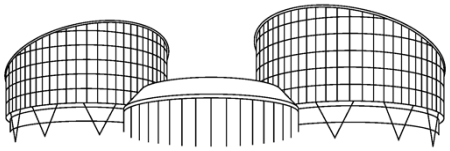

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

SECOND SECTION

CASE OF DŽINIĆ v. CROATIA

(Application no. 38359/13)

JUDGMENT

STRASBOURG

17 May 2016

FINAL

17/08/2016

This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.

COUNCIL OF EUROPE
CONSEIL DE L'EUROPE

In the case of Džinić v. Croatia,

The European Court of Human Rights (Second Section), sitting as a Chamber composed of:

Julia Laffranque, *President,*
Nebojša Vučinić,
Paul Lemmens,
Valeriu Griţco,
Ksenija Turković,
Jon Fridrik Kjølbro,
Stéphanie Mourou-Vikström, *judges,*
and Stanley Naismith, *Section Registrar,*

Having deliberated in private on 26 April 2016,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 38359/13) against the Republic of Croatia lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Croatian national, Mr Antun Džinić ("the applicant"), on 3 June 2013.

2. The applicant was represented by Mr D. Štivić, a lawyer practising in Županja. The Croatian Government ("the Government") were represented by their Agent, Ms Š. Stažnik.

3. The applicant alleged that the seizure of his property in the context of criminal proceedings had not been proportionate in the circumstances of the case and that he had not had an effective procedure to challenge it, contrary to Article 1 of Protocol No. 1 and Article 13 of the Convention.

4. On 8 November 2013 the complaints were communicated to the Government and the remainder of the application was declared inadmissible.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1952. He is a businessman living in Županja.

6. On 11 August 2000 the Vukovar County State Attorney's Office (*Županijsko državno odvjetništvo u Vukovaru*) asked an investigating judge

of the Vukovar County Court (*Županijski sud u Vukovaru*) to open an investigation in respect of the applicant, in his capacity of the director of company M., in connection with suspicion of several charges of economic crime. It also requested that several items of the applicant's real property be restrained so as to secure effective enforcement of a probable confiscation order in the amount of 3,573,747.24 Croatian kunas (HRK) (approximately 469,475 Euros (EUR)).

7. The investigation was opened on 21 August 2000, and on 6 March 2001 the investigating judge declared the request for seizure of the applicant's property inadmissible on the ground that under the Code of Criminal Procedure applicable at the time the State Attorney's Office had not been authorised to make such a request.

8. After the completion of the investigation, on 10 May 2002 the applicant was indicted, together with three other persons, in the Vukovar County Court on several charges of economic crime, concerning in particular misappropriation of company shares, and misuse of the company M.'s assets and facilities.

9. On 28 May 2007 the Vukovar County State Attorney's Office amended the indictment, dropping the charges on six counts against the applicant and charging him on one count of misappropriation of company shares, and several counts of misuse of the company M.'s assets and facilities. The total value of the pecuniary gain which the applicant had allegedly obtained by the commission of these offences was set out at approximately EUR 1,060,000.

10. On the basis of the amended indictment, on 8 April 2008 the Vukovar County Court found the applicant guilty of charges of misappropriation of company shares and acquitted him of all other charges. The applicant was sentenced to three years and six months' imprisonment and confiscation of the pecuniary gain in the amount of HRK 6,169,977.35 (approximately EUR 850,000) allegedly obtained by the commission of the offence of which he was found guilty.

11. Upon appeal by the applicant and the Vukovar County State Attorney's Office against this judgment, on 18 October 2011 the Supreme Court (*Vrhovni sud Republike Hrvatske*) quashed it and ordered a retrial.

12. In the resumed proceedings, and after the 2010 Confiscation of the Proceeds of Crime Act (see paragraph 36 below) had entered into force, on 27 June 2012 the Vukovar County State Attorney's Office requested the Vukovar County Court that several items of the applicant's real property be seized (ten plots of land, two houses and a commercial building) so as to secure effective enforcement of a probable confiscation order in the amount of approximately EUR 1,060,000.

13. In support of its request the Vukovar County State Attorney's Office submitted records from the land registry attesting to the applicant's ownership of the real properties in respect of which the request for a seizure

order was made. It did not submit an assessment of the value of the property nor did it make any reference to its possible value. However, according to the information submitted by the Government, the assessment of the value of several items of the real property, which were the subject matter of the proceedings, had been made on the basis of the material available from the investigation case file and their estimated value at the moment of purchase in 1997 (in total estimated at approximately EUR 440,000), whereas the assessment of the value of the remainder of the real property had been made by the Vukovar County State Attorney's Office with regard to the information available in the land registry, although the records in the land registry did not contain information on the value of the property itself.

14. On 27 June 2012 a single judge of the Vukovar County Court ordered seizure of the applicant's real property listed in the request of the Vukovar County State Attorney's Office so as to secure effective enforcement of a possible confiscation order in the amount of approximately EUR 1,060,000. No reasoning was provided with regard to the proportionality of the alleged pecuniary gain obtained and the value of the restrained real property.

15. On the basis of an order of the Vukovar County Court, the seizure of the applicant's real property was registered in the land registry.

16. The applicant challenged the decision of the Vukovar County Court before the Supreme Court and on 5 September 2012 the Supreme Court quashed it and remitted the matter for re-examination on the grounds that the decision on seizure of the real property was not within the competence of a single judge but a panel of three judges.

