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PROMOTING THE REFORM OF PRE-TRIAL DETENTION IN CEU-FSU COUNTRIES – INTRODUCING GOOD PRACTICES

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Promoting the Reform of Pre-Trial Detention in CEU-FSU Countries – Introducing Good Practices

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Introduction

Excessive resort to pre-trial detention (PTD) continues to be a serious problem throughout the Central Eastern Europe and the former Soviet Union (CEE-FSU) region and the practice of PTD in most countries of the region seems to be contrary to the standards and case law of the European Court of Human Rights (ECtHR) and other international standards on the realisation and protection of human rights of persons deprived of liberty. The Republic of Serbia can without doubt be categorised as one of these countries. The specific atmosphere that prevails in it gives rise to an erroneous understanding of the very purpose of PTD. Namely, PTD, which is defined as an exceptional measure ordered to ensure the presence of the defendant and the unhindered conduct of criminal proceedings, is perceived and implemented as punishment in Serbia. This conclusion can be inferred from a series of indicators, including media reports, the majority public opinion, statements by leading political figures, as well as from judicial practices, the work of defence counsels (lawyers), and, notably, from the way people in PTD are treated.

Although the existing legislative framework envisages a number of alternative measures that can achieve the goal – unhindered conduct of criminal proceedings – just as efficiently whilst incurring less damage to the defendants, their enforcement is minimal. Furthermore, data published every once in a while indicate that the number of days people in Serbia have spent wrongfully in PTD is exceptionally high; estimates are that the courts every year order over 20,000 days or 54 years of wrongful PTD. Setting aside the financial effects of this practice for the moment, which are often publicly used as the key reason for initiating changes in this field, it needs to be underlined that both the general and expert public in Serbia lacks sensitivity towards measures limiting human rights and towards persons those measures are enforced against. As the Hungarian Helsinki Committee (HHC) correctly emphasised, the socio-economic impact of excessive PTD is profound, affecting not just the individuals detained, but their families, communities, and even states as well.

All of the above prompted the HHC in December 2011 to launch the project "Promoting the Reform of Pre-Trial Detention in CEU-FSU Countries – Introducing Good Practices" with the financial and professional aid of the Open Society Foundations (OSF). This project aims at identifying problems in terms of legislation and practice regarding PTD common to all or most countries in the region and at promoting more extensive application of measures alternative to

detention and strengthening the capacities of the non-government organisations taking part in the project.

In the first stage of the project, the HHC designed a uniform questionnaire the local NGOs in 17 CEE-FSU countries used in order to collect information on the laws and practices regarding PTD and alternatives to PTD. Based on the information collected through the questionnaire, the HHC endeavoured to identify the common features and shortcomings in the laws and practices of the countries covered by the research.

The research results are presented in a Study describing in detail the PTD legislation and practices in all 17 countries. The Study outlines data regarding: living conditions in PTD wards, rights of detainees, status of vulnerable groups in PTD, grounds for ordering detention, duration of detention, *ex officio* reviews of PTD, appeals of PTD orders and statistical data obtained during the research.[1] The Study, as well as the problems the NGOs faced while collecting the information, were analysed and discussed in detail at a three-day workshop in Budapest in December 2012, which was attended by the representatives of the involved NGOs, the OSF experts and British experts specialising in the research topics. The following three key issues were identified after the three-day debate and exchange of opinions and experiences:

- lack of judicial transparency with respect to data on PTD and alternatives to PTD
- lack of judicial awareness of international standards and their insufficient application;
- inappropriate judicial attitudes towards PTD and alternatives to PTD and towards persons ordered into detention.

These problems served as a starting point for developing local initiatives to be implemented by the local NGOs in their respective countries.

As it embarked on collecting data on PTD and alternatives to PTD, the BCHR team realised that there were no single nationwide records of PTD practices. The Ministry of Justice and State Administration, the central authority charged with judicial administration, does not keep records of either the use of the PTD measure or of other measures alternative to PTD.

The BCHR thus initiated a project entitled "Judicial Transparency – Starting Point for Addressing Overcrowding in Penitentiaries" involving monitoring visits and desk research in order to examine the possibilities and capacities of Serbian Basic and Higher Courts to keep records of the use of

1 The Study is available on HHC's website: http://helsinki.hu/en/promoting-the-reform-of-pre-trial-detention-in-cee-fsu-countries-%E2%80%93-introducing-good-practices-2011-2013

measures for ensuring the presence of the defendants at trials and the unhindered conduct of criminal proceedings. Furthermore, departing from the findings in the HHC analysis, the BCHR used its visits to the Serbian Basic and Higher Courts to establish the judges' attitudes towards PTD and the extent in which they were guided by and applied international standards related to PTD and alternatives to PTD. The BCHR simultaneously endeavoured to establish whether the judges were familiar with international standards on the status and treatment of detainees.

During the implementation of the project, the BCHR team visited the Basic and Higher Courts in Belgrade, Pančevo, Novi Sad, Subotica, Kragujevac, Kraljevo, Niš and Vranje and met with the representatives of the Ministry of Justice and State Administration and the Attorney General's Office. The BCHR team also submitted requests for access to information of public importance with a view to obtaining various data on PTD practices and records and how the courts monitored the enforcement of the detention measures. It also used the data the BCHR had obtained during the implementation of the project "Reducing Overcrowding in Serbian Prisons through Monitoring, Public Advocacy and Sharing Best Practices"[2] and its years-long work in the Serbian penal system.

This publication was developed on the basis of all the research and aims at presenting its results and findings. The Serbian version of the publication also presents the international standards of relevance to judges and prosecutors in particular, as well as to the judicial administration staff in general. The publication is comprised of three parts and is accompanied by a short educational-informative film.

Part I of the publication focuses on the transparency of judicial authorities, above all the courts, Part II on the use of PTD and alternatives to PTD and Part III on the status and treatment of detainees. The Commissioner for Information of Public Importance and Personal Data Protection Rodoljub Šabić, European Court of Human Rights (ECtHR) judge Dragoljub Popović, Supreme Court of Cassation judge Radmila Dičić Dragičević, lawyer and former member of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) Ivan Janković, Deputy Protector of Citizens charged with persons deprived of liberty Miloš Janković and Tadej Kurepa, a political scientist and former detainee, feature in the film.

The entire project and the publication of this document have been financially and professionally supported by the Open Society Foundations via the Hungarian Helsinki Committee. The BCHR bears sole responsibility for

2 More on this project is available at www.bgcentar.org.rs. available on Serbian: http://www.bgcentar.org.rs/smanjenje-prenaseljenosti-u-zatvorima-u-srbiji-kroz-monitoring-javno-zagovaranje-i-razmenu-najboljih-praksi/#more-398

the content of the publication and the views expressed in it cannot be taken as representing the positions of the Open Society Foundations or the Hungarian Helsinki Committee.

The BCHR owes its gratitude to the Basic and Higher Courts, the representatives of which facilitated its monitoring visits, and the Ministry of Justice and State Administration, which provided all the required information at its disposal for the research. We are equally grateful to the Offices of the Protector of Citizens and Commissioner for Information of Public Importance and Personal Data Protection, which supported this project; the main characters in our film and its producer Marko Petrešević; Jovana Zorić and Nevena Dičić Kostić for their participation in the research; Darko Jojić and Tamara Protić Milutinović for their logistic support; and Mr. Martin Schoenteich for his professional and constructive advice during the design of the project activities.

Methodology

As mentioned above, the research part of the project involved monitoring visits to Basic and Higher Courts and meetings with the Ministry of Justice and State Administration and the Attorney General's Office. It was also based on information obtained in response to requests for access to information of public importance, the data the BCHR obtained during the implementation of its project "Reducing Overcrowding in Serbian Prisons through Monitoring, Public Advocacy and Sharing Best Practices" and its years-long work in Serbian penal institutions. BCHR's activities were facilitated by the knowledge and relevant information it already possessed about the situation in the PTD wards in the penitentiaries, given its active and continuous presence in Serbia's penal system since 2009.

