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Communication from Georgia concerning the case of Merabishvili v. Georgia (Application No. 72508/13)

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Communication de la Géorgie concernant l'affaire Merabishvili c. Géorgie (Requête n° 72508/13)  
**(anglais uniquement)**

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**Updated Action Plan of the Government of Georgia**

**(Case of *Merabishvili v. Georgia*, App. No. 72508/13)**

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DGI

26 OCT. 2018

SERVICE DE L'EXECUTION  
DES ARRETS DE LA CEDH

**25 October 2018**

## **Introduction**

1. The Government of Georgia hereby submits the updated Action Plan and its comments in response to the communication of the applicant's legal representatives (Ref:DGI/COV/PRK/Ima) with respect to the execution of the judgement delivered on the case of *Merabishvili v. Georgia*.<sup>1</sup>
2. On 16 February 2018 the Government presented preliminary submissions<sup>2</sup> containing information on several criminal proceedings carried out at the national level with respect to the applicant, which elucidated that Merabishvili serves his sentence on the basis of several final criminal judgements against him, whereas only pre-trial detention on one criminal case was the subject-matter of examination of the Grand Chamber of the Court.
3. In particular, to date **the applicant has been convicted and sentenced on five criminal cases, whilst currently one criminal case is pending before the Tbilisi City Court**. It should be stressed out that on 26 October 2017 the Tbilisi City Court, in view of the several judgements, determined the term to be served by the applicant, *in toto*. Notably, the more severe sentence imposed on the applicant absorbed the less, and the final term to be served was defined - 6 years and 9 months imprisonment, to begin on 21 May 2013. As of today, all sentences (including the sentence for the so-called "Akura Wine Factory episode" by the decision of the Tbilisi City Court dated 25 June 2018) imposed on the applicant have been commuted into one. **Thus, his detention ends on 21 February 2020.**
4. The Government echoes its foregoing statement that the applicant serves his sentence on the basis of several criminal judgements delivered against him and not all those proceedings have been subjected to the Court's adjudication in its Grand Chamber judgement. Therefore, the Government reiterates that **by virtue of the applicant's current legal status there is no need of either reopening the criminal proceedings against the applicant or ordering his release pending the outcome of the reopening proceedings.**
5. On 2 June 2018 the Government submitted comprehensive Action Plan<sup>3</sup> including the individual and general measures carried out in the course of the execution of the case. According to the information provided, the payment of EUR 4. 000 to the applicant for non-pecuniary damage was conducted on 22 February 2018, *i.e.* within the 3-month time-limit set by the Court.
6. Before updating, with the present document, the Committee of Ministers on the present case, the Government would like to recall anew the final conclusions of the Grand Chamber.
7. *Merabishvili* judgement represents the **sole judgement of the Court where a violation of article 18 in conjunction with article 5 §1 was found without establishing a violation of the latter**. Namely, the Court came to the conclusion that the manner in which the

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<sup>1</sup> Merabishvili v. Georgia, application no. 72508/13, judgement of 28 November 2017 [GC], available at: <http://hudoc.echr.coe.int/eng?i=001-178753>

<sup>2</sup> Communication of the Government of Georgia, Publication date 22/02/2018, available at: [https://search.coe.int/cm/Pages/result\\_details.aspx?ObjectId=090000168078b5a9](https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=090000168078b5a9)

<sup>3</sup> Action Plan of 2 June 2018, Publication date 12/06/2018, available at: [http://hudoc.exec.coe.int/eng?i=DH-DD\(2018\)602E](http://hudoc.exec.coe.int/eng?i=DH-DD(2018)602E)

criminal proceedings against the applicant were conducted did not reveal a predominantly political purpose behind his pre-trial detention and it had not been established that Merabishvili's pre-trial detention had principally been meant to remove him from Georgia's political scene (§§320-329). Therefore, **any parallel between the case of Merabishvili and other judgements on article 18 cannot be drawn.**