17. On 17 October 2012 the applicant requested the Vukovar County Court that the quashed seizure order be removed from the land registry. He contended that he had taken a bank loan which was secured by a mortgage on his real property and that the loan would not be extended due to the seizure of his property, which could lead to his total bankruptcy and destruction of his business. In support of his request, the applicant submitted email correspondence with the bank asking him to clarify when the seizure order would be lifted, as it affected the management of his loan.

18. On 18 October 2012 the applicant's representative received a summons by the Vukovar County Court to appear before a three-judge panel of that court on 30 October 2012, without specifying the exact reason for the summons. It was also indicated that the court session could be held in the absence of the defence.

19. On 30 October 2012 a three-judge panel of the Vukovar County Court examined the request of the Vukovar County State Attorney's Office for the seizure of the applicant's real property. On the same day it accepted the request in full and ordered restraint of the applicant's real property listed in the request of the Vukovar County State Attorney's Office (see

paragraph 12 above) by prohibiting its alienation or encumbrance. The relevant part of the decision reads:

> "The records from the land registry ... show that the accused Antun Džinić is the owner of the above listed items of real property.
>
> Under section 11 § 1(A) in conjunction with section 31 § 2 of the Confiscation of the Proceeds of Crime Act (Official Gazette no. 145/2010), and also in view of section 12 of the Confiscation of the Proceeds of Crime Act, this panel finds that it is presumed that there is a danger that the claim of the Republic of Croatia with regard to confiscation of the proceeds of crime would not be enforceable or that its enforcement would be difficult without ordering of a restraint measure.
>
> Under Article 82 of the Criminal Code no one can retain the proceeds of crime.
>
> By the indictment of the Vukovar County State Attorney's Office ... the accused Antun Džinić is charged, under count 4 (a), (b) and (c), of having procured for himself a pecuniary gain in the amount of HRK 1,800,857.74.
>
> ...
>
> [T]he proceedings at issue concern ... the confiscation of the proceeds of crime under section 11 § 1(A) in conjunction with section 31 § 2 of the Confiscation of the Proceeds of Crime Act. In view of the above, it is ordered to the land registry of the Županja Municipal Court to register the restraint of the listed property in the land registry."

20. The restraint of the applicant's real property was registered in the land registry on the basis of an order of the Vukovar County Court.

21. On 12 November 2012 the applicant lodged an appeal before the Supreme Court challenging the decision of the Vukovar County Court ordering the seizure of his property. He contended in particular that the value of the restrained property was according to his provisional estimate more than HRK 20,000,000 (approximately EUR 2,600,000), which significantly surpassed the pecuniary gain allegedly obtained by the commission of the offences which were the subject matter of the proceedings. He also stressed that it was reasonably expected from the Vukovar County Court to conduct at least a general assessment of the value of the property restrained and the pecuniary gain allegedly obtained by the commission of the offences in question. The applicant therefore submitted that by failing to make any such assessment, the Vukovar County Court had imposed an excessive individual burden on his property rights.

22. The Supreme Court dismissed the applicant's appeal on 27 December 2012. With regard to the applicant's specific complaint concerning the lack of proportionality of the measure imposed, the Supreme Court noted:

> "The Supreme Court finds that the principle of proportionality has not been breached since Antun Džinić is charged with having obtained a pecuniary gain in the amount of HRK 1,800,857.74, and the value of the restrained property does not justify [his] argument that the value of the restrained property listed in the operative part of the impugned decision significantly surpasses the [possible confiscation] claim."

23. On 18 February 2013 the applicant lodged a constitutional complaint before the Constitutional Court (*Ustavni sud Republike Hrvatske*) challenging the decisions of the lower courts on the seizure of his property. He relied on the Convention and the Court's case-law, contending that the decision on the seizure of his property had been disproportionate.

24. On 20 February 2013 the applicant requested the Vukovar County Court that the seizure order be lifted or reassessed. He argued that there were other less restrictive means of securing the enforcement of a possible confiscation order, and contended that it had not been alleged that the seized property had been obtained by a criminal activity. He also urged the Vukovar County Court to make an assessment of the value of the seized property so as to limit the scope of the restraint to the value of the pecuniary gain allegedly obtained. He also contended that the value of the seized property significantly surpassed the alleged pecuniary gain obtained, which had endangered the normal functioning of his business.

25. On 25 April 2013 the Constitutional Court declared the applicant's constitutional complaint of 18 February 2013 (see paragraph 23 above) inadmissible on the ground that the decisions of the lower courts did not concern a decision on the merits of any of the applicant's rights or obligations or any criminal charge against him.

26. On 9 July 2013 a three-judge panel of the Vukovar County Court dismissed the applicant's request that the seizure order be lifted or reassessed (see paragraph 24 above). The relevant part of the decision reads:

> "The request for the lifting of the restraint and the request for its modification are unfounded.
>
> It follows from the final indictment of the Vukovar County State Attorney's Office ... that there is a reasonable suspicion that the accused Antun Džinić, by the offences listed in count 4 (a), (b) and (c) [of the indictment], obtained pecuniary gain in the total amount of HRK 1,800,857.
>
> Since the [seizure order] is based, under section 12 § 1 of the Confiscation of the Proceeds of Crime Act, on the presumption that there is a danger that the confiscation of the proceeds from crime would not be enforceable or that its enforcement would be difficult without ordering of a restraint measure, it was decided as noted in the operative part of this decision."

