FIRST SECTION

CASE OF TOMASOVIĆ v. CROATIA

(Application no. 53785/09)

JUDGMENT

STRASBOURG

18 October 2011

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Tomasović v. Croatia,

The European Court of Human Rights (First Section), sitting as a Chamber composed of:
Anatoly Kovler, *President,*
Nina Vajić,
Peer Lorenzen,
Mirjana Lazarova Trajkovska,
Julia Laffranque,
Linos-Alexandre Sicilianos,
Erik Møse, *judges,*
and Søren Nielsen, *Section Registrar,*

Having deliberated in private on 27 September 2011,

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

PROCEDURE

1. The case originated in an application (no. 53785/09) 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, Ms Ksenija Tomasović ("the applicant"), on 28 July 2009.

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

3. On 10 November 2010 the President of the First Section decided to give notice of the application to the Government. It was also decided to rule on the admissibility and merits of the application at the same time (Article 29 § 1).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

4. The applicant was born in 1973 and lives in Split.

1. Minor-offences proceedings against the applicant

5. On 25 March 2004 the Split police lodged a request for minor-offences proceedings to be instituted against the applicant in the Split Minor Offences Court (*Prekršajni sud u Splitu*).

6. On 3 March 2006 the Split Minor Offences Court found that on 15 March 2004 at about 10.35 p.m. the applicant had had 0.21 grams of heroin on her, which amounted to a minor offence under section 3(1) of the Prevention of Narcotics Abuse Act. She was fined 1,700 Croatian kunas (HRK) on the basis of section 54(1)(1) and 54(3) of the same Act. This decision became final on 15 March 2006.

2. Proceedings on indictment

7. On 8 February 2005 the Split State Attorney's Office (*Općinsko državno odvjetništvo u Splitu*) lodged an indictment with the Split Municipal Court (*Općinski sud u Splitu*) accusing the applicant of possession of heroin. The police report was included in the case file.

8. On 19 March 2007 the Split Municipal Court, in criminal proceedings against the applicant, found the applicant guilty of possessing 0,14 grams of heroin on 15 March 2004 at about 10.35 p.m. and fined her HRK 1,526. The previous fine was to be included in this one. The applicant was also ordered to bear the costs of the proceedings in the amount of HRK 400.

9. The applicant's conviction was upheld by the Split County Court (*Županijski sud u Splitu*) on 5 June 2007 but a suspended sentence of four month's imprisonment was applied with a one-year probation period.

10. The applicant's subsequent constitutional complaint, alleging a violation of the *ne bis in idem* principle, was dismissed by the Constitutional Court on 7 May 2009 on the ground that the Croatian legal system did not exclude the possibility of punishing the same person twice for the same offence when the same act is prescribed both as a minor offence and a criminal offence.

II. RELEVANT DOMESTIC LAW

11. The relevant part of the Prevention of Narcotics Abuse Act (*Zakon o suzbijanju zloupotrebe opojnih droga*, Official Gazette nos. 107/2001, 87/2002, 163/2003) reads:

Section 3

"(1) The growing of plants from which narcotics may be produced and the production, possession and trafficking in narcotics, plants and parts of the plants from which narcotics may be produced is banned, as is the production, possession and trafficking in substances which may be used for the production of narcotics, save for [such possession, production and trafficking] under the conditions prescribed by this Act for medical, nutritional, veterinarian or educational purposes or for the purposes of scientific research.

..."

Section 54

"(1) A legal entity shall be fined between HRK 20,000 and HRK 50,000 for the minor offences of:

1. possession of narcotics ...

...

(3) For the minor offence under subsection (1) point 1 ... of this section a person shall be fined between HRK 5,000 and 20,000."

12. The relevant part 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) reads:

Article 173

"(1) Whoever unlawfully possesses substances which are prescribed as narcotics shall be fined or sentenced to a term of imprisonment not exceeding one year.

..."

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 4 OF PROTOCOL NO. 7 TO THE CONVENTION

13. The applicant complained that she had been tried and convicted twice for the same offence. She relied on Article 4 of Protocol No. 7 which reads as follows:

"1. No one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that State.

2. The provisions of the preceding paragraph shall not prevent the reopening of the case in accordance with the law and penal procedure of the State concerned, if there is evidence of new or newly discovered facts, or if there has been a fundamental defect in the previous proceedings, which could affect the outcome of the case.