### **I. Individual measures**

#### *- Investigation into Merabishvili's alleged covert removal from the cell*

8. As to the investigation into the applicant's alleged covert removal from the cell, the Government updates the Committee with the following information.
9. In its judgement of 28 November 2017, the Grand Chamber indicated certain flaws in the internal decision-making processes. In order to respond to these shortcomings, on 12 July 2018, with a view of carrying out a thorough, prompt, independent and effective investigation the decision of 11 February 2017 on termination of investigation was annulled. The investigation has thus been renewed and the case was assigned to the Division of the Criminal Prosecution of Corruption Crimes of the Chief Prosecutor's Office which represents an **independent body institutionally** and **in practice** from those allegedly implicated in the incident as well as from those who had been investigating the case beforehand.
10. In particular, the aforementioned Division carries out its activities in accordance with the principles of **legality and fairness, objectivity and impartiality, as well as political neutrality**. The head of this Division is appointed and dismissed by the Chief Prosecutor of Georgia. The Division is not subordinated to any of the Departments and is solely accountable to the Chief Prosecutor and the relevant Deputy Chief Prosecutor.
11. The Government also stresses that in July 2018 the Parliament of Georgia appointed a new Chief Prosecutor of Georgia,<sup>4</sup> hence, the investigation of the present case under the direct supervision of the new Chief Prosecutor will be thorough and effective and will take full account of the Court's findings.
12. Through the renewed investigation the following activities have already been carried out in execution of the Court's judgement.
13. The Court has indicated that the authorities did not appear to have attempted to obtain the video recording from the pre-trial hearing during which G.G. (then head of the special forces of the Ministry of Prisons) was said to have spoken about his role in the events of 14 December 2013, or third-party evidence about G.G.'s whereabouts in the early hours of 14 December 2013 (§337). Noteworthy, the date when the investigative bodies were first informed regarding the fact that on 4 February 2015 G.Ts. had heard G.G. saying that he had been one of those who had transported the applicant on 14 December 2013 was 2 August 2016 - while interviewing G.Ts. (§108).

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<sup>4</sup> Available at: <http://parliament.ge/en/parlamentarebi/chairman/chairmannews/irakli-kobaxidze-darwmunebuli-varrom-shalva-tadumadze-warmatebit-gaartmevs-tavs-im-saqmes-rasac-hqvia-prokuraturis-saqmianobis-shemdgomi-gaumdjosebaba.page>

14. Taking into consideration that the video recordings of the court hearings are not kept for so long (in the present case more than 1 year had elapsed from the pre-trial hearing of 4 February 2015 to 2 August 2016 when G.Ts. mentioned the above episode) the investigative body did not have any possibility to examine those recordings. Within the renewed investigation the Prosecutor's Office still referred to the national court to determine in which courtroom the pre-trial hearing was held regarding application of restraint measures to I.P., G.Ts. and others on 4 February 2015, whether it was equipped with video surveillance and in case of confirmation, if the records were still preserved. According to the letter of 21 September 2018 of the Tbilisi City Court, the video recordings are kept up to 14 days which further demonstrates the objective impossibility to examine the recordings at any stage of the investigation.
15. In addition, at this stage, G.G. and I.M. (former special-forces officers) were questioned as witnesses in September 2018. It is further planned to question the witnesses named by them and also those persons who worked in the penitentiary facility in 2013 and who had received high bonuses.
16. According to the Court, the exact method used to examine the footage from the private surveillance and road-traffic cameras remained unclear (§345). In particular, within the initial investigations, the investigative authorities examined footages of video surveillance cameras operational nearby the premises of Prison N9 and along the main municipal roads leading to the Office of the Penitentiary Department. They obtained in December 2013 the relevant footages of the video surveillance cameras owned by the private establishments such as JSC "Wisol Petroleum", "Aversi-Geopharmi", LTD "Rompetrol Georgia", LTD "Crystalbet", LTD "San Tsentralium Georgia" and LTD "VIA". However, the examination of the mentioned footage did not reveal any information helpful for the investigation. Within the renewed investigation, the records of the video surveillance (in total 18 cameras) of 13-14 December 2013 which cover the territories of the road of Prison N9 and the only entrance to the Penitentiary Department building have been observed in details by the new investigation team and the protocols clarifying the exact methods of examination were drawn.
17. According to the Court, one of the deficiencies of the investigation has been failure to check G.G.'s and I.M.'s mobile telephone records and cell tower data for the early hours of 14 December 2013 (§340). As the Committee is well aware, the Chief Prosecutor's Office of Georgia launched the investigation on 21 June 2016 on Merabishvili's alleged covert removal under paragraph 1 of article 333 of the Criminal Code of Georgia (exceeding official powers).<sup>5</sup>
18. The Government hereby reminds that pursuant to the law still in force, the possibility/procedure of verifying the telephone communications and cell towers is envisaged by articles 136, 143<sup>2</sup>-143<sup>10</sup> of the Criminal Procedure Code of Georgia<sup>6</sup> with respect to crimes explicitly enshrined in paragraph 2 (a) of article 143<sup>3</sup> of the mentioned