27. On 12 July 2013 the applicant challenged this decision by lodging an appeal before the Supreme Court. He complained that he had not had an effective opportunity to challenge the seizure order in a hearing before the Vukovar County Court and that the seizure of his property had been disproportionate and thus contrary to Article 1 of Protocol No. 1. The applicant further stressed that it was unclear for which amount of the alleged pecuniary gain the seizure order had been made given that the Vukovar County Court had only referred to one count of the indictment, alleging that he had obtained pecuniary gain in the amount of HRK 1,800,857, whereas it had ignored the other count of the indictment according to which he had

obtained a pecuniary gain in the amount of HRK 6,169,977.35. The applicant, therefore, assuming that the overall amount of the pecuniary gain for which the seizure order had been made corresponded to the sum of the two amounts noted (approximately EUR 1,060,000), submitted a detailed estimate value of each item of the restrained property based on the information from a publicly available Internet portal on the market values of real properties in Croatia. According to this estimate, the total value of the seized property corresponded to some EUR 9,887,084. The applicant thus contended that there was a gross disproportionality between the alleged pecuniary gain obtained by the commission of the offences referred to in the indictment and the value of the seized property, which imposed on him an excessive individual burden.

28. On 17 October 2013 the Supreme Court, acting as the appeal court, dismissed the applicant's appeal by noting the following:

> "The same complaints had been made against the decision of 30 October 2012 ... and then it was answered to the appellant that the principle of proportionality had not been breached ... By a speculative assessment of the value of the real properties listed in the appeal, the appellant did not manage to put into doubt the findings of the first-instance court.
>
> The appellant's argument that it is not clear from the impugned decision which amount of the pecuniary gain he has allegedly obtained is unfounded.
>
> The first-instance court stated in the impugned decision that the accused had obtained a pecuniary gain in the amount of HRK 1,800,857, as referred to in count 4 of the indictment, but it failed to cite the amount referred to in count 1 of the indictment of HRK 6,169,977.35, which is as such, in view of the status of the case, uncontested. There is therefore no doubt that the [seizure order] was made in respect of the overall amount of the possible pecuniary gain, as it was explained in the first decision by which the measure was ordered."

29. The applicant challenged this decision before the Constitutional Court and on 7 February 2014 the Constitutional Court declared it inadmissible, reiterating its previous reasoning (see paragraph 25 above).

30. At a closing hearing in the criminal proceedings before the Vukovar County Court on 8 July 2014, the applicant again requested that the seizure order be lifted.

31. On 11 July 2014 the Vukovar County Court found the applicant guilty on the charges of misuse of the company M.'s assets and facilities by which he had allegedly obtained a pecuniary gain in the amount of HRK 1,800,857.74 (approximately EUR 240,000), and acquitted him on charges of misappropriation of company shares and one alleged event of misuse of the company M.'s assets and facilities. The applicant was sentenced to two years' imprisonment and confiscation of the amount of HRK 1,800,857.74. The case is pending on appeal before the Supreme Court.

32. On the same day the Vukovar County Court dismissed the applicant's request for lifting of the seizure order made at the hearing on

8 July 2014 (see paragraph 30 above) as ill-founded on the ground that the seizure of the property could be maintained for sixty days following the relevant procedures related to the finality of the judgment. As the judgment had not become final, the Vukovar County Court considered that there was no ground for lifting of the seizure order.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Relevant domestic law

1. Constitution

33. The relevant provision of the Constitution of the Republic of Croatia (Ustav Republike Hrvatske, Official Gazette nos. 56/1990, 135/1997, 8/1998, 113/2000, 124/2000, 28/2001, 41/2001, 55/2001, 76/2010, 85/2010 and 5/2014) reads as follows:

Article 48

"The right of ownership shall be guaranteed ..."

2. Criminal Code

34. The relevant provision of the Criminal Code (*Kazneni zakon*, Official Gazette nos. 110/1997, 27/1998, 50/2000, 129/2000, 51/2001, 111/2003, 190/2003, 105/2004, 84/2005, 71/2006, 110/2007 and 152/2008), provided:

Confiscation of the proceeds of crime
Article 82

"(1) No one can retain the proceeds of crime. The proceeds [of crime] shall be confiscated by a court decision finding that a criminal offence has been committed.

..."

3. Code of Criminal Procedure

35. The relevant provisions of the Code of Criminal Procedure (*Zakon o kaznenom postupku*, Official Gazette nos. 110/1997, 27/1998, 58/1999, 112/1999, 58/2002 and 62/2003) provided:

Article 20

"...

(2) Three-judge panels of the county courts shall be competent to hear cases as the second-instance courts and shall adopt [other] decisions out of the main hearing."

4. Confiscation of the Proceeds of Crime Act

36. The relevant parts of the Confiscation of the Proceeds of Crime Act (*Zakon o postupku oduzimanja imovinske koristi ostvarene kaznenim djelom i prekršajem*, Official Gazette no. 145/2010), which entered into force on 1 January 2011, provide:

Section 1

"...

(2) Other legal provisions concerning identification, restraint and enforcement of orders of confiscation of the proceeds of criminal or minor offences shall be applicable in so far as this Act does not provide otherwise."

Section 3

"The terms used in this Act shall have the following meaning:

...

7. prosecutor is the competent State Attorney ...

...

8. claimant... is the prosecutor, ..."

Section 11

"(1) In order to secure the possibility of confiscation of the proceeds of crime, the claimant is authorised, before or after the institution of the criminal proceedings ..., to request any restraint measure capable of achieving that aim, and in particular:

a) prohibition of alienation or encumbrance of real property ... with the registration of this prohibition in the land registry ..."

Section 12

"(1) In the proceedings concerning the restraint measure under this Act it shall be presumed that there is a danger that the claim of the Republic of Croatia with regard to confiscation of the proceeds of crime would not be enforceable or that its enforcement would be difficult without ordering of a restraint measure.