3. No derogation from this Article shall be made under Article 15 of the Convention."

A. Admissibility

14. The Court notes that the application is not manifestly ill-founded within the meaning of Article 35 § 3(a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

15. The applicant argued that she had been punished twice for the same offence.

16. The Government argued that the first penalty was not criminal in nature since it was adopted in the context of minor-offences proceedings and was prescribed as a minor offence under the domestic law. This minor offence was prescribed by the Prevention of Narcotics Abuse Act which had been adopted together with other laws on the basis of the national strategy on supervision of narcotics. The Act in question prescribed conditions for the growing of plants from which narcotics could be produced; measures for the prevention of narcotics abuse; and the system for preventing and treating drug abuse. This showed that the aim of that Act could not be associated with criminal law. The aim of this Act and its provisions was not to punish those in possession of small amounts of narcotics but the protection of their health by discouraging the possession and use of illegal substances.

17. As regards the severity of the penalty, the Government argued that the applicant had been fined HRK 1,700, which was not a significant fine and that the minor offence was not liable to imprisonment.

2. The Court's assessment

(a) Whether the first penalty was criminal in nature

18. The Court observes that on 3 March 2006 the applicant was found guilty in proceedings conducted under the Minor Offences Act and fined HRK 1,700. Under the Croatian legal classification it is not entirely clear whether "minor offences" are to be regarded as "criminal". Thus, in order to determine whether the applicant was "finally acquitted or convicted in accordance with the law and penal procedure of [the] State", the first issue to be decided is whether those proceedings concerned a "criminal" matter within the meaning of Article 4 of Protocol No. 7.

19. The Court reiterates that the legal characterisation of the procedure under national law cannot be the sole criterion of relevance for the applicability of the principle of *non bis in idem* under Article 4 § 1 of Protocol No. 7. Otherwise, the application of this provision would be left to the discretion of the Contracting States to a degree that might lead to results incompatible with the object and purpose of the Convention (see, most recently, *Storbråten v. Norway* (dec.), no. 12277/04, ECHR 2007-... (extracts), with further references). The notion of "penal procedure" in the text of Article 4 of Protocol No. 7 must be interpreted in the light of the general principles concerning the corresponding words "criminal charge" and "penalty" in Articles 6 and 7 of the Convention respectively (see *Haarvig v. Norway* (dec.), no. 11187/05, 11 December 2007; *Rosenquist v. Sweden* (dec.), no. 60619/00, 14 September 2004; *Manasson v. Sweden* (dec.), no. 41265/98, 8 April 2003; *Göktan v. France,* no. 33402/96, § 48, ECHR 2002-V; *Malige v. France*, 23 September 1998, § 35, *Reports of Judgments and Decisions* 1998-VII; and *Nilsson v. Sweden* (dec.), no. 73661/01, ECHR 2005-...).

20. The Court's established case-law sets out three criteria, commonly known as the "*Engel* criteria" (see *Engel and Others v. the Netherlands*, 8 June 1976, Series A no. 22), to be considered in determining whether or not there was a "criminal charge". The first criterion is the legal classification of the offence under national law, the second is the very nature of the offence and the third is the degree of severity of the penalty that the person concerned risks incurring. The second and third criteria are alternative and not necessarily cumulative. This, however, does not exclude a cumulative approach where separate analysis of each criterion does not make it possible to reach a clear conclusion as to the existence of a criminal charge (see, as recent authorities, *Jussila v. Finland* [GC], no. 73053/01, §§ 30-31, ECHR 2006-..., and *Ezeh and Connors v. the United Kingdom* [GC], nos. 39665/98 and 40086/98, §§ 82-86, ECHR 2003-X).

21. In the domestic legal classification the offence at issue amounted to a minor offence under section

6 of the Minor Offences against Public Order and Peace Act. Nevertheless, the Court reiterates that it has previously found that certain offences still have a criminal connotation although they are regarded under relevant domestic law as too trivial to be governed by criminal law and procedure (see *Menesheva v. Russia*, no. 59261/00, § 96, ECHR 2006-...; *Galstyan v. Armenia*, no. 26986/03, § 57, 15 November 2007; and *Ziliberberg v. Moldova*, no. 61821/00, §§ 32-35, 1 February 2005).