1. Visits to Basic and Higher Courts included meetings with one or more representatives of Criminal Department judges (preferably, the chairmen of the Criminal Departments) and the Court Secretaries, who are charged with all the administrative and technical court issues. The BCHR team in some courts had the opportunity to see what records they kept and how. Due to time constraints and the large number of courts, the BCHR decided to visit the courts in the following cities: Belgrade, Novi Sad, Subotica, Pančevo, Kragujevac, Kraljevo, Niš and Vranje. It selected the cities by applying the following criteria: equal geographic representation, that they had both Basic and Higher Courts and the number of criminal cases in the courts' dockets.

2. Interviews with judges were prepared before the visits to courts took place. The BCHR team collected in advance all the information it could in order to concentrate on specific issues and not waste the judges' time. The judges were first asked to comment their court's practice regarding PTD and alternatives to PTD; to provide data on the number of people against whom criminal proceedings had been instituted and ordered into PTD, the number of bails granted and the number of house arrests and orders banning the individuals from leaving their temporary or permanent places of residence. Some of the courts we visited had been unable to provide us with data on the number of PTD orders and measures alternative to PTD and we used our visits to ask our interlocutors to explain why. We also asked our interlocutors to tell us about the difficulties and obstacles they encountered when ordering a measure to ensure the presence of the defendants. Furthermore, we used the interviews to establish whether the judges were aware of and consulted during the drafting of the new

legislation, such as the new Criminal Procedure Code, the Draft Penal Sanctions Enforcement Act and the draft Probation Act. We were interested also in finding out how familiar they were with the Strategy to Reduce Overcrowding in Penal Institutions in the Republic of Serbia in the 2010-2015 Period and the Action Plan for the Implementation of the Strategy.

Another topic we raised during our visits regarded the tours of PTD wards by representatives of Higher Courts – under the law, the Higher Court Presidents or judges they designate were under the obligation to pay weekly visits to PTD wards in the territorial jurisdiction of their courts. Like the first part of the interview, our questions were informed by prior reports on visits by representatives of Higher Courts and their findings and the memos they had sent to the Ministry of Justice and State Administration about any shortcomings that needed to be eliminated. Data collected within earlier BCHR projects and the reports by the Protector of Citizens and National Preventive Mechanism (NPM) provided us with additional useful information. Departing from the collected data, we endeavoured to establish how familiar the judges were with the situation in the PTD wards in the penitentiaries under their jurisdiction; how often they had had the opportunity to tour the PTD wards and whether they were aware that nearly all the PTD wards were overcrowded and in a desultory state.

Given that Serbia ratified the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), we took the opportunity during our visits to the courts to establish to what extent the judges applied ECtHR case law standards, especially on Articles 3 and 5 of the ECHR. We were also interested in finding out how familiar they were with the case law, reports and standards of the European Committee for the Prevention of Torture (CPT), the case law of the Republic of Serbia Constitutional Court and the reports of the Protector of Citizens and the NPM.

3. Meetings with Representatives of the Ministry of Justice and State Administration and the Attorney General's Office – the purpose of these meetings was to establish how the procedure for awarding damages to persons who had been wrongfully detained was conducted; the total amount of money paid as compensation for damages to wrongfully detained persons in the 2005-2013 period; the number of cases in which such people reached a settlement with the Ministry of Justice and State Administration Damage Claims Commission; how many civil proceedings for compensation of damages had been initiated by claimants who had not reached a settlement with the Commission; which criteria the Commission was guided by when setting the amount of compensation and which criteria were applied by the courts hearing the civil damage cases.

I. Right of Access to Information of Public Importance

The right of access to information of public importance will in this analysis be viewed as a key element of the transparency of a public authority. The freedom of information includes the right of access to information, that is, to receive and impart information and forms part of the right to freedom of expression.[3]

The quality and user-friendliness of information are important aspects to consider with respect to the transparency of public authorities and access to information. Providing access to information does not necessarily mean that the purpose for which it has been sought has been fulfilled and that the published information conveys the message and properly informs the public. Information must be provided in a form and way understandable to the man in the street. Hence, the way information is presented and the mechanisms used in the process, not only its availability, are also important factors, which raise the issue of the complexity of information management.

Public authorities are under the obligation to process and store data in their possession in a manner ensuring the clarity of the situation in the field the data concern. By introducing an adequate record-keeping system, a public authority will be able to assess its own work results, identify problems and good practice examples more easily, which it can then share with and recommend to other relevant authorities. Poor record-keeping results in a chaotic situation in which a public authority is unable to objectively present its work results; sometimes, one even gains the impression that some authorities are themselves unaware of the state of affairs in the field they are in charge of. The way in which records of data are kept is an important segment of transparency of a public authority.

1. Judicial Transparency in the Republic of Serbia – Legal Framework

The right to be informed is one of the fundamental human rights enshrined in the Constitution of the Republic of Serbia[4]. The Constitution sets out that

3 ECtHR's judgment in the case of *Youth Initiative for Human Rights v. Serbia*, of 25 June 2013, App. No. 48135/06.

4 *Sl. glasnik RS*, 98/06.

everyone shall have the right to be informed accurately, fully and timely about issues of public importance and that the media shall be obliged to respect this right.[5] Therefore, judicial transparency cannot be perceived merely as the transparency of the decisions it renders on specific legal matters – in trials; this transparency also entails that everyone shall be entitled to access information about how the judicial system or any part of it operates.

The Ministry of Justice and State Administration is the central judicial administration authority. Under Article 10 of the Act on Ministries, it shall *keep statistical data on and analyse the performance of the judicial authorities*. Furthermore, the Court Rules of Procedure[6] comprise a number of provisions governing the operations of the court administration, including provisions on *keeping court statistics*. The Court Rules of Procedure govern the internal organisation and operation of courts in the Republic of Serbia, which are separated from adjudication and comprise the managerial, administrative, technical, professional, information-related, financial and other affairs of relevance to the judicial branch.[7] Compliance with the Court Rules of Procedure shall be monitored by the ministry charged with judicial affairs.

Under Article 139 of the Court Rules of Procedure, courts shall use information and communication technologies (ICT) for text processing, managing all forms of records (registers, subsidiary books, et al), for processing and collecting statistical data, electronic data exchange, etc.

Electronic management of court records was introduced in 2010 when the Case Management System (CMS) was launched. This form of technical support has facilitated court operations and public access to case law in a uniform manner. All Basic and Higher Courts use the CMS, tailored to their specific needs and jurisdictions.[8] All registers and subsidiary books are now kept in electronic format and the general public can monitor the progress of cases on the Courts Portal.[9] It, however, needs to be noted that the Court Rules of Procedure still envisage the keeping of PTD hard-copy control books in each stage of the criminal proceedings – of persons ordered into detention during the preliminary proceedings, the investigation stage and upon indictment – and a control book on other measures to ensure the presence of the defendants and the unhindered conduct of criminal proceedings.[10]

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5 Article 51(1), Constitution of the Republic of Serbia.

6 *Sl. glasnik RS*, 110/09, 70/11 and 19/12.

7 Article 2(1), Court Rules of Procedure.

8 BCHR Report Protection of Human Rights Before Serbian Courts, available in Serbian at:. http://www.bgcentar.org.rs/konsultativni-proces-izrada-preporuka-za-vodjenje-jedinstvene-sudske-statistike/

9 The Portal is accessible at http://tpson.portal.sud.rs/libra_portal_full/default.cfm.

10 Article 328, Court Rules of Procedure.

Under Article 51(2) of the Constitution of the Republic of Serbia, "[E]veryone shall have the right to access information kept by state authorities and organisations vested with public powers in accordance with the law."

A request for access to information of public importance, an institute introduced and regulated by the Free Access to Information of Public Importance Act[11], is one of the most efficient instruments available to non-government organisations (NGOs) and, as it were, a good test of an authority's compliance with Article 51(2) of the Constitution.