(2) The restraint may be ordered before the respondent had a possibility of replying to the request made by the claimant."

Section 15

"...

(2) The restraint measure can be lifted or replaced by another measure before the expiry of the time-limit for which it was ordered ... if the court, based on a request of the respondent, finds that [the restraint] is no longer necessary or that [the same aim] can be achieved by another restraint measure, and if the respondent or a third party provides a surety deposit. The surety deposit will be always given in cash and exceptionally by providing objects or rights which can be, according to the assessment of the court, swiftly remunerated."

Section 16

"(1) The restraint may be ordered for a period of a maximum of sixty days after the court informs the claimant that the judgment ... has become final.

..."

Section 17

"(1) The Republic of Croatia shall be responsible for damage related to the application of the restraint measure securing the confiscation of the proceeds of crime.

...

(3) The respondent may institute civil proceedings for damage before the competent court within one year following the finality of the judgment by which the accused was acquitted or charges were dismissed ... In the case under paragraph 1 of this section the respondent may institute civil proceedings within the thirty-day time-limit after he or she has learned that the State Attorney's Office has declined his or her request for friendly settlement ..."

B. Relevant practice

37. In its decisions nos. Kž-290/2012-3 and Kž-289/2012-3 of 5 June 2012, the Supreme Court held that, upon a request by the accused for the application of a less severe measure securing the enforcement of a possible confiscation order, the competent court was required to examine whether such a possibility existed. It also stressed that the surety deposit, under section 15 § 2 of the Confiscation of the Proceeds of Crime Act, could not be imposed cumulatively with the restraint measure.

III. RELEVANT INTERNATIONAL MATERIAL

A. United Nations

1. Convention against Transnational Organized Crime

38. The United Nations Convention against Transnational Organized Crime (A/RES/55/25) in its relevant part provides:

Article 2

"For the purposes of this Convention:

...

(d) "Property" shall mean assets of every kind, whether corporeal or incorporeal, movable or immovable, tangible or intangible, and legal documents or instruments evidencing title to, or interest in, such assets;

(e) "Proceeds of crime" shall mean any property derived from or obtained, directly or indirectly, through the commission of an offence;

(f) "Freezing" or "seizure" shall mean temporarily prohibiting the transfer, conversion, disposition or movement of property or temporarily assuming custody or control of property on the basis of an order issued by a court or other competent authority;

(g) "Confiscation", which includes forfeiture where applicable, shall mean the permanent deprivation of property by order of a court or other competent authority; ..."

Article 12

"1. States Parties shall adopt, to the greatest extent possible within their domestic legal systems, such measures as may be necessary to enable confiscation of:

(a) Proceeds of crime derived from offences covered by this Convention or property the value of which corresponds to that of such proceeds; ..."

2. Convention against Corruption

39. The relevant part of the United Nations Convention against Corruption (A/58/422) reads:

Article 31

"1. Each State Party shall take, to the greatest extent possible within its domestic legal system, such measures as may be necessary to enable confiscation of:

(a) Proceeds of crime derived from offences established in accordance with this Convention or property the value of which corresponds to that of such proceeds; ..."

B. Council of Europe

40. The relevant provisions of the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime (CETS No. 141) provide:

Article 2 – Confiscation measures

"Each Party shall adopt such legislative and other measures as may be necessary to enable it to confiscate instrumentalities and proceeds or property the value of which corresponds to such proceeds.

Each Party may, at the time of signature or when depositing its instrument of ratification, acceptance, approval or accession, by a declaration addressed to the Secretary General of the Council of Europe, declare that paragraph 1 of this article applies only to offences or categories of offences specified in such declaration. "

Article 3 – Investigative and provisional measures

"Each Party shall adopt such legislative and other measures as may be necessary to enable it to identify and trace property which is liable to confiscation pursuant to Article 2, paragraph 1, and to prevent any dealing in, transfer or disposal of such property."

C. European Union

41. The Directive 2014/42/EU of the European Parliament and of the Council of 3 April 2014 on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union in its relevant part provides:

Article 7
Freezing

"1. Member States shall take the necessary measures to enable the freezing of property with a view to possible subsequent confiscation. Those measures, which shall be ordered by a competent authority, shall include urgent action to be taken when necessary in order to preserve property.

..."

Article 8
Safeguards

"1. Member States shall take the necessary measures to ensure that the persons affected by the measures provided for under this Directive have the right to an effective remedy and a fair trial in order to uphold their rights.

2. Member States shall take the necessary measures to ensure that the freezing order is communicated to the affected person as soon as possible after its execution. Such communication shall indicate, at least briefly, the reason or reasons for the order concerned. When it is necessary to avoid jeopardising a criminal investigation, the competent authorities may postpone communicating the freezing order to the affected person.

3. The freezing order shall remain in force only for as long as it is necessary to preserve the property with a view to possible subsequent confiscation.

4. Member States shall provide for the effective possibility for the person whose property is affected to challenge the freezing order before a court, in accordance with procedures provided for in national law. Such procedures may provide that when the initial freezing order has been taken by a competent authority other than a judicial authority, such order shall first be submitted for validation or review to a judicial authority before it can be challenged before a court.

5. Frozen property which is not subsequently confiscated shall be returned immediately. The conditions or procedural rules under which such property is returned shall be determined by national law.

6. Member States shall take the necessary measures to ensure that reasons are given for any confiscation order and that the order is communicated to the person affected. Member States shall provide for the effective possibility for a person in respect of whom confiscation is ordered to challenge the order before a court.

...