22. By its nature, the inclusion of the offence at issue in the Prevention of Narcotics Abuse Act served to guarantee the control of the abuse of illegal substances, which may also fall within the sphere of protection of criminal law. The corresponding provision of the Act was directed towards all citizens rather than towards a group possessing a special status. There is no reference to the "minor" nature of the acts and the fact that the first proceedings took place before a minor-offences court does not, in itself, exclude their classification as "criminal" in the autonomous sense of the Convention, as there is nothing in the Convention to suggest that the criminal nature of an offence, within the meaning of the *Engel* criteria, necessarily requires a certain degree of seriousness (see *Ezeh*, cited above, § 104). Lastly, the Court considers that the primary aims in establishing the offence in question were punishment and deterrence, which are recognised as characteristic features of criminal penalties (ibid., §§ 102 and 105).

23. As to the degree of severity of the measure, it is determined by reference to the maximum potential penalty for which the relevant law provides. The actual penalty imposed is relevant to the determination but it cannot diminish the importance of what was initially at stake (ibid., § 120). The Court observes that section 54 of the Prevention of Narcotics Abuse Act provided for a fine of between HRK 5,000 and 20,000 and that the applicant was eventually fined HRK 1,700. The Court considers that the fine thus prescribed cannot be seen as minor.

24. In this connection the Court notes that it is a common feature of all criminal-law systems that some criminal offences are liable to fines while others entail deprivation of liberty. In this connection the Court notes that the criminal offence of possession of narcotics under Article 173 of the Croatian Criminal Code is also liable to a fine and that this does not deprive it of its criminal nature.

25. In the light of the above considerations the Court concludes that the nature of the offence in question, together with the severity of the penalty, were such as to bring the applicant's conviction of 16 June 2005 within the ambit of "penal procedure" for the purposes of Article 4 of Protocol No. 7.

(b) Whether the offences for which the applicant was prosecuted were the same (*idem*)

26. Article 4 of Protocol No. 7 establishes the guarantee that no one shall be tried or punished for an offence of which he or she has already been finally convicted or acquitted. The Court set out the relevant principles in that respect in the case of *Sergey Zolotukhin v. Russia* ([GC], no. 14939/03, 10 February 2009). The relevant passages read as follows:

> "78. The Court considers that the existence of a variety of approaches to ascertaining whether the offence for which an applicant has been prosecuted is indeed the same as the one of which he or she was already finally convicted or acquitted engenders legal uncertainty incompatible with a fundamental right, namely the right not to be prosecuted twice for the same offence. It is against this background that the Court is now called upon to provide a harmonised interpretation of the notion of the 'same offence' – the *idem* element of the *non bis in idem* principle – for the purposes of Article 4 of Protocol No. 7. While it is in the interests of legal certainty, foreseeability and equality before the law that the Court should not depart, without good reason, from precedents laid down in previous cases, a failure by the Court to maintain a dynamic and evolutive approach would risk rendering it a bar to reform or improvement (see *Vilho Eskelinen and Others v. Finland* [GC], no. 63235/00, § 56, ECHR 2007-...).
>
> 79. An analysis of the international instruments incorporating the *non bis in idem* principle in one or another form reveals the variety of terms in which it is couched. Thus, Article 4 of Protocol No. 7 to the Convention, Article 14 § 7 of the UN Covenant on Civil and Political Rights and Article 50 of the Charter of Fundamental Rights of the European Union refer to the '[same] offence' ('*[même] infraction*'), the American Convention on Human Rights speaks of the 'same cause' ('*mêmes faits*'), the Convention Implementing the Schengen Agreement prohibits prosecution for the 'same acts' ('*mêmes faits*'), and the Statute of the International Criminal Court employs the term '[same] conduct' ('*[mêmes] actes constitutifs*') . The difference between the terms 'same acts' or 'same cause' ('*mêmes faits*') on the one hand and the term '[same] offence' ('*[même] infraction*') on the other was held by the Court of Justice of the European Communities and the Inter-American Court of Human Rights to be an important element in favour of adopting the approach based strictly on the identity of the material acts and rejecting the legal classification of such acts as irrelevant. In so finding, both tribunals emphasised that such an approach would favour the perpetrator, who would know that, once he had been found guilty and served his

sentence or had been acquitted, he need not fear further prosecution for the same act...

80. The Court considers that the use of the word ‘offence’ in the text of Article 4 of Protocol No. 7 cannot justify adhering to a more restrictive approach. It reiterates that the Convention must be interpreted and applied in a manner which renders its rights practical and effective, not theoretical and illusory. It is a living instrument which must be interpreted in the light of present-day conditions (see, among other authorities, *Tyrer v. the United Kingdom*, 25 April 1978, § 31, Series A no. 26, and *Christine Goodwin v. the United Kingdom* [GC], no. 28957/95, § 75, ECHR 2002-VI). The provisions of an international treaty such as the Convention must be construed in the light of their object and purpose and also in accordance with the principle of effectiveness (see *Mamatkulov and Askarov v. Turkey* [GC], nos. 46827/99 and 46951/99, § 123, ECHR 2005-I).

