incidence of criminal activities in each country's 22 departments.



Figure 5: Departments of Guatemala.

The first of these is the **Drug Trafficking Thermometer**. This Thermometer addresses the 22 departments of Guatemala for the period 2017-2021. It uses the following indicators: statistics on the number of seizures of 1) cocaine kilos, 2) marijuana and poppy plants, 3) vehicles, as well as the number of 4) clandestine airstrips iden-

tified in each department. We calculated the national average for each of these indicators. If the department's statistics are above the average, the indicator was identified as one with a high incidence. The more indicators with high incidence the department has, the higher the level it is positioned in the Thermometer.

8. A region located in the department of Izabal that borders the lake where Guatemala's access to the Atlantic begins.

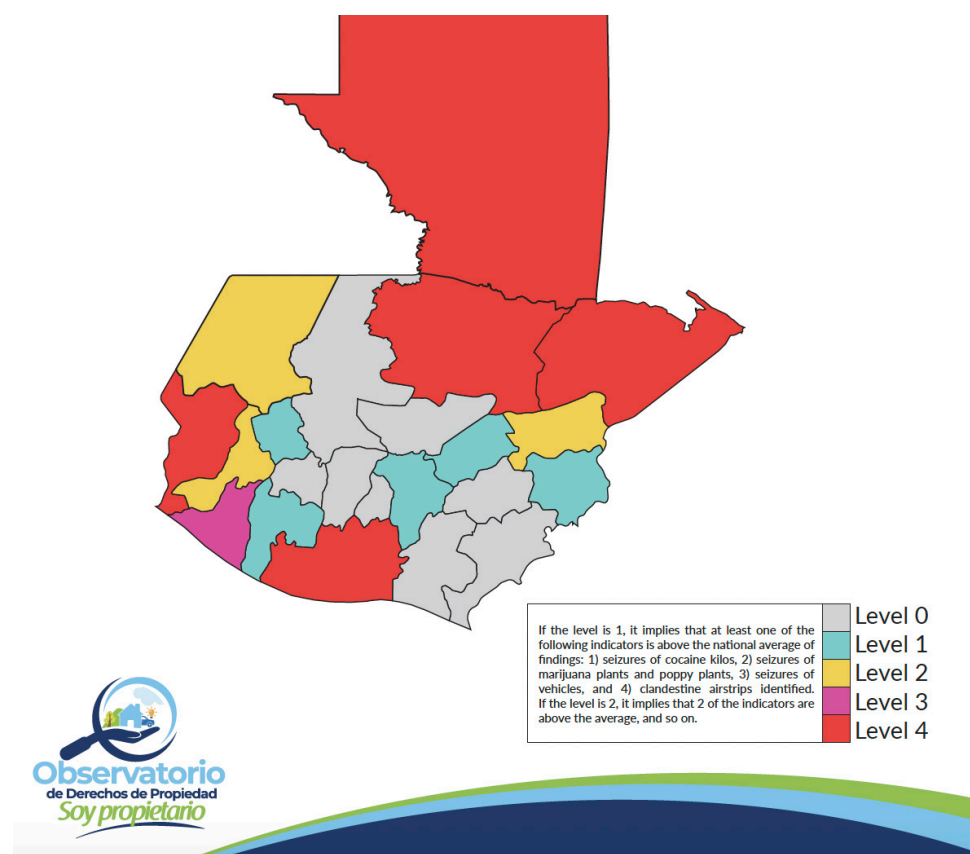


Figure 6: Drug Trafficking Thermometer.

As shown on the map, the departments of Escuintla, San Marcos, Alta Verapáz, Izabal, Petén, and Rethaluleu are territorial districts with high levels of drug activity.

On the other hand, the Observatory developed two Thermometers: one for **Criminal Complaints of Electricity Theft 2017-2021** and one for **Criminal Complaints of Land Invasions 2017-2021**. For its elaboration, it considered the accumu-

lated total of complaints by the department for the last five years. The number 0 was established as the lower range of complaints obtained, and the maximum number of complaints reported by the department was established as the upper range. Finally, the maximum range was divided into five quintiles, and a level was assigned to each department based on the number of complaints reported. The higher the level, the greater the number of complaints.