8. In proceedings referred to in Article 5, the affected person shall have an effective possibility to challenge the circumstances of the case, including specific facts and available evidence on the basis of which the property concerned is considered to be property that is derived from criminal conduct.

...”

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 1 OF PROTOCOL No. 1 TAKEN ALONE AND IN CONJUNCTION WITH ARTICLE 13 OF THE CONVENTION

42. The applicant complained that the seizure of his property had not been proportionate in the circumstances of the case and that he had not had an effective procedure to challenge it. He relied on Article 13 of the Convention and Article 1 of Protocol No. 1, which read as follows:

Article 13

“Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.”

Article 1 of Protocol No. 1

“Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.”

A. Admissibility

1. The parties' arguments

43. The Government submitted that the applicant had failed to exhaust the domestic remedies given that he had not appeared before a three-judge panel of the Vukovar County Court, which had ordered the seizure of his property on 30 October 2012. In the Government's view, the applicant had had every opportunity to participate effectively in the proceedings before a three-judge panel and that would have allowed him to effectively challenge the request for seizure of his property made by the Vukovar County State Attorney's Office. However, since he had failed to appear, the Vukovar County Court had had no reason not to accept that request and to order the seizure of his property.

44. The applicant argued that he had properly exhausted the domestic remedies in the course of the proceedings concerning the seizure of his

property. He stressed in particular that the three-judge panel referred to by the Government had never communicated to him the request for a seizure order. He also pointed out that the proceedings before the three-judge panel had not provided adequate procedural guarantees since a hearing before such a panel of judges was in the form of a court session and not a hearing at which the relevant evidence could be effectively examined.

2. The Court's assessment

45. The Court reiterates that under Article 35 § 1 of the Convention, it may only deal with an application after all domestic remedies have been exhausted. The purpose of Article 35 is to afford the Contracting States the opportunity of preventing or putting right the violations alleged against them before those allegations are submitted to the Court (see, for example, *Mifsud v. France* (dec.) [GC], no. 57220/00, § 15, ECHR 2002-VIII). The obligation to exhaust domestic remedies requires an applicant to make normal use of remedies which are effective, sufficient and accessible in respect of his Convention grievances. To be effective, a remedy must be capable of resolving directly the impugned state of affairs (see *Balogh v. Hungary*, no. 47940/99, § 30, 20 July 2004).

46. The rule of exhaustion of domestic remedies must be applied with some degree of flexibility and without excessive formalism. At the same time it requires in principle that the complaints intended to be made subsequently at international level should have been aired before domestic authorities, at least in substance and in compliance with the formal requirements laid down in domestic law (see *Azinas v. Cyprus* [GC], no. 56679/00, § 38, ECHR 2004-III; *Melnik v. Ukraine*, no. 72286/01, § 67, 28 March 2006; *Hummatov v. Azerbaijan*, nos. 9852/03 and 13413/04, § 91, 29 November 2007; and *Dvořáček and Dvořáčková v. Slovakia*, no. 30754/04, § 54, 28 July 2009).

47. However, in the event of there being a number of domestic remedies which an individual can pursue, that person is entitled to choose a remedy which addresses his or her essential grievance. In other words, when a remedy has been pursued, use of another remedy which has essentially the same objective is not required (see *T.W. v. Malta* [GC], no. 25644/94, § 34, 29 April 1999; *Moreira Barbosa v. Portugal* (dec.), no. 65681/01, ECHR 2004-V; and *Jeličić v. Bosnia and Herzegovina* (dec.), no. 41183/02, 15 November 2005; and *Jasinskis v. Latvia*, no. 45744/08, § 50, 21 December 2010).

48. The Court notes that after the initial seizure of the applicant's property had been ordered by a decision of the Vukovar County Court of 30 October 2012 (see paragraph 19 above), the applicant properly used all available domestic remedies challenging that decision. In particular, he lodged an appeal before the Supreme Court (see paragraph 21 above) and a constitutional complaint before the Constitutional Court (see paragraph 23

above). Moreover, during the proceedings the applicant several times requested the Vukovar County Court to lift and reassess the seizure order, arguing in particular that the measure at issue had disproportionately affected his property rights (see paragraphs 24 and 30 above). The Court also notes that thereafter the applicant duly pursued all available remedies, including a constitutional complaint, against the decisions dismissing his request (see paragraphs 27 and 29 above).

49. In these circumstances the Court finds that the applicant made the domestic authorities sufficiently aware of his situation and gave them an adequate opportunity to assess whether the seizure of his property had been reasonable and proportionate in the circumstances (compare *Dervishi v. Croatia*, no. 67341/10, §§ 116-117, 25 September 2012).

50. The Court, therefore, concludes that the applicant has complied with the obligation to exhaust domestic remedies and that the Government's objection must be rejected. It also notes that the applicant's complaints are not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that they are not inadmissible on any other grounds. They must therefore be declared admissible.

B. Merits

1. The parties' arguments

(a) The applicant

51. The applicant submitted that there was no doubt that there had been an interference with his property rights by the seizure of his real property. He contended, however, that such interference had not been in accordance with the law and that it was contrary to the principle of legal certainty. The applicant also argued that the interference at issue had imposed an excessive individual burden on him. In particular, he pointed out that the value of the seized property had been grossly disproportionate to the pecuniary gain allegedly obtained by the commission of the offences which were the subject matter of the proceedings.