Under Article 2 of this Act:

> "1. In terms of this Act, information of public importance shall denote information held by a public authority, created during the work or related to the work of the public authority, contained in a specific document, and related to everything that the public has a justified interest to know. Information shall be considered information of public importance regardless of whether the source of information is a public authority or another person; of the information medium (paper, tape, film, electronic media, et al) containing the document with the information; of the date the information was created, of the manner in which it was obtained or of another feature of the information.
>
> 2. Everyone shall have the right to access information of public importance by being allowed insight in a document containing information of public importance, the right to a copy of that document, and the right to receive a copy of the document upon request, by mail, fax, electronic mail, or in another way."

The rights enshrined in this law may be exceptionally subjected to restrictions set out in Article 9-14 of the Act if necessary in a democratic society in order to prevent a serious violation of an overriding interest based on the Constitution or the law. Under Article 16 of the Act:

> "A public authority shall without delay and within 15 days from receipt of the request at the latest inform the applicant whether it holds the requested information, allow insight in the document containing the requested information i.e. issue or send out to the applicant a copy of the document. The copy of the document shall be deemed sent out on the day it leaves the office of the public authority from which the information was requested. [...] If a public authority is for a justified reason unable to inform the applicant within the deadline in paragraph 1 of this Article that it holds the information, to allow him/her insight in the document containing the sought information, to issue i.e. send him/her a copy of the document, the public authority shall promptly inform the applicant thereof and set another deadline that may not exceed 40 days from receipt of the request, within which it shall inform the applicant that it holds the information, allow him/her insight in the document containing the sought information,

11 *Sl. glasnik RS*, 120/04, 54/07, 104/09 and 36/10.

issue i.e. send the applicant a copy of the document.[...] The applicant shall be allowed insight in a document containing the requested information on the public authority's official premises."

2. Judicial Transparency in Serbia in Practice

2.1. Data on Measures to Ensure the Presence of Defendants and Unhindered Conduct of Criminal Proceedings

Guided by the Act on Ministries[12] and with a view to filling the HHC questionnaire, BCHR's associates submitted a request to the Ministry of Justice and State Administration for statistical data on the use of PTD and alternatives to PTD. The Ministry replied that it was unable to provide us with the information we asked for because it did not order these measures.[13] The argument the Ministry gave for its failure to provide the information – that "this public authority does not order the above-mentioned measures" – remains unclear. On 29 July 2010, the Government of the Republic of Serbia adopted the Strategy to Reduce Overcrowding in Penal Institutions in the Republic of Serbia in the 2010-2015 Period and the Action Plan for the Implementation of the Strategy, which lists greater enforcement of alternatives to PDT as one of the measures to reduce overcrowding in PTD wards. It would have been natural to assume that the ministry charged with the judiciary monitors the implementation of the Action Plan measures regarding the work of judicial bodies – courts and prosecution offices.

Having realised that the Ministry of Justice and State Administration did not possess the required data, the BCHR proceeded to send requests for access to information of public importance to all the Basic and Higher Courts in the Republic of Serbia asking them for the following information for the 1 January 2010-31 December 2012 period:

- total number of people against whom criminal proceedings had been initiated;
- total number of people ordered into PTD;
- total number of people placed under house arrest or prohibited from leaving their places of residence; and
- total number of people granted bail.

12 Article 10.

13 Reply to the Request for Access to Information of Public Importance No. 7-00-104/12-42, of 18 October 2012.

Not all the courts replied to the requests; 22 of the 25 Higher Courts[14] and 28 of the 33 Basic Courts did[15]. The courts' replies varied to such an extent that BCHR concluded that the courts' records were not aligned or that they did not apply the identical record-keeping procedure. Some courts have precise records of the number of people against whom criminal proceedings had been launched and of the number of people ordered into PTD, while others provided information on the number of people against whom criminal proceedings had been launched and on the total number of PTD cases, but not on the number of people ordered into PTD.[16] Some courts provided data on the number of people ordered into PTD and the total number of initiated criminal proceedings, but not on how many people criminal proceedings had been instituted against.[17] Unfortunately a number of courts, albeit a small one, were unable to forward us any of the data we requested.

BCHR realised that the Basic Courts' records of the number of people against whom criminal proceedings had been instituted were not fully updated: of the 28 courts that replied to our requests, 12 failed to provide the information on this issue; 26 Basic Courts replied to the question on the number of people ordered into PTD, but the Sombor and Požarevac Basic Courts only specified the total number of PTD cases (see Table I).

The Paraćin Basic Court, for example, provided us with information about the total number of criminal proceedings initiated in the given period and the total number of defendants against whom criminal proceedings had been instituted. This Court's reply clearly indicated that it was possible to distinguish between the total number of proceedings and the total number of defendants they regard.

Seven of the Higher Courts that had responded to our requests were unable to provide us with information on the number of criminal proceedings launched in the given period, while six of them failed to provide us with data on the number of persons ordered into PTD; five of them failed to reply to either of the two questions. One of them was the Kragujevac Higher Court, which, said that our request required extensive work and that it would have to peruse each individual case file to provide us with the data (See Table II).

The replies we received indicated that the Courts keep much better records of alternatives to PTD – bail, house arrest and the ban on leaving one's place of residence. Only five of the courts that had replied to our requests had failed to

14 The Vranje, Jagodina and Zaječar Higher Courts.

15 The Jagodina, Negotin, Šabac, Sremska Mitrovica and Leskovac Basic Courts.

16 One PTD case can refer to more than one person ordered into PTD.

17 A criminal proceeding may be conducted against more than one defendant.

provide us with information on these measures: the Higher Court in Kragujevac and the Basic Courts in Sombor, Subotica, Požarevac and Prokuplje. Herewith a brief review of their explanations of why they were unable to reply to this specific question:

- The Kragujevac Higher Court, which did not answer any questions we had asked in our request, qualified the request as requiring too much work because it would have to peruse each individual case file to provide us with the data.
- The Sombor Basic Court clearly stated that "no separate records are kept" of alternatives to PTD.
- The Subotica Basic Court did not provide us with data on house arrest and on the ban on leaving one's place of residence because it did not keep separate records of those measures.
- The Požarevac Basic Court replied that the CMS did not allow them to extract the data with reliability, and that they would have to go through every single case file to extract the requested data.
- The Prokuplje Basic Court's reply was similar: it underlined that it would need to peruse every single case file to provide us with answers to our questions.

BCHR's team had not been fully aware of the possibilities offered by the CMS or had the opportunity to familiarise itself with the court record-keeping methodology until it visited the courts. We could only draw inferences from the diverse replies we had been receiving from courts, which we had been asking the same questions for years. We thus also interviewed the Court Secretaries during our visits to the Courts and, whenever possible, the Criminal Department Registrars, to clarify the procedure(s) and understand the reasons underlying the current practices.

During our visits to the Vranje Basic Court and the Belgrade Second Basic Court, we had the opportunity to see for ourselves what options the CMS offered and discuss with the Court Secretaries and Registrars how their courts kept records. The information we received led us to conclude that the CMS provides the users with the possibility of establishing exactly how many PTD and alternatives to PTD have been ordered. The "Data and Codes" category includes the subcategory "PTD Book" regarding all PTD cases. It allows easy access to the following data: a) how many people were ordered into PTD; b) the duration of their PTD (dates when the order to place them in PTD and when the decision to release them were issued), and; c) how many times PTD was extended and when.

Furthermore, the "Reports" category includes the following subcategories: "Active PTD" and "PTD Cases", which allow the users to establish how many people are currently in PTD and how many people had been ordered into PTD since 2010, when the CMS was launched. As far as other measures for ensuring the presence of individuals and unhindered conduct of criminal proceedings are concerned, the "Reports" category also includes the subcategory "Reports by Set Criteria" in which data on nearly all procedural decisions taken during criminal proceedings can be entered (e.g. summons and apprehension orders, rulings discontinuing investigation, decisions to dismiss the charges, et al). The courts can also enter in this subcategory data on rulings granting bail, placing individuals under house arrest or prohibiting them from leaving their place of residence.