81. The Court further notes that the approach which emphasises the legal characterisation of the two offences is too restrictive on the rights of the individual, for if the Court limits itself to finding that the person was prosecuted for offences having a different legal classification it risks undermining the guarantee enshrined in Article 4 of Protocol No. 7 rather than rendering it practical and effective as required by the Convention (compare *Franz Fischer*, cited above, § 25).

82. Accordingly, the Court takes the view that Article 4 of Protocol No. 7 must be understood as prohibiting the prosecution or trial of a second ‘offence’ in so far as it arises from identical facts or facts which are substantially the same.

83. The guarantee enshrined in Article 4 of Protocol No. 7 becomes relevant on commencement of a new prosecution, where a prior acquittal or conviction has already acquired the force of *res judicata*. At this juncture the available material will necessarily comprise the decision by which the first ‘penal procedure’ was concluded and the list of charges levelled against the applicant in the new proceedings. Normally these documents would contain a statement of facts concerning both the offence for which the applicant has already been tried and the offence of which he or she stands accused. In the Court’s view, such statements of fact are an appropriate starting point for its determination of the issue whether the facts in both proceedings were identical or substantially the same. The Court emphasises that it is irrelevant which parts of the new charges are eventually upheld or dismissed in the subsequent proceedings, because Article 4 of Protocol No. 7 contains a safeguard against being tried or being liable to be tried again in new proceedings rather than a prohibition on a second conviction or acquittal...

84. The Court’s inquiry should therefore focus on those facts which constitute a set of concrete factual circumstances involving the same defendant and inextricably linked together in time and space, the existence of which must be demonstrated in order to secure a conviction or institute criminal proceedings.

...”

27. As to the present case the Court notes that in respect of the minor offence the applicant was found guilty of possessing 0.21 grams of heroin on 15 March 2004 at about 10.35 p.m. As regards the proceedings on indictment, she was found guilty of possessing 0.14 grams of heroin on 15 March 2004 at about 10.35 p.m.

28. The Court cannot but conclude that the facts constituting the minor offence of which the applicant was convicted were essentially the same as those constituting the criminal offence of which she was also convicted.

(c) Whether there was a duplication of proceedings (*bis*)

29. The Court reiterates that Article 4 of Protocol No. 7 does not necessarily extend to all proceedings instituted in respect of the same offence (see *Falkner v. Austria* (dec.), no. 6072/02, 30 September 2004). Its object and purpose imply that, in the absence of any damage proved by the applicant, only new proceedings brought in the knowledge that the defendant has already been tried in the previous proceedings would violate this provision (see *Zigarella v. Italy* (dec.), no. 48154/99, ECHR 2002-IX (extracts)).

30. The Court notes that the proceedings before the Split Minor Offences Court were conducted further to a request lodged by the police. The decision was adopted on 3 March 2006 and became final on 15 March 2006. The criminal proceedings before the Split Municipal Court were instituted further to an indictment lodged by the Split State Attorney’s Office on 8 February 2005. The police report upon which the minor-offences proceedings were instituted was included in the case file. These circumstances show that both sets of proceedings were instituted on the basis of the police report. It is obvious that the police lodged a request for proceedings to be instituted against the applicant in the Split Minor Offences Court and also submitted the report on the same incident to the Split State Attorney’s Office, which resulted in the applicant being prosecuted twice.

31. Furthermore, it is to be noted that in her constitutional complaint the applicant clearly complained

of a violation of the *non bis in idem* principle. However, the Constitutional Court expressly held that double prosecution for the same offence was possible under the Croatian legal system. In these circumstances, the Court finds that the domestic authorities permitted the duplication of criminal proceedings in the full knowledge of the applicant's previous conviction for the same offence.

32. The Court finds that the applicant was prosecuted and tried for a second time for an offence of which she had already been convicted. There has accordingly been a violation of Article 4 of Protocol No. 7.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

33. 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

34. The applicant claimed 2,000 euros (EUR) in respect of non-pecuniary damage.

35. The Government deemed the request unfounded and excessive.

36. The Court accepts that the applicant must have suffered some non-pecuniary damage in connection with being punished twice in respect of the same offence. In view of the circumstances of the present case and ruling on an equitable basis, the Court awards the applicant EUR 1,000 in respect of non-pecuniary damage, plus any tax that may be chargeable to her on that amount.