52. In the applicant's view, this principally followed from the fact that a proper assessment of the value of the restrained real property had never been made. In this connection, the applicant stressed that even if the Government's submission as to the manner in which the value of the property had been assessed by the Vukovar County State Attorney's Office were accepted, such a possible estimate in fact disclosed a number of failures. Specifically, the investigation case file had only contained information concerning the difference between the purchase and accounting value of the property with regard to the purchase contracts of 1997, namely fifteen years before the request for seizure of the property had been made. It had therefore not been possible to assess the value of the real property on

the basis of such estimates. In any case, however, any such possible estimate concerned only a limited number of items of the real property, whereas the remainder of the property in respect of which the seizure order had been made had remained without any relevant estimate of its value.

53. On the other hand, the applicant argued that his assessment of the value of the seized real property, which he had provided during the criminal proceedings, had been based on publicly available information from a specialised Internet site and as such corresponded to its present market value. The applicant therefore considered that, without any such assessment being made by the competent authorities, their decision on the seizure of his property had been disproportionate and contrary to Article 1 of Protocol No. 1. This had therefore endangered his business activities as the restrained real property had been the only valuable property which he owned that allowed him to pursue his business activities. In particular, the applicant explained that his business activities were associated with agriculture and that it was therefore of paramount importance for him to be able to dispose freely of the real property (in particular the plots of land) so as to be able, for instance, to take loans by providing mortgages on that property.

54. The applicant also alleged a number of procedural failures in the manner in which the domestic courts had examined his complaints. In particular, he pointed out that he had not been provided with the request for a seizure order made by the Vukovar County State Attorney's Office so as to be able to comment on it before the adoption of the decision. Moreover, his possibility of using the legal remedies had been limited as there was no possibility of lodging an appeal on points of law against a seizure order, and the Constitutional Court was declaring constitutional complaints to that effect inadmissible. There was also a presumption of the existence of a fear that the possible confiscation would not be possible or would be difficult, which effectively he could not have rebutted. Furthermore, the applicant pointed out that the parties' requests related to the seizure of property had not been examined at a public hearing and he considered that the existence of an appeal against the decisions on seizure of property had not been a sufficient procedural guarantee. Lastly, the applicant stressed that although the possibility of obtaining damages related to the improper seizure of property existed in law, it followed from the case-law of the domestic courts that it had not been effective in practice.

(b) The Government

55. The Government accepted that there had been an interference with the applicant's property rights but they considered that such interference had been in accordance with the law and that it had pursued a legitimate aim of securing the payment of public contributions and penalties, namely the enforcement of a possible confiscation order against the applicant. The Government also argued that the seizure of the applicant's real property had

not disproportionately affected his rights and had not imposed an excessive individual burden on him.

56. In this connection the Government pointed out that the applicant had been indicted in the criminal proceedings on charges of economic crime by which he had allegedly procured a pecuniary gain in the total amount of some EUR 1,000,000. In the Government's view, the only possibility for securing the enforcement of a confiscation order against the applicant had been to order seizure of his real property. Had that not been done, the applicant could have transferred his property to other persons and thus he could have thwarted any possibility of confiscation.

57. Furthermore, in view of the amount of the pecuniary gain allegedly obtained by the applicant it had been necessary to seize his property of a significant value. The exact value of the seized property and the proportionality of the application of such measure had been assessed several times by the domestic authorities. In particular, it had been for the first time assessed by the Vukovar County State Attorney's Office based on its findings related to the applicant's property. Thereafter, it had been assessed several times by the Vukovar County Court and the Supreme Court, which had found, on the basis of the relevant material available in the case file, that the impugned measure had been necessary and proportionate in the circumstances. Accordingly, given that only the relevant part of the seized property would be later confiscated if such an order became final and that the only restriction on the applicant's use of that property had been his inability to use it for obtaining a loan or to sell it, the Government considered that the applicant had not been required to bear an excessive disproportionate burden.

58. Lastly, the Government stressed that the applicant had had several effective remedies concerning the seizure of his property in the criminal proceedings at issue. In particular, he had been able to appeal against the decision ordering the seizure of property to the Supreme Court. He had also had a possibility of applying to the Vukovar County Court for the reassessment of the seizure order and to challenge any decision to that effect by lodging further appeals to the Supreme Court. Lastly, the Government pointed out that the applicant had a possibility of claiming damages under the Confiscation of the Proceeds of Crime Act for possible damages sustained by the seizure of his property.

2. The Court's assessment

(a) Whether there has been interference with the applicant's possessions

59. It is common ground between the parties that the applicant was the lawful owner of the real property restrained in the context of the criminal proceedings against him on charges of economic crime. There is therefore no dispute that the real property at issue was his "possession". Neither is it

disputed that the seizure of the applicant's property by prohibiting its alienation or encumbrance amounted to an interference with the applicant's right to peaceful enjoyment of his possessions and that Article 1 of Protocol No. 1 is therefore applicable.

60. The Court reiterates that the seizure of property for legal proceedings normally relates to the control of the use of property, which falls within the ambit of the second paragraph of Article 1 of Protocol No. 1 to the Convention (see, among others, *Raimondo v. Italy*, 22 February 1994, § 27, Series A no. 281-A; *Andrews v. the United Kingdom* (dec.), no. 49584/99, 26 September 2002; *Adamczyk v. Poland* (dec.), no. 28551/04, 7 November 2006; *Simonjan-Heikinheino v. Finland* (dec.), no. 6321/03, 2 September 2008; and *JGK Statyba Ltd and Guselnikovas v. Lithuania*, no. 3330/12, § 117, 5 November 2013).