The Registrar of the Belgrade Second Basic Court alerted us to the importance of regularly updating the information on pending criminal cases i.e. of entering in the CMS all the procedural decisions taken during each proceeding (e.g. to exclude the public from the main hearing). If such information is not entered regularly, it is impossible to establish the precise number of times the court rendered a specific decision by searching "Reports under Set Criteria".

2.2. Data on Wrongful PTD

A number of officials have publicly spoken about the excessive use of PTD and the large amounts of money the state has been paying people to compensate them for wrongful detention. However, no public authority has ever published precise data about how many people have been wrongfully detained and for how long or the amount of compensation they have been paid for damages. The previous research of these issues was conducted and published by the Centre for Peace and Development of Democracy in 2008.[18]

Individuals who had been wrongfully detained are entitled to compensation of the damages they suffered. They are entitled to file a claim with the Damage Claims Commission of the Ministry of Justice and State Administration, which is under the duty to try and reach a settlement with the claimants. If it does not, the claimants may file a civil claim against the state of Serbia, which is represented by the General Attorney's Office.

In response to BCHR's request, the Ministry of Justice and State Administration provided it with all the data on the settlements the Damage Claims Commission had reached with wrongfully detained persons in the 1 January 2005 – 1 October 2013 period. These data are a useful follow-up to the ones the Centre for Peace and Democracy obtained in its research.

18 N. Mrvić-Petrović, Z. Petrović, *Naknada štete zbog neosnovanog lišenja slobode ili neosnovane osude (*Compensation of Damages for Wrongful Deprivation of Liberty or Conviction), Centre for Peace and Development of Democracy, Belgrade 2008.

Wrongfully detained individuals, who fail to reach a settlement with the Commission, are entitled to sue the Republic of Serbia, which is represented by the Attorney General's office, the authority charged with legally protecting Serbia's property rights and interests.[19] Given the difficulties the BCHR team had in collecting data from each and the time constraints, the BCHR sought a meeting with the Attorney General's Office to establish how many final judgments had been rendered in the lawsuits against Serbia in the 2005-2013 period. The BCHR team suggested that it sign a confidentiality agreement and itself peruse the Office archives and determine the amount of the compensation awarded to wrongfully detained persons in Belgrade. The Office rejected the request, explaining that, given the volume of the data BCHR wanted to access, it was unable to allow BCHR researchers access to its archives because their presence would "disrupt the work of the staff and their regular performance of duties, which is extensive, complex and has to be completed by specific deadlines; exceeding these deadlines would have unforeseeable consequences on the protection of the property interests of the Republic of Serbia".[20]

Not only has the Office thus deprived the public of its right to be informed about how much money is paid out of the Serbian state budget to remedy to mistakes of the judiciary. It has also deprived the public of the right to know that the current practice involves large-scale violations of one of the fundamental human rights – the right to liberty.

2.3. Situation Assessment

Several conclusions can be drawn from all of the above. First, the courts that had failed to forward the data on PTD and alternatives to PTD are apparently not making the most of the CMS, which allows them to keep detailed records of PTD and alternatives to PTD, including the duration of those measures. It remains unclear why they do not keep the hard-copy control books as prescribed by the Court Rules of Procedure. And, last but not the least, the Attorney General's Office rejection of our request to peruse its archives because we might disrupt its work and cause damage to Serbia's property interests is a concerning one and brings into question the transparency of this authority, which is under the duty to provide public access to all data of public interest, which the effects of the current PTD practice definitely are.

The fact that the CMS facilitates perusal of court statistics does not justify the failure of the judicial authorities to collect, collate and publish the data periodically (on a yearly or a quarterly basis). Improving the situation in any field requires the existence of updated and user-friendly data which can bring to light

19 Act on the Attorney General's Office, Article 1, *Sl. glasnik RS*, 43/91.

20 Reply by the Attorney General's Office Ref No P-1366/13, of 19 November 2013.

the good and bad practices not only to the benefit of the authority they concern, but other authorities as well. Furthermore, such data can be made available to the public. Excessive resort to PTD has been a long standing problem in Serbia and it is unfortunate that the Ministry of Justice and State Administration does not have the relevant records that would enable it to monitor the situation in that area and inform the public of issues of general interest. The courts not keeping records of measures to ensure the presence of the defendants are themselves contributing to the development of the general trend, in which PTD is the primary rather than the ultimate measure, the *ultima ratio*.

II. Detention as *ultima ratio*

PTD is not mandatory under Serbia's criminal procedure law. A court *may* but does not *have to* order detention.

The relevance and weight attached to PTD is perhaps best corroborated by the fact that the Constitution of the Republic of Serbia devotes two articles to detention.

Under Article 30 of the Constitution:

1) Any person under reasonable doubt of committing a crime may be remanded to detention only upon the decision of the court, should detention be necessary to conduct criminal proceedings.
2) If the detainee has not been questioned when making a decision on detention or if the decision on holding in detention has not been carried out immediately after the pronouncement, the detainee must be brought before the competent court within 48 hours from the time of sending to detention which shall reconsider the decision on detention.
3) A written decision of the court with explanation for reasons of detention shall be delivered to the detainee not later than 12 hours after pronouncing. The court shall decide on the appeal to decision detention and deliver it to the detainee within 48 hours

Under Article 31 of the Constitution:

1) The court shall reduce the duration of detention to the shortest period possible, keeping in mind the grounds for detention. Sentencing to detention under a decision of the court of first instance shall not exceed three months during investigation, whereas higher court may extend it for another three months, in accordance with the law. If the indictment is not raised by the expiration of the said period, the detainee shall be released.
2) The court shall reduce the duration of detention after the bringing of charges to the shortest possible period, in accordance with the law.
3) Detainee shall be allowed pre-trial release as soon as grounds for remanding to detention cease to exist.

The Serbian Criminal Procedure Code sets out that the the authority conducting the proceedings shall take care not to apply a harsher measure if the same purpose can be achieved by a more lenient measure and that it shall closely monitor the situation and repeal the measure *ex officio* when the reasons for ordering it cease to exist, or replace it with a more lenient measure when the conditions for that arise.

1. Grounds for Detention

Reasonable suspicion that someone committed a crime does not suffice to place that person in PTD. PTD may be ordered only if there is evidence that the suspect may:

1) abscond
2) obstruct the proceedings (by, e.g. threatening the witnesses, destroying the evidence or exerting influence on witnesses, accomplices)
3) complete the commission of the crime or commit another crime
4) endanger public law and order

A number of judges said that PTD was ordered more frequently than other measures because of the defendants' social status, which prevented them from enforcing another measure to ensure their presence. In their view, PTD is the only option in case of individuals without a registered place of residence. Needless to say, it is unjustified to automatically place such individuals into detention just because they do not have a registered residence; a sizeable share of the population, most of whom are poor, does not have a registered residence, which does not per se indicate that they may go into hiding or abscond.[21]

Another reason BCHR heard in the Vranje Basic and Higher Courts was that many of the defendants lived in the Serbian-Macedonian border area or near the administrative crossing with Kosovo, which led the judges to believe that they were at greater risk of absconding. This view is justified provided that the judges can specify other circumstances reinforcing their belief that these people will abscond (e.g. that the defendant frequently goes to the neighbouring country). Place of residence as sole grounds for PTD per se would amount to discrimination against persons living in border areas.

Courts have often justified ordering PTD by specifying that the defendants were poor and thus likely to commit another crime. This cannot be grounds for PTD per se and such practice amounts to discrimination against the poor and the unemployed.

2. Use of Alternatives to PTD in Serbia in the 2010-2012 Period

The CPC envisages the following measures that may be ordered in lieu of PTD: restraining order (Article 197), ban on leaving one's place of permanent

21 Radmila Dragičević Dičić and Ivan Janković, *Sprečavanje i kažnjavanje mučenja i dugih oblika zlostavljanja – Priručnik za sudije i tužioce* (Prevention and Punishment of Torture and Other Forms of Ill-Treatment – Guidebook for Judges and Prosecutors), BCHR, Belgrade 2011, p. 229.

or temporary residence (Article 199), bail (Article 202) and house arrest (Article 208). The PTD and other measures reviewed in this research were ordered under the old 2001 CPC, which was in force in the period covered by the research (2010-2012). The new CPC, which came into force on 1 October 2013, introduces new alternative measures to PTD.