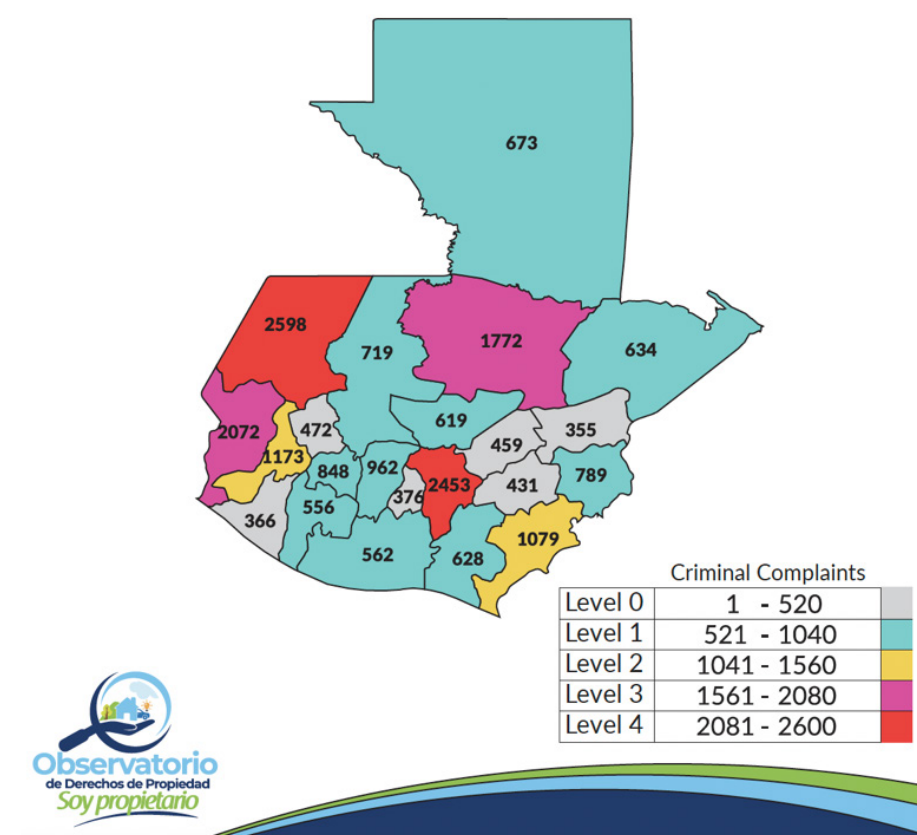


Figure 7: Criminal Complaints of Land Invasions 2017-2021.

The department of Huehuetenango, followed by the departments of San Marcos and Alta Verapáz, Quetzaltenango, and Jutiapa, have the highest land invasion complaints.