61. Indeed, the seizure of the applicant's property did not purport to deprive him of his possessions but placed a temporary restriction on its use by prohibiting its alienation or encumbrance, which, in circumstances where the disposition of the property was associated with the applicant's lawful business, also inevitably affected the capacities of his business activity (see *JGK Statyba Ltd and Guselnikovas*, cited above, § 129; and paragraph 17 above). The Court also finds it important to note that the seizure of the applicant's property was applied as a provisional measure aimed at securing enforcement of a possible confiscation order imposed at the outcome of the criminal proceedings in relation to the obtained proceeds of crime (see, for example, *Rafig Aliyev v. Azerbaijan*, no. 45875/06, § 118, 6 December 2011).

62. In view of its finding that such a measure falls within the ambit of the second paragraph of Article 1 of Protocol No. 1, the Court must establish whether it was lawful and "in accordance with the general interest", and whether there existed a reasonable relationship of proportionality between the means employed and the aim sought to be realised (see, for example, *JGK Statyba Ltd and Guselnikovas*, cited above, § 118).

(b) Whether the interference was prescribed by law

63. The Court notes that the seizure of the applicant's real property in the context of the criminal proceedings against him was based on section 11 of the Confiscation of the Proceeds of Crime Act, which allows for a possibility of imposing restraints on real property by the prohibition of its alienation or encumbrance for the purpose of securing the possibility of confiscation of the proceeds of crime (see paragraph 36 above).

64. Accordingly, the Court is satisfied that the seizure of the applicant's real property in the case at hand was lawful.

(c) Whether the interference pursued a legitimate aim

65. The Court has already held that the application of provisional measures in the context of judicial proceedings, aimed at anticipating a possible confiscation of property, was in the "general interest" of the community (see, for example, *Borzhonov v. Russia*, no. 18274/04, § 58, 22 January 2009, and cases cited therein; and *East West Alliance Limited v. Ukraine,* no. 19336/04, § 187, 23 January 2014).

66. The Court therefore accepts that the interference at issue pursued a legitimate aim.

(d) Proportionality of the interference

67. Even if an interference has taken place subject to the conditions provided for by law and in the public interest, there must also be a reasonable relationship of proportionality between the means employed and the aim sought to be realised by any measures applied by the State, including measures designed to control the use of the individual's property. That requirement is expressed by the notion of a "fair balance" that must be struck between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights (see, for example, *Hutten-Czapska v. Poland* [GC], no. 35014/97, § 167, ECHR 2006-VIII; *Depalle v. France* [GC], no. 34044/02, § 83, ECHR 2010; and *Herrmann v. Germany* [GC], no. 9300/07, § 74, 26 June 2012; see also *Borzhonov*, cited above, § 59).

68. In particular, whereas seizure of the applicant's property is not in itself open to criticism, having regard in particular to the margin of appreciation permitted under the second paragraph of Article 1 of the Protocol, it carries with it the risk of imposing on him an excessive burden in terms of his ability to dispose of his property and must accordingly provide certain procedural safeguards so as to ensure that the operation of the system and its impact on an applicant's property rights are neither arbitrary nor unforeseeable. Furthermore, the Court reiterates that while any seizure or confiscation entails damage, the actual damage sustained should not be more extensive than that which is inevitable, if it is to be compatible with Article 1 of Protocol No. 1 (see *Borzhonov*, cited above, §§ 60-61)

69. Accordingly, in assessing compliance with Article 1 of Protocol No. 1, the Court must make an overall examination of the various interests in issue, bearing in mind that the Convention is intended to safeguard rights that are "practical and effective". It must look behind appearances and investigate the realities of the situation complained of (see *JGK Statyba Ltd and Guselnikovas*, cited above, § 128).

70. The Court notes in the case at issue that following the amendment of the charges against the applicant in 2007 he was suspected of having procured by the commission of the offences at issue a pecuniary gain in the total amount of approximately EUR 1,060,000 (see paragraph 9 above).

There is therefore nothing in the action of the Vukovar County State Attorney's Office seeking seizure of the applicant's real property so as to secure enforcement of a possible confiscation order which is in itself open to criticism. This, however, in view of the fact that the application of such a measure carries with it the risk of imposing on the applicant an excessive burden, did not absolve the competent courts from ascertaining and giving reasons for whether the conditions for seizure of the applicant's property had indeed been met and whether its nature and scope were proportionate in the circumstances (see paragraphs 67-68 above; and, *mutatis mutandis*, *JGK Statyba Ltd and Guselnikovas*, cited above, § 136).

71. In this connection the Court notes that together with its request for seizure of the applicant's property the Vukovar County State Attorney's Office only submitted records from the land registry attesting to the applicant's ownership of the real property in respect of which the restraint had been sought. No other relevant evidence concerning its value was provided nor did the request make any reference in that respect or, for that matter, about the proportionality of the impugned measure (see paragraph 13 above).

72. Moreover, even assuming that the Vukovar County State Attorney's Office made its request on the basis of the material suggested by the Government (see paragraph 13 above), the Court notes that the Government did not contest the applicant's assertion that the material concerning the value of the property existed only in respect of part of the property seized and dated back to 1997 (see paragraph 13 above).

73. However, the Court notes that irrespective of the absence of any clear indications as to the value of the property listed in the request for seizure of the applicant's property, the Vukovar County Court accepted that request in total and ordered seizure of all the property listed in the request. It thereby made no assessment as to the proportionality between the value of the restrained property and the pecuniary gain allegedly directly or indirectly obtained by the applicant (see paragraph 19 above).

74. While the Court could accept that there may be instances where the seizure of property in the context of criminal proceedings could initially be ordered on the basis of a provisional assessment of proportionality between the value of the seized property and the pecuniary gain allegedly obtained by a suspect or accused, as the absence of a prompt reaction could frustrate the possibility of application of such a measure, it notes that there is nothing in the circumstances of the present case justifying the complete failure of the Vukovar County Court to address the matter.