The following statistical overview (Table I) aims to present the judicial authorities' use of PTD and alternatives to PTD and may serve as a parameter of the efficiency of the new CPC, which regulates in greater detail the grounds for ordering house arrest and the ban on leaving one's place of residence and extends the grounds for granting bail (to include those charged with crimes carrying over 10 years' imprisonment or with violent crimes carrying over five years' imprisonment). Furthermore, under the new CPC, the court may order PTD only upon a reasoned motion of the public prosecutor. (The old CPC laid down that the court ordered PTD *ex officio*, wherefore the new CPC transfers part of the accountability from the courts to the prosecution offices)

The table at the bottom of this report with the data from courts that had replied to our requests for access to information of public importance demonstrates that PTD is by far the most popular measure the courts resort to in order to ensure the presence of the defendants. The number of PTD orders has, however, been falling from 3,592 in 2010, to 3,112 in 2011 and to 2,968 in 2012. The number of alternatives to PTD has increased in the same period. The courts prohibited the defendants from leaving their places of residence and ordered house arrest 73 times in 2010, 100 times in 2011 and 135 times in 2012. They granted bail 64 times in 2010, 80 times in 2011 and 107 times in 2012. However, it may be concluded that the mild increase in the number of alternatives to PTD was due not only to the decrease in the number of PTD orders, but to the fall in the number of criminal proceedings as well.[22]

On the other hand, there are still courts that have not ordered alternatives to PTD even once in the past few years. The BCHR team noted that the courts very rarely ordered house arrest and electronic surveillance. A criminal defendant was placed under electronic surveillance for the first time on 1 July 2012; that year, the courts ordered put 20 people under house arrest and prohibited them from leaving their places of residence.[23] The authorities are planning on adopting a new Probation Act and expanding the probationary service network, which will facilitate the enforcement of the house arrest measure with or without electronic surveillance. BCHR's interlocutors agreed that raising the capacities

22 See the Overview of the Results of Measures Undertaken in Accordance with the Government of Serbia Strategy for Reducing Overcrowding in Penal Institutions in the Republic of Serbia in the 2010-2015 Period, p. 9, available at http://www.bgcentar.org.rs/ .

23 Data obtained from the Electronic Surveillance Sector.

of the probationary service would encourage the judges and prosecutors to order alternatives to PTD more frequently.

As mentioned about, the BCHR team aimed at establishing how familiar the judges were with the Strategy for Reducing Overcrowding in Penal Institutions in the Republic of Serbia and the Action Plan for its implementation, which envisages more extensive enforcement of alternatives to PTD and indicates that this measure is to be enforced by the judges and prosecutors. The Strategy evidently has not yielded significant results in the past two years; what is even more disconcerting is that only a few of our interlocutors were familiar with the content of this document.

3. Compensation of Damages for Wrongful Detention

Everyone wrongfully deprived of liberty is entitled to compensation of material and damages.

Under Article 35 of the Serbian Constitution:

> Any person deprived of liberty, detained or convicted for a criminal offence without grounds or unlawfully shall have the right to rehabilitation and compensation of damage by the Republic of Serbia, as well as other rights stipulated by the law.
>
> Everyone shall have the right to compensation of material or non-material damage inflicted on him by unlawful or irregular work of a state body, entities exercising public powers, bodies of the autonomous province or local self-government.
>
> The law shall stipulate conditions under which the injured party may demand compensation for damage directly from the person that inflicted the damage.

Guided by this constitutional provision, the legislator defined the wrongful deprivation of liberty and laid down the procedure claiming damages for illegal detention in the CPC.

Under Article 584 of the CPC:

> A person shall be deemed wrongfully deprived of liberty in the event:
>
> 1) s/he was deprived of liberty and no proceedings were instituted, or the proceedings were terminated by a final ruling, or the charges were rejected, or the proceedings were concluded with a final judgment of rejection of acquittal;
> 2) s/ he served a prison sentence, and in connection with a request for the reopening criminal proceedings or a request for the protection of legality s/he was sentenced to a term of imprisonment of shorter duration than the one s/ he served, or s/he was sentenced to a criminal sanction that does not include the deprivation of liberty, or s/he was declared guilty but his/her penalty was remitted;

3) s/he was deprived of liberty for a period longer than the duration of the criminal sanction consisting of deprivation of liberty to which he was sentenced;

The procedure for claiming damages for wrongful deprivation of liberty (detention) consists of two parts. The first part is conducted before an administrative authority – the Damage Claims Commission within the Justice Ministry to which the injured party is to submit a claim with the aim of reaching a settlement on the existence and types of damages and amount of compensation (Article 588). In the event the Commission rejects the claim or fails to render a decision on it within three months, the injured party may seek compensation of damages by instituting civil proceedings against the Republic of Serbia (Article 589). In the event a settlement had been reached only in respect of a part of the claim, the civil action for compensation may be submitted in respect of the remainder of the claim.

The statute of limitations on the right to compensation shall expire three years from the date the first-instance judgment of rejection or acquittal or the first instance ruling terminating the proceedings or rejecting the charges becomes final, or, in the event an appellate court ruled on an appeal – from the date of receipt of the appellate court decision.

Damages may be material (actual damages or lost profits) and non-material (psychological or physical anguish or suffering caused by the deprivation of liberty). When ruling on a claim, the court takes a number of factors into consideration: loss of employment, reduced income, damage to the claimant's reputation and health, divorce, interrupted education, conditions in the PTD ward, the nature and gravity of the crime the claimant had been charged with, the claimant's age, media coverage, inability to find employment, et al.

4. Compensation of Damages for Wrongful Deprivation of Liberty in the Republic of Serbia in the 1 January 2005 – 1 October 2013 Period

One of the goals of this project was to establish the total amount of compensation paid for wrongful PTD from 2005, when Serbia's penitentiaries were officially declared overcrowded, to 1 October 2013 (when the new CPC came into force). The BCHR team initially planned to obtain the data from the existing records and in direct contact with the representatives of the Ministry of Justice and State Administration and the Attorney General's Office. However, due to time constraints, the BCHR team only managed to establish the total amount of compensation paid pursuant to the settlements between the Damage Claims Commission and the people who had been wrongfully deprived of liberty. The data it obtained show that most of the claims regarded wrongful PTD.

The following table presents the data obtained from the Ministry of Justice and State Administration:

Year	Number of claims filed for wrongful deprivation of liberty	Number of claims the Commission reviewed	Number of days of deprivation of liberty in claims reviewed by the Commission	Number of settlements	Number of days of deprivation of liberty in settled claims	Total amount of compensation paid in accordance with settlements (in RSD)
2005	876	496	/	315	17,461	48,155,980
2006	904	405	24,872	170	12,687	40,016,500
2007	698	455	26,913	206	15,930	62,127,000
2008	452	275	27,535	133	6,924	17,581,000
2009	528	237	13,499	63	2,722	7,644,000
2010	572	217	12,071	53	3,051	7,517,500
2011	574	346	22,076	50	4,149	25,061,400
2012	607	342	21,582	51	2,355	6,424,000
Until 1 October 2013	658	408	31,591	45	5,419	25,045,000
				40	6,154	22,528,000
Total	5,896	3,181	180,089	1,126	76,852	262,100,380

The following conclusions may be drawn from the above Table:

- The total amount of compensation granted by the Commission for wrongful PTD stands at 262,100,380 RSD.
- The Commission granted 3,410 RSD on average per day of wrongful PTD.
- The Commission reviewed 3,181 of the 5,896 claims but did not review 2,175 of the claims at all.
- The 3,181 claims the Commission reviewed regarded 180,089 days of wrongful deprivation of liberty; the days of wrongful deprivation of liberty is much greater if one takes into account the 2,715 claims that have not been reviewed.
- The number of days of wrongful deprivation of liberty is presumed to be much higher, given that the Commission has not reviewed as many as 2715 claims at all.
- It would, however, be reasonable to assume that quite a few of the claims that have been rejected or not reviewed do not fulfil the requirements in Articles 584 and 585, or were launched after the statutory deadlines in Article 591.
- The Commission reached settlement with 1,126 claimants; they had wrongfully spent 76,582 days in PTD.