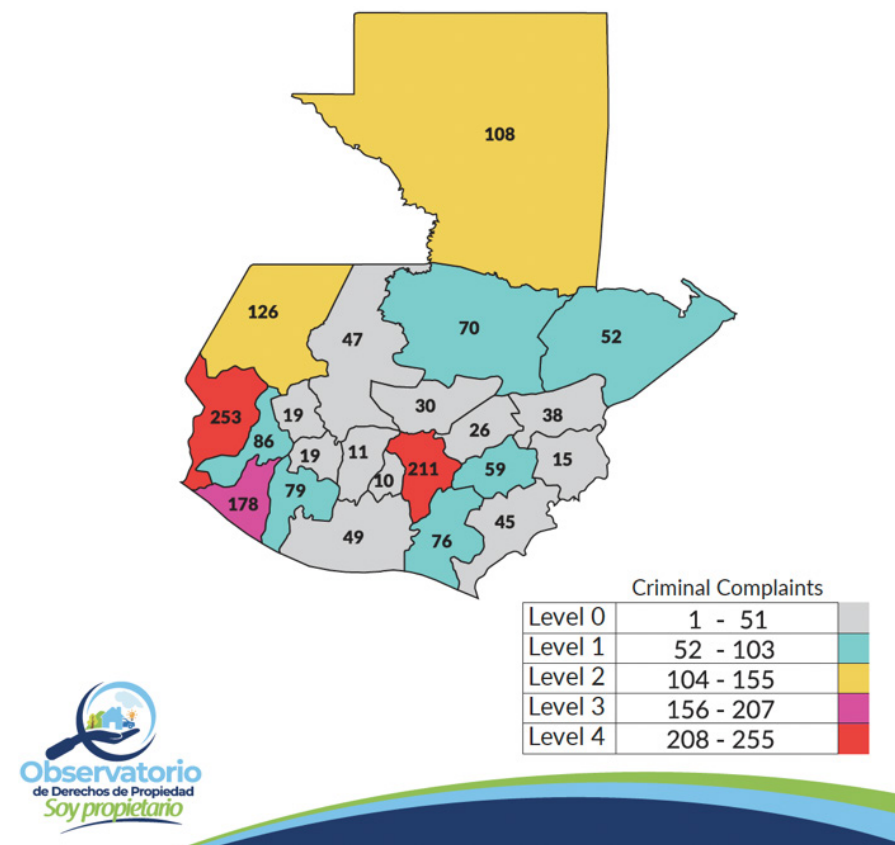


Figure 8: Criminal Complaints of Electricity Theft 2017-2021.

The departments of San Marcos and Guatemala, followed by Retalhuleu, Huehuetenango and Petén, have the highest electricity theft complaints.

Finally, the different Thermometer's data (drug trafficking, land invasions, and electricity theft) is included in the **Organized Crime Thermometer**. If the department has a high incidence (greater

or equal to 50 percent of the national average) of an indicator, its position is 1 out of 3; if the high incidence is in two indicators, its position is 2 out of 3; and if the high incidence is in the three indicators, its position is 3 out of 3. The more indicators above the average, the higher the position on the Organized Crime Thermometer since the correlation between the three criminal activities is more significant.

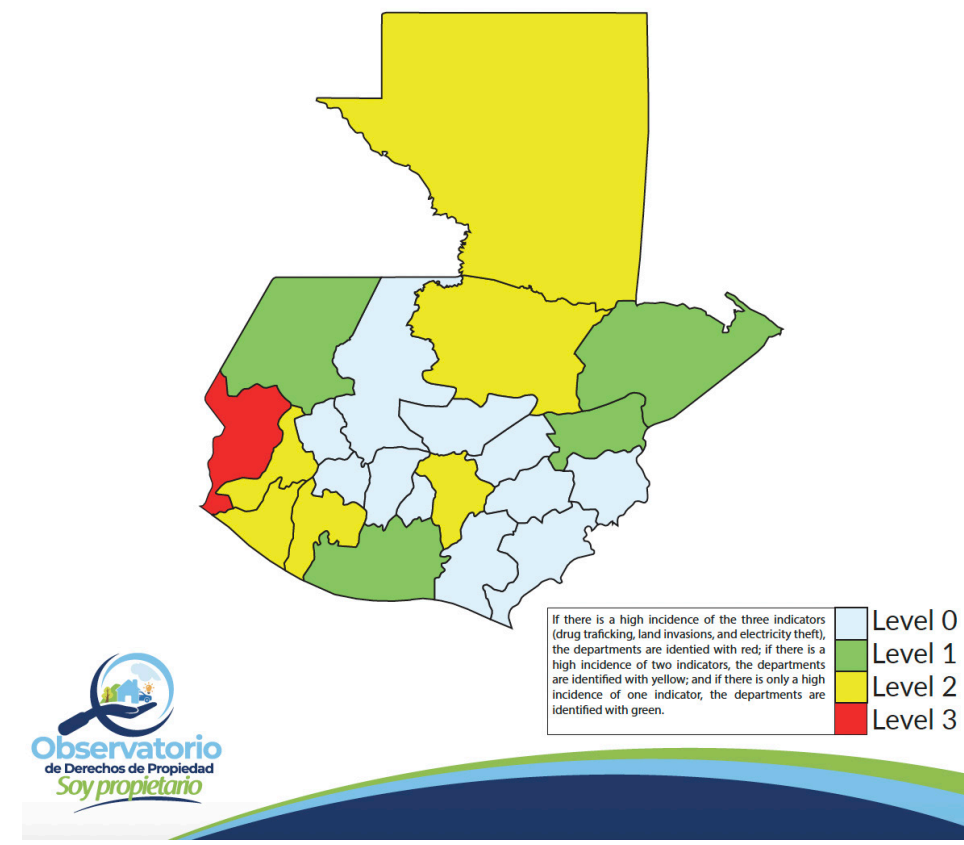


Figure 9: Organized Crime Thermometer: Drug Trafficking, Land Invasions, and Electricity Theft 2017-2021.

The department of San Marcos is in an alarming position, followed by Peten, Alta Verapáz, Guatemala, Quetzaltenango, Retalhuleu, and Suchitepéquez.