B. Costs and expenses

37. The applicant also claimed EUR 1,130 for the costs she had had to pay in respect of the criminal proceedings and the constitutional proceedings before the domestic courts.

38. The Government opposed the applicant's claim for the costs incurred in the domestic proceedings.

39. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. As regards the costs the applicant had to pay in the criminal proceedings, the Court notes that it has found that her conviction in those proceedings violated the *non bis in idem* principle. Her constitutional complaint was aimed at remedying that same violation. Therefore, these domestic legal costs may be taken into account in assessing the costs claim. Having regard to the information in its possession and the above criteria, the Court awards the applicant a sum of EUR 1,130 plus any tax that may be chargeable to her on that amount.

C. Default interest

40. The Court considers it appropriate that the default interest 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 4 of Protocol No. 7 to the Convention;

3. *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 1,000 (one thousand euros), plus any tax that may be chargeable to the applicant, in respect of non-pecuniary damage;

(ii) EUR 1,130 (one thousand one hundred thirty 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;

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

Done in English, and notified in writing on 18 October 2011 Rule 77 §§ 2 and 3 of the Rules of Court.

Søren Nielsen Anatoly Kovler
Registrar President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the separate opinion of Judge Sicilianos is annexed to this judgment.

A.K.
S.N.

CONCURRING OPINION OF JUDGE SICILIANOS

(Translation)

The present judgment refers, in particular, to the *ne bis in idem* principle enshrined in Article 4 of Protocol No. 7 to the Convention, and finds a violation of that provision. I am in full agreement with the operative provisions of the judgment and with most of the reasoning. However, there is one paragraph – which, moreover, serves little purpose in my view in terms of the reasoning of the judgment – which leaves me perplexed. Paragraph 29 states as follows: "The Court reiterates that Article 4 of Protocol No. 7 does not necessarily extend to all proceedings instituted in respect of the same offence (see *Falkner* ***v****. Austria* (dec.), no. 6072/02, 30 September 2004). Its object and purpose imply that, in the absence of any damage proved by the applicant, only new proceedings brought in the knowledge that the defendant has already been tried in the previous proceedings would violate this provision". It is true that this passage is not new but has featured in previous judgments and decisions (see, in particular, *Zigarella v. Italy* (dec.), no. 48154/99, 3 October 2002, and *Maresti* ***v****.* ***Croatia***, no. 55759/0725, 25 June 2009, § 66). Nevertheless, the Grand Chamber judgment in *Sergey Zolotukhin v. Russia* (no. 14939/03, 10 February 2009), which is now seen as the *locus classicus* as regards interpretation of the *ne bis in idem* principle, contains no assertion of this kind but affords much greater protection to the individual.

The above-mentioned Grand Chamber judgment was, quite rightly, hailed by legal commentators (see, for instance, H. Mock, 'Ne bis in idem: *Strasbourg tranche en faveur de l'identité des faits. Cour européenne des droits de l'homme (Grande Chambre), Zolotoukhine c. Russie, 10 février 2009*', in the *Revue trimestrielle des droits de l'homme,* 2009, pp. 867-881) as bringing to an end years of uncertainty as to the precise scope and content of the *ne bis in idem* principle, from which no derogation is permitted. Indeed, the third paragraph of Article 4 of Protocol No. 7 to the Convention states as follows: "No derogation from this Article shall be made under Article 15 of the Convention". In other words, in view of its crucial importance in a State governed by the rule of law, the *ne bis in idem* principle features among the select group of norms which are non-derogable and even form an imperative part of the normative structure of the Convention and the Protocols thereto.

It is true that the second paragraph of Article 4 introduces two limitations to the *ne bis in idem* principle. A further limitation arises from the first paragraph, concerning the territorial scope of the principle, which applies only to the courts of the State concerned and is not binding on those of another State. Nevertheless, all the limitations in question form part of the rule itself as they are expressly articulated by it. As defined in the first and second paragraphs of Article 4 of Protocol No. 7, the *ne bis in idem* principle may not be derogated from in any circumstances, not even in times of crisis. Any other exception, limitation, restriction or derogation, irrespective of its nature, which is not provided for by Article 4 itself is incompatible with the imperative nature of the principle recognised by that provision.