- The 2,055 claims the Commission rejected regarded 103,237 days of PTD.
- Civil lawsuits have been instituted for compensation of damages for at least 103,237 days of wrongful deprivation of liberty.
- The average compensation granted by courts is difficult to establish. Media have reported that courts on average granted between eight and twelve thousand RSD per day of wrongful PTD.[24]

The Justice Ministry does not keep records of or possess data on the total amount of compensation courts awarded for wrongful deprivation of liberty. The Attorney General's Office refused to allow the BCHR team access to its archives to itself establish that amount.

II.5. Concluding Observations

The data obtained in this research show that the current PTD practice in Serbia has given rise to a large number of problems the national penal system has faced. Given that the penal institutions have been overcrowded since 2005 and that the living conditions in most of them, especially in the PTD wards, are desultory, such excessive use of PTD cannot be justified. The large number of wrongfully detained people, the reluctance to order alternatives to PTD, the limited capacities of the probationary service, and the amounts the state has already paid out or owes to compensate for wrongful PTD (estimated at over 10,000,000 EUR) all indicate that the current practice deviates from all international standards governing the right to freedom and security of person.

It may also be concluded that most judges are not fully aware of how the measures they so eagerly order interfere with human rights. The case law of the Constitutional Court of the Republic of Serbia does not comply fully with international standards either.

What is particularly concerning is that the legal experts and professionals do not appear worried about the situation. The implementation of the Strategy for Reducing Overcrowding in the Penal Institutions and its Action Plan has to intensify without delay, particularly in view of the increasingly frequent political statements and media announcements of arrests, investigations and trials and the likelihood that the courts will pursue their current practice of excessively ordering PTD.

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24 State Annually Paying up to Two Million Euros in Compensation for Wrongful Detention, daily Danas, 16/12/2012 available in Serbian at http://www.danas.rs/danasrs/drustvo/zbog_nezakonitih_hapsenja_drzava_placa_godisnje_i_do_dva_miliona_evra_.55.html?news_

III. Prohibition of Ill-Treatment and Status and Treatment of Detainees

Under Articles 23 and 24 of the Serbian Constitution, human dignity and physical and psychological integrity shall be inviolable. Article 25 of the Constitution states that no-one may be subjected to torture, inhuman or degrading treatment or punishment or to medical or scientific experiments without their free consent. Under Article 28 of the Constitution, persons deprived of liberty must be treated humanely and with respect to dignity of their person. This Article also prohibits all violence against persons deprived of liberty and extortion of confessions.

1. PTD and Inhuman and/or Degrading Treatment

1.1 Living Conditions in PTD Wards

Overcrowded prison and PTD wards are one of the direst problems in Serbia's penal system. The Rulebook on PTD House Rules states that every detainee must be provided with four square or eight cubic metres of living space, which is the international standard. However, it is very unlikely that any PTD wards in Serbia have attained this standard. Overcrowding is an issue the CPT finds particularly relevant. It has noted the following:

> [...]Overcrowding is an issue of direct relevance to the CPT's mandate. All the services and activities within a prison will be adversely affected if it is required to cater for more prisoners than it was designed to accommodate; the overall quality of life in the establishment will be lowered, perhaps significantly. Moreover, the level of overcrowding in a prison, or in a particular part of it, might be such as to be in itself inhuman or degrading from a physical standpoint. [...][25]
>
> [...]An overcrowded prison entails cramped and unhygienic accommodation; a constant lack of privacy (even when performing such basic tasks as using a sanitary facility); reduced out-of-cell activities, due to demand outstripping the staff and facilities available; overburdened health-care services; increased tension and hence more violence between prisoners and between prisoners and staff. This list is far from exhaustive.
>
> The CPT has been led to conclude on more than one occasion that the adverse effects of overcrowding have resulted in inhuman and degrading conditions of detention.[...][26]

25 Extract from the 2nd General Report [CPT/Inf (92) 3], paragraph 46.

26 Extract from the 7th General Report [CPT/Inf (97) 10], paragraph 13.

BCHR's associates who had visited the penitentiaries heard lots of complaints about the hygiene in the wards and had the opportunity to see for themselves the desultory state of the toilets, the mattresses the inmates slept on and how stuffy the cells and rooms were. Many inmates complained that they had contracted skin diseases due to the substandard living conditions and lack of hygiene kits the prison administrations were under the obligation to provide them with, infestation of vermin (which BCHR's associates also saw in a number of wards)[27] et al.

Furthermore, the cells in some penitentiaries, such as the Belgrade District Prison, have so many beds that the already cramped living area appears even smaller. Some have triple bunk beds; in others, four inmates share $9m^2$ cells and in others, yet, eight detainees live in $21m^2$ cells.[28] Furthermore, BCHR's associates have noticed that many of the penitentiaries lack beds and that some detainees have to sleep on mattresses laid on the floor.

Boards, panels and other objects put up on the windows for security reasons[29] are another common feature in nearly all Serbian penitentiaries, particularly in the PTD wards. These obstacles hinder ventilation and access to fresh air; coupled with overcrowding and poor hygiene, they facilitate the outbreak of skin and respiratory diseases.

> [...]The CPT frequently encounters devices, such as metal shutters, slats, or plates fitted to cell windows, which deprive prisoners of access to natural light and prevent fresh air from entering the accommodation. They are a particularly common feature of establishments holding pre-trial prisoners. The CPT fully accepts that specific security measures designed to prevent the risk of collusion and/or criminal activities may well be required in respect of certain prisoners. However, the imposition of measures of this kind should be the exception rather than the rule. This implies that the relevant authorities must examine the case of each prisoner in order to ascertain whether specific security measures are really justified in his/her case. Further, even when such measures are required, they should never involve depriving the prisoners concerned of natural light and fresh air. The latter are basic elements of life which every prisoner is entitled to enjoy; moreover, the absence of these elements generates conditions favourable to the spread of diseases and in particular tuberculosis.
>
> The CPT recognises that the delivery of decent living conditions in penitentiary establishments can be very costly and improvements are hampered in many countries by lack of funds. However, removing devices blocking the

27 See the NPM's report on its visit to the Kragujevac District Prison, available in Serbian at http://ombudsman.npm.rs/index.php?option=com_content&view=article&id=331%3A2013-08-13-09-32-08&catid=89%3A2011-10-24-12-47-48&Itemid=82&lang=sr

28 CPT Report CPT/Inf (2012) 17, paragraph 41

29 E.g. to prevent detainees from communicating with other inmates in the prison yard.

> windows of prisoner accommodation (and fitting, in those exceptional cases where this is necessary, alternative security devices of an appropriate design) should not involve considerable investment and, at the same time, would be of great benefit for all concerned. [...][30]

BCHR's associates noted such problems in many of the penitentiaries they visited, such as the Čačak District Court and the Niš Correctional Institution.[31]

Another, even more disconcerting fact is that the PTD wards in some penitentiaries do not have any windows. That is the case in some parts of the Belgrade District Prison and in all PTD wards in the Kruševac District Court. The Protector of Citizens has also alerted to this problem.[32] There are no windows in the Belgrade Special Prison Hospital (SPH), which treats inmates ordered mandatory psychiatric or drug or alcohol abuse treatment, and inmates, including detainees, who have been transferred from other penitentiaries for other medical reasons. Given that the SPH is primarily a health institution, the question arises how its patients can recover if they hospitalised in rooms without windows.