Although correlation does not imply causality, it is essential to highlight that 7 of 22 departments in which at least two of the three indicators used to measure the incidence of acts potentially linked to organized crime coincide.

In addition, other peer-reviewed studies show that in the Central American narco-frontiers of Guatemala, pre-existing property rights are profoundly impacted and overwhelmed by the influx of money and violence associated with drug trafficking. This phenomenon happens because traffickers use their financial and physical power to destroy or co-opt pre-existing sources of legitimate authority over property rights and land control.^{xi}

KEY POLICY ISSUES

The hidden problem behind property rights in Guatemala is not only subsumed in the three causes analyzed above. However, if these causes are addressed through strategic interventions of public policy and regulation, the protection of this right could improve considerably.

In terms of access to justice, for decades it has been said that a comprehensive reform of the justice system is required. Judicial reform in the country implies regulatory and constitutional changes. Although proposing a complete reform of the Guatemalan judicial system is not the specific object of this report, some fundamental aspects can be established. It is essential to improve judicial independence, mitigate corruption, have a timely and effective criminal adjudication system, strengthen institutional capacities, and promote accessibility. Thus, reforms must focus on identifying the bottlenecks that make judicial processes last so long, and efforts must be made to expand access to justice by implementing information and communication technologies.

Regarding access to justice and how land invasions-related crimes are processed, it is necessary to prioritize the design and implementation of a criminal policy focused on this matter. Imple-

menting this criminal policy involves reviewing and standardizing eviction protocols used by different government entities that intervene in their execution. These protocols must not establish additional requirements to those set in the law to guarantee that the eviction process is immediate and that the usurpation is prevented from continuing indefinitely. Likewise, in terms of access to justice, legislative reforms should be evaluated that provide those affected by these crimes with tools that allow them to defend their dispossessed property quickly and efficiently.

On the other hand, several changes can be made in certainty and registry security. Remnants of the old manual registration system still exist today. For this reason, in the short term, it is urgent to complete the total digitization and transcription of the registry files. Furthermore, the preparation and completion of the cadastre should be prioritized, with reliable georeferencing mechanisms suitable for the time. After completing it, it is necessary to maintain an updated cadastre and keep automatic coordination between the cadastre and the land registry.

Additionally, means should be sought to promote the efficiency and speed with which the procedures are carried out in the Prop-

erty Registry. For example, a deadline could be established to operate registry inscriptions. Once the deadline for registration has expired, the fee to be paid could be equivalent to zero.

In the medium and long term, it is necessary to start discussing the need for a major shift in the property registration system. There is evidence in comparative law of countries with successful land registry systems with elements and successful practices that could be implemented in Guatemala.

An example of the above would be the possibility of recognizing alternatives to notarial public faith as mechanisms that give legal certainty to contracts on real estate, and a legislative reform that allows the use of tools such as advanced electronic signatures so that the parties involved in a real estate contract can certify their willingness to enter it. As said, this would imply a significant shift in the property registration system, and it must be recognized in advance that it can be complex.

It is also necessary to evaluate the possibility of completely digitizing the entire registration process by creating an electronic platform for the land registry system and its users. On this platform, anyone should be able to check the status of all their real estate. Through this plat-

form, a citizen could verify and electronically sign any contract that will be later registered over any of its properties. Legislative reforms could also involve using biometric data or signature verification protocols as prerequisites for real estate transfer.

Finally, regarding the impact of organized crime on property rights, it is worth mentioning that in this case, proposing a single regulatory or political intervention would be to oversimplify the complexity of this problem. However, the judicial system can reduce organized crime by strengthening judicial independence, reducing judicial delay and impunity, and creating specific and immediate tools to protect property during dispossession.

These ideas do not seek to fully resolve the hidden crisis of real property rights in Guatemala. What is sought is to start a discussion on a subject as relevant as the human right to property and the ways to guarantee it. We must not forget that without property rights, no other rights are possible.

ACKNOWLEDGMENTS

Words cannot express our gratitude to the members of the Property Rights Alliance. They allowed us to prepare and publish this case study in the most important International Property Rights Index.

The Observatory will continue working on its vision: positioning property rights as a fundamental axis of the freedom of Guatemalans and as a catalyst for social and economic growth, being the technical benchmark for the defense of the right to human property in Guatemala. We hope this case study will be the beginning of a generation of proposals for improving and strengthening guarantor institutions of property in Guatemala.

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