However, paragraph 29 of this judgment appears to view the scope of the *ne bis in idem* principle in strangely relative terms. The passage in question accepts that the principle is not violated even if a new set of criminal proceedings is brought, provided that two apparently cumulative conditions are met: (1) the new set of proceedings does not cause any damage to the applicant and (2) the competent authorities were not aware that the person concerned had been finally acquitted or convicted. Quite apart from the fact that no such exception can be derived from the letter or even the spirit of Article 4 of Protocol No. 7, the conditions outlined above create significant potential for abuse which is liable to undermine the *ne bis in idem* principle.

It is not clear how bringing a new set of criminal proceedings could be said not to cause damage. In my view the setting in motion of such proceedings, in whatever manner, would *ipso facto* occasion non-pecuniary damage to the person finally acquitted or convicted of the same offence, to say nothing of other negative consequences for him or her. As observed by the Grand Chamber, "the Court reiterates that Article 4 of Protocol No. 7 is not confined to the right not to be punished twice but extends to the

right not to be prosecuted or tried twice (see *Franz Fischer* [*v. Austria*, no. 37950/97, 29 May 2001] § 29). Were this not the case, it would not have been necessary to add the word 'punished' to the word 'tried' since this would be mere duplication. Article 4 of Protocol No. 7 applies even where the individual has merely been prosecuted in proceedings that have not resulted in a conviction. The Court reiterates that Article 4 of Protocol No. 7 contains three distinct guarantees and provides that no one shall be (i) liable to be tried, (ii) tried or (iii) punished for the same offence (see *Nikitin*, cited above, § 36)" (*Sergey Zolotukhin*, cited above, § 110).

Furthermore, it would be equally dangerous to introduce here the notion of the good faith of the competent authorities, as the second condition laid down by paragraph 29 of the judgment, referred to above, appears to do. It seems obvious that each time new proceedings were brought for the same offence, the competent authorities could claim to have had no knowledge and to have therefore acted in good faith, with all the practical implications that this entails, not least as regards the burden of proof and the degree of compensation afforded to the person concerned. In *Zolotukhin*, the Grand Chamber was much stricter on this point, stating as follows: "The Court therefore accepts that in cases where the domestic authorities institute two sets of proceedings but later acknowledge a violation of the *non bis in idem* principle and offer appropriate redress by way, for instance, of terminating or annulling the second set of proceedings and effacing its effects, the Court may regard the applicant as having lost his status as a 'victim'. Were it otherwise it would be impossible for the national authorities to remedy alleged violations of Article 4 of Protocol No. 7 at the domestic level and the concept of subsidiarity would lose much of its usefulness" (see *Sergey Zolotukhin*, cited above, § 115). In other words, the Grand Chamber does not simply accept that the national authorities lacked knowledge, but lays down very stringent and objectively measurable requirements – in the form of acknowledging the violation and affording redress for it, more specifically by terminating or annulling the second set of proceedings and effacing its effects – in order for the applicant no longer to be considered as a victim. Hence, as I see it, paragraph 29 of the present judgment departs significantly from the interpretation of the *ne bis in idem* principle derived in particular from the passages of the Grand Chamber judgment in *Sergey Zolotukhin* cited above.

Leaving aside the fact that the paragraph of the present judgment cited above is incompatible, in my view, with Article 4 of Protocol No. 7 as interpreted and applied by the Grand Chamber in *Sergey Zolotukhin*, it runs counter to the international trend as regards regulation of the *ne bis in idem* principle. We are aware that, as far back as 1990, Article 54 of the Convention implementing the Schengen Agreement extended the territorial scope of the principle in question to all the Contracting Parties. The Charter of Fundamental Rights of the European Union echoed this idea by extending the scope of the principle to all 27 Member States of the Union. Article 50 of the Charter states as follows: "No one shall be liable to be tried or punished again in criminal proceedings for an offence for which he or she has already been finally acquitted or convicted *within the Union* in accordance with the law" (my italics). It is true that the territorial scope of the *ne bis in idem* principle is a different issue from that under consideration here. Nevertheless, the gradual broadening of the scope of the principle represents a move towards strengthening and consolidating it at international level, whereas paragraph 29 of the present judgment tends in the direction of a relative approach to, and hence a weakening of, that principle.

TOMASOVIĆ v. CROATIA JUDGMENT

TOMASOVIĆ v. CROATIA JUDGMENT – SEPARATE OPINION