Many of the penitentiaries are damp and the premises of a large number of them are in a desultory state, which may be ascribed to the faulty out-dated installations or defective external insulation. The damp has resulted in the caving of the walls and ceilings in Pavilion II of the Niš Correctional Institution. The same happened in the Belgrade District Court and SPH, where the ceiling has fallen in a number of rooms.[33] These problems have prompted the BCHR to repeatedly recommend the closure of the Niš Pavilion II building.[34]

1.2. Absence of Meaningful Activities in PTD

None of the penitentiaries provide for meaningful activities and, in most of them, the detainees spend 23 (or more) hours a day locked up in their overcrowded cells. Under the Rulebook on PTD House Rules[35] the detainees should spend at least two hours a day in fresh air.[36] Both the BCHR and the Protector of Citizens

30 Extract from the 11th General Report [CPT/Inf (2001) 16], paragraph 30.

31 See Treatment of Persons Deprived of Liberty – Report, BCHR, 2010.

32 See The National Preventive Mechanism of Republic of Serbia 2012 Report, Protector of Citizens, Belgrade, 2012. Available at http://www.npm.lls.rs/index.php?option=com_content&view=category&layout=blog&id=6&Itemid=14.

33 See: Treatment of Persons Deprived of Liberty – Report, BCHR, 2010, and the CPT Report CPT/Inf (2012) 17, paragraph 41.

34 See "*Predlozi za unapređenje pravnog okvira i prakse u oblasti sprečavanja i kažnjavanja zlostavljanja u Srbiji*" ("Recommendations for Improving the Legislation and Practices in the Field of Preventing and Punishing Ill-Treatment in Serbia"), BCHR, Belgrade 2012, pp 34-35, available in Serbian at: http://www.bgcentar.org.rs/sprecavanje-i-kaznjavanje-torture-od-usvajanja-pravnih-standarda-do-unapredivanja-prakse/#more-188

35 *Sl. glasnik RS*, 35/99.

36 Article 28.

via the NPM have repeatedly alerted to this problem[37]. This practice is absolutely in contravention of CPT recommendations and standards:

> [...]A satisfactory programme of activities (work, education, sport, etc.) is of crucial importance for the well-being of prisoners. This holds true for all establishments, whether for sentenced prisoners or those awaiting trial. The CPT has observed that activities in many remand prisons are extremely limited. The organisation of regime activities in such establishments – which have a fairly rapid turnover of inmates – is not a straightforward matter. Clearly, there can be no question of individualised treatment programmes of the sort which might be aspired to in an establishment for sentenced prisoners. However, prisoners cannot simply be left to languish for weeks, possibly months, locked up in their cells, and this regardless of how good material conditions might be within the cells. The CPT considers that one should aim at ensuring that prisoners in remand establishments are able to spend a reasonable part of the day (8 hours or more) outside their cells, engaged in purposeful activity of a varied nature. Of course, regimes in establishments for sentenced prisoners should be even more favourable.[...][38]
>
> [...]Specific mention should be made of outdoor exercise. The requirement that prisoners be allowed at least one hour of exercise in the open air every day is widely accepted as a basic safeguard (preferably it should form part of a broader programme of activities). The CPT wishes to emphasise that *all prisoners without exception* (including those undergoing cellular confinement as a punishment) should be offered the possibility to take outdoor exercise daily. It is also axiomatic that outdoor exercise facilities should be reasonably spacious and whenever possible offer shelter from inclement weather. [...][39]
>
> [...]The CPT would add that it is particularly concerned when it finds a combination of overcrowding, poor regime activities and inadequate access to toilet/washing facilities in the same establishment. The cumulative effect of such conditions can prove extremely detrimental to prisoners..[...][40]

All of the above leads to the conclusion that the detainees, who are still to be presumed innocent and who have not been convicted of a crime by a final judgment, are incarcerated in much worse conditions and treated much worse than convicts serving their prison sentences.

3. Supervision of PTD Wards

In its meetings with judges, the BCHR team endeavoured to establish how familiar they were with the situation in the PTD wards within their courts'

37 See BCHR's Treatment of Persons Deprived of Liberty – Reports and the National Preventive Mechanism of the Republic of Serbia 2012 Report, Protector of Citizens, Belgrade 2012.

38 Extract from the 2nd General Report [CPT/Inf (92) 3]paragraf 47.

39 Extract from the 2nd General Report [CPT/Inf (92) 3],paragraf 48.

40 Extract from the 2nd General Report [CPT/Inf (92) 3]paragraf 50.

jurisdiction and the other PTD wards both personally and in general. Most of our interlocutors were aware that the wards were overcrowded and that in some of them the detainees spent over 23 hours locked up in their cells. They highlighted that they could not be guided by the fact that the conditions in PTD were poor when they were ruling on whether or not to order PTD, a view which BCHR fully supports. Some of our interlocutors, however, were unfamiliar with the conditions in PTD wards or had last visited such wards while they were still in college or more than a decade ago.

Under Article 152(1) of the 2001 CPC, which was valid until October 2013, supervision of the PTD wards was conducted by the presidents of higher courts or by the judges they designated. Such supervision consisted of weekly visits to the wards by the judges/court presidents, during which they could see for themselves what state the establishments were in and whether there were any irregularities in the status or treatment of the detainees. Judges, who identified any irregularities, were under the duty to "notify" the Ministry of Justice thereof. Although the CPC did not specify the form of such notices, it laid down that the Ministry notify the court within a fortnight of measures undertaken to eliminate the irregularities (paragraph 2). The court presidents and investigating judges were entitled to visit all the detainees, talk to them and receive their complaints at all times (paragraph 3).

Guided by these provisions, the BCHR associates sent requests for access to information of public importance to all the Higher Courts they had visited, in which they asked the following questions:

- How often did the court presidents or the judges they had designated visit the PTD wards within their courts' jurisdiction in the 1 January 2010-1 July 2013 period?
- Did they identify any irregularities warranting notification of the Ministry of Justice? (We asked them to forward us their reports and the Ministry's replies).
- How many, if any, complaints had they received from detainees regarding their status or treatment, and what specifically had they complained of?

The Higher Courts' replies lead to the conclusion that their officials had not visited the wards every week. Some courts visited the penitentiaries two or three times a year,[41] while most courts made monthly visits to the penitentiaries. What gives rise to concern that the judge of only one court, the Higher Court in Niš, identified irregularities, drafted a reports about them and sent them to the

41 Niš Higher Court's Reply SU VIII 42 26/13, 18 September 2013; Čačak Higher Court's Reply SU VIII-42-11-/13, 10 September 2013.

Ministry. This Court's reports lead to the conclusion that both the BCHR and the Protector of Citizens had properly assessed the situation in the PTD wards under its jurisdiction. The Court noted numerous problems in the PTD wards: overcrowding, damp and dilapidated cells, substandard hygiene, that detainees could spend maximum one hour in fresh air, that absence of meaningful activities, lack of electricity in the cells, worn-out mattresses, that the detainees complained about the health care they were provided, et al. Replies from all courts boiled down to general statements that no irregularities had been identified.

One cannot but wonder how the judges of the Belgrade Higher Court, who had visited the Belgrade District Prison 60 times in the 2010-2013 period, had failed to identify any irregularities regarding the status and treatment of the detainees. BCHR's associates had visited this institution a number of times in the same period and repeatedly alerted in their reports and press releases that the poor living conditions in this and other penitentiaries might amount to inhuman or degrading treatment. The Protector of Citizens and the NPM[42] visited the Belgrade District Prison as well during this period and warned of a number of shortcomings mentioned above. The CPT, too, visited this penitentiary in 2011 and described the situation in detail in its Report.[43]

In its meetings with the judges, the BCHR team also tried to ascertain how familiar they were with the work of the NGO sector, the Protector of Citizens or the NPM and concluded that, in general, the judges were unaware or partly aware of the activities of those organisations, that they had not read the NGO reports on the situation in prisons and were unfamiliar with the work or results of the NPM. The judges themselves stated that they would benefit from additional counselling and seminars on international standards.