75. Moreover, irrespective of the complete absence of an assessment of proportionality in the decision of the Vukovar County Court, and the applicant's explicit complaint to that effect, the Supreme Court failed to rectify that omission by making an appropriate assessment of the proportionality of the impugned measure, and merely noted that the

principle of proportionality had not been breached (see paragraphs 21 and 22 above), whereas the Constitutional Court at the outset declined to deal with the matter (see paragraphs 23 and 25 above).

76. The Court also observes that in the further course of the criminal proceedings the applicant requested the domestic courts that the scope of the restraint on his property be reassessed, arguing that there was a gross disproportion between the value of the seized property and the pecuniary gain allegedly obtained. In particular, before the Supreme Court he submitted a detailed assessment of the value of the seized property on the basis of the publicly available information on the market value of real properties in Croatia. According to this information the total value of the applicant's restrained property was estimated at some EUR 9,887,084, whereas he was indicted in the criminal proceedings for having procured an unlawful pecuniary gain in the total amount of some EUR 1,060,000, thus nine times less than the purported value of his seized property (see paragraph 27 above).

77. In this respect the Court notes, although it is impossible for it to speculate on the exact value of the restrained property, that the applicant's allegations were not frivolous and devoid of any substance. In any event, in view of the overall circumstances of the case, the Court considers that such a request made by the applicant should have prompted the Supreme Court to examine his allegations carefully. This is particularly true given that the applicant's business activity arguably related to the possibility of him freely disposing of his real property (see paragraph 17 above) and that a relevant assessment of the value of the seized real property had never been made (see paragraphs 67-69, and 71-75 above).

78. Having said that, the Court notes that the Supreme Court, without making any further assessment with regard to the applicant's specific allegations concerning the disproportion between the impounded property and the alleged unlawfully obtained pecuniary gain, and although being unable to benefit from any such assessment made by the Vukovar County Court, rejected the applicant's arguments as speculative, without explaining why it ignored the applicant's detailed assessment of the value of his restrained property made on the basis of publicly available information on the market value of properties in Croatia (see paragraph 28 above).

79. The Supreme Court thereby allowed the impugned situation to persist for more than two and a half years without ever addressing the applicant's specific arguments of disproportion between the value of the seized property and the alleged unlawfully obtained pecuniary gain. In this connection the Court finds it important to note that the overall seized property was not alleged to be a result of crime or traceable to the crime. The seizure at issue was rather applied as a provisional measure on the applicant's overall property aimed at securing enforcement of a possible confiscation order imposed at the outcome of the criminal proceedings.

80. In these circumstances, the Court notes that the impugned seizure of the applicant's real property in the context of the criminal proceedings at issue, although in principle legitimate and justified, was imposed and kept in force without an assessment of whether the value of the seized property corresponded to the possible confiscation claim. The Court therefore finds that the application of such a measure was not adequate to demonstrate that a requirement of "fair balance" inherent in the second paragraph of Article 1 of Protocol No. 1 was satisfied.

81. The foregoing considerations are sufficient to enable the Court to conclude that in the circumstances of the applicant's case there has been a violation of Article 1 of Protocol No. 1 to the Convention.

82. In these circumstances, in view of the fact that the applicant's complaint that he did not have an effective procedure to challenge the seizure of his property is intrinsically linked to the questions dealt with by the Court under the Article 1 of Protocol No. 1 (see, for example, *Velikovi and Others v. Bulgaria*, nos. 43278/98 and others, § 251, 15 March 2007), the Court considers that it is not necessary to examine the same question separately under Article 13 of the Convention.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

83. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

84. The applicant claimed EUR 15,000 in respect of non-pecuniary damage. He also submitted that it was impossible to estimate the exact extent of pecuniary damage at this point before a final judgment in the criminal proceedings against him. He therefore invited the Court to reserve its decision on pecuniary damage until the completion of the criminal proceedings.

85. The Government considered the applicant's claim unfounded and unsubstantiated.

86. As to the pecuniary damage claimed, the Court considers that there is no causal link between the facts in respect of which it has found a breach of the Convention and the pecuniary damage for which the applicant seeks compensation. It therefore rejects the applicant's claim in this respect.

87. On the other hand, the Court considers that the applicant must have sustained non-pecuniary damage which is not sufficiently compensated by the finding of a violation. Ruling on an equitable basis, it awards the

applicant EUR 2,000 in respect of non-pecuniary damage, plus any tax that may be chargeable on this amount.

B. Costs and expenses

88. The applicant also claimed EUR 850 for the costs and expenses incurred before the domestic courts and for those incurred before the Court.

89. The Government considered the applicant's claim unfounded and unsubstantiated.

90. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. In the present case, regard being had to the documents in its possession and the above criteria, the Court considers it reasonable to award the claimed amount in full covering costs under all heads, plus any tax that may be chargeable.

C. Default interest

91. The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the application admissible;

2. *Holds* that there has been a violation of Article 1 of Protocol No. 1 to the Convention;

3. *Holds* that there is no need to examine the complaint under Article 13 of the Convention separately;

4. *Holds*

(a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts, to be converted into Croatian kunas at the rate applicable at the date of settlement:

(i) EUR 2,000 (two thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;

(ii) EUR 850 (eight hundred and fifty euros), plus any tax that may be chargeable to the applicant, in respect of costs and expenses;

(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

5. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 17 May 2016, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Stanley Naismith	Julia Laffranque
Registrar	President