4. Situation Assessment

Without disputing the expertise, professionalism and competences of its interlocutors during the research, the BCHR cannot but conclude that judges are generally not fully familiar with the general situation in the PTD wards and the detainees' substandard status. It drew this conclusion both from the collected data and the information it received during the meetings. The BCHR team presented the situation in practice vis-à-vis international standards in the endeavour to alert to the fact that many detainees are incarcerated in circumstances that may be considered inhuman and degrading, both under

42 See National Preventive Mechanism of the Republic of Serbia 2012 Report, Protector of Citizens, Belgrade, 2012.

43 See CPT Report - CPT/Inf (2012) 17.

ECtHR's and CPT's standards and case law, which the judges in Serbia seem to be largely unaware of. It may, therefore, be concluded that this situation may be one of the reasons for the society's attitude towards PTD in general. Many of the standards clearly specify the purpose of PTD, its effects and the conditions that have to be fulfilled to preclude inhuman and degrading treatment. The NGOs, the Protector of Citizens and the NPM, which, in 2012 alone, visited 6 PTD wards and identified irregularities in all of them, as well as the CPT, have been warning of the conditions in Serbian PTD wards for years. Therefore, additional mechanisms — such as the visits that had been organised in the ex-SFRY which some judges told us about — need to be developed to familiarise the judges with the situation in the PTD wards. The judges will thus see for themselves how people deprived of liberty live and how they are treated.

Annex

Table I

Higher Court	PTD			House Arrest and Ban on Leaving One's Place of Residence			Bail		
	2010	2011	2012	2010	2011	2012	2010	2011	2012
Kraljevo	22	38	30	3	1	2[1]	0	1	0
Pančevo	61	41	65	0	14	17	0	0	2
Subotica	81	58	55	4	6	9	0	1	2
Čačak	48	31	19	0	0	0	1	0	0
Požarevac	51	21	33	0	0	0	0	0	1
Šabac[2]	/	/	/	0	0	0	0	0	0
Pirot	23	24	21	0	3	2	0	1	1
Negotin	19	11	21	0	0	1	0	0	1
Leskovac	109	59	49	0	0	1	0	0	0
Sombor	62	53	52	0	0	2	0	0	1
Sremska Mitrovica	146	90	62	0	3	4	2	2	0
Užice	59	44	43	4	3	1	0	0	0
Kruševac	47	72	44	0	0	3	1	0	0
Smederevo	95	45	95	2	0	1	1	0	0
Prokuplje[3]	23	26	16			7			2
Novi Pazar	59	49	40	0	0	0	1	2	1
Zrenjanin[4]	/	/	/	0	0	0	0	0	0
Valjevo	27	41	21	1	1	2	0	0	2
Novi Sad	/	/	/	1	1	13	3	5	3
Beograd[5]	/	/	/	20	23	11	2	5	6
Kragujevac[6]	/	/	/	/	/	/	/	/	/
Niš	137	109	92			3			8

1 Under electronic surveillance in one case.

2 This court did not forward us data on the number of people ordered into PTD.

3 Number of alternatives to PTD were not disaggregated by year; three people were under electronic surveillance.

4 This court did not forward us data on the number of people ordered into PTD a.

5 Ibid.

6 Request dismissed as ill-founded.

Table I

Basic court	PTD			House Arrest and Ban on Leaving One's Place of Residence			Bail		
	2010	2011	2012	2010	2011	2012	2010	2011	2012
Niš	272	190	212	0	0	0	0	0	0
Novi Sad	193	232	270	0	0	0	0	0	1
Pirot	27	37	45	2	13	23	1	0	0
Požega	8	7	4	1	3	2	2	0	0
Valjevo	70	83	66	0	0	4	0	0	2
Pančevo[1]	106	83	67	0	0	0	/	/	/
Novi Pazar	236	149	199	0	0	0	2	1	1
Užice	26	24	39	2	4	15	0	0	1
Kruševac[2]	70	82	66	1	2	2	0	2	3
Kikinda	5	15	10	0	0	0	0	0	0
Prijepolje	4	9	11	0	0	0	3	1	0
Paraćin	46	65	34	0	1	2	0	0	2
Čačak	77	33	17	0	2	0	0	0	0
Zrenjanin	45	47	36	0	0	0	0	0	0
Zaječar	44	28	55		5		0	0	0
Loznica	18	20	21	0	0	1	0	0	0
Bor	26	42	40	0	0	0	0	0	0
Vršac	29	22	22	0	0	0	0	0	0
Smederevo[3]	55	61	58	0	5	2	1	0	2
II Beograd	191	163	181	3	1	0	11	20	36
I Beograd	617	452	450	5	5	1	17	25	14
Vranje	30	89	100	0	0	0	12	8	10
Kraljevo	70	114	48	8	1	3	0	4	2
Požarevac[4]									
Subotica[5]	84	109	82	/	/	/	1	0	0
Sombor									
Kragujevac	174	144	77	6	3	1	3	2	3

1 Did not forward data on bail, claiming that would require perusal of each individual case.

2 Electronic surveillance was ordered (and enforced) along with each measure under Article 136 of the 2001 CPC.

3 Ibid.

4 Does not keep records.

5 Does not keep records of house arrests and bans on leaving places of residence.

Table II

Basic Courts	Number of People against Whom Criminal Proceedings Have Been Instituted	Number of People Ordered into PTD
Belgrade First Basic Court	Submitted the information	Submitted the information
Second Belgrade Basic Court	Did not submit the information	Submitted the information
Niš	Did not submit the information	Submitted the information
Novi Sad	Did not submit the information	Submitted the information
Pirot	Submitted the information	Submitted the information
Požega	Submitted the information	Submitted the information
Valjevo	Submitted the information	Submitted the information
Pančevo	Submitted the information	Submitted the information
Prokuplje	Submitted the information	Submitted the information
Novi Pazar	Submitted the information	Submitted the information
Užice	Submitted the information	Submitted the information
Kruševac	Submitted the information	Submitted the information
Kikinda	Submitted the information	Submitted the information
Prijepolje	Submitted the information	Submitted the information
Požarevac	Did not submit the information	Did not submit the information
Čačak	Did not submit the information	Submitted the information
Zrenjanin	Submitted the information	Submitted the information
Paraćin	Submitted the information	Submitted the information
Zaječar	Submitted the information	Submitted the information
Loznica	Did not submit the information	Submitted the information
Bor	Did not submit the information	Submitted the information
Vršac	Submitted the information	Submitted the information
Subotica	Did not submit the information	Submitted the information
Smederevo	Did not submit the information	Submitted the information
Sombor	Did not submit the information	Did not submit the information
Vranje	Submitted the information	Submitted the information
Kragujevac	Did not submit the information	Submitted the information
Kraljevo	Did not submit the information	Submitted the information

Seven of the Higher Courts that responded to our requests were unable to provide us with information on the number of criminal proceedings launched in the given period, while six of them failed to provide us with data on the number of persons ordered into PTD; five of those six failed to reply to either of the two questions.

The Kragujevac Higher Court, for instance, failed to reply to either of the two questions, explaining that our request required extensive work and that it would have to peruse each individual case file to provide us with the data.

Table II

Higher Court	Number of People against Whom Criminal Proceedings Have Been Instituted	Number of People Ordered into PTD
Belgrade	Submitted the information	Did not submit the information
Niš	Submitted the information	Submitted the information
Novi Sad	Did not submit the information	Did not submit the information
Valjevo	Submitted the information	Submitted the information
Zrenjanin	Did not submit the information	Did not submit the information
Novi Pazar	Did not submit the information	Did not submit the information
Prokuplje	Did not submit the information	Submitted the information
Smederevo	Submitted the information	Submitted the information
Kruševac	Submitted the information	Submitted the information
Užice	Submitted the information	Submitted the information
Sremska Mitrovica	Submitted the information	Submitted the information
Sombor	Did not submit the information	Submitted the information
Leskovac	Submitted the information	Submitted the information
Negotin	Submitted the information	Submitted the information
Pirot	Submitted the information	Submitted the information
Požarevac	Submitted the information	Submitted the information
Čačak	Submitted the information	Submitted the information
Subotica	Submitted the information	Submitted the information
Pančevo	Submitted the information	Submitted the information
Kraljevo	Submitted the information	Submitted the information
Kragujevac	Did not submit the information	Did not submit the information
Šabac	Did not submit the information	Did not submit the information