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<sup>5</sup> Criminal Code of Georgia, available at: <https://matsne.gov.ge/ka/document/view/16426?publication=197>

<sup>6</sup> Criminal Procedure Code of Georgia, available at: <https://matsne.gov.ge/ka/document/view/90034?publication=95>

code.<sup>7</sup> Since article 333(1) of the Criminal Code under which the investigation was initiated is not included into article 143<sup>3</sup> of the same Code, it was not possible in the present case to obtain the aforementioned information in the course of investigation. Therefore, the investigative bodies were not able to carry out the measure as indicated by the Court (§340).

19. This legislative regulation has therefore represented an obstacle to check mobile telephone records and cell tower data in a renewed investigation as well.
20. For the aim of execution of this particular part of the judgement the relevant legislative amendments were prepared by the Ministry of Justice of Georgia and approved by the Government in its sitting of 25 October 2018. The legislative initiative will now be examined by Parliament in three readings, according to Law.
21. In particular, as a result of the amendments, the prosecution will become able to check the mobile telephone records of the aforesaid persons and the cell tower data for the early hours of 14 December 2013 as indicated by the Court. Namely, the prosecuting bodies will be able to verify the whereabouts of the persons within the respective time-period as well as determine whether they had telephone calls as alleged by the applicant (§340). Consequently, on the basis of the evidence *in toto* the prosecution will conclude whether the aforesaid persons had had the above telephone conversations and whether they had been among those who had allegedly transported the applicant. The mentioned legislative amendments are further reviewed within the general measures presented below (see paras. 27-29).
22. Hereby, the Government underscores that the further investigative steps will be planned accordingly.
23. As to setting up an inquiry commission within the Parliament, the Committee is already informed by the Government's previous Action Plan of 2 June 2018 that according to the Georgian legislation, the investigative commission (composed of members of the Parliament according to article 56 of the Rules of Procedure of the Parliament of Georgia) may be established to enquire alleged violations of the Georgian legislation by state officials. The report of the Commission is submitted to the Parliament and followed by the political debates. This mechanism is designed to facilitate political discussion. However, the Commission is not authorized to impose criminal liability on anyone. Consequently, the Government reiterates that the Prosecutor's Office is the most effective body for the purpose of investigation of criminal cases and the investigation on this case should be carried out by the Prosecutor's Office.

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<sup>7</sup> Article 143<sup>3</sup> - **Procedure for carrying out secret investigative actions:** 2. *A motion of the prosecutor shall refer to the circumstances that confirm that: (a) an investigation has been initiated and/or criminal prosecution is conducted due to an intentionally serious and/or particularly serious offence or to any of the offences defined in the following articles of the Criminal Code of Georgia: Article 117(1), Article 134, Article 139(2), Articles 140 and 141, Article 143(1), Article 143<sup>3</sup> (1), Article 180(1), Article 181(1), Article 186(2), Article 187(2), Article 198(1), Article 210(1), Article 253(1), Article 254(1 and 2), Articles 255<sup>1</sup>, 259<sup>4</sup> and 284, Article 285(1), Articles 286 and 287, Article 288(1 and 2), Articles 289, 290 and 292-303, Article 304(1), Articles 305, 306 and 306<sup>1</sup>, Article 318(1), Article 322<sup>1</sup> (1 and 2), Articles 340 and 341.*

24. In addition, the Government note that, apart from assigning this case to a new investigative body under supervision of the newly nominated Chief Prosecutor of Georgia, new constitutional amendments will further strengthen independence of the investigation activities on this case. Following the constitutional amendments, which will enter into force upon inauguration of the next President of Georgia as a result of presidential elections to be held on 28 October 2018, the **Prosecutor's Office of Georgia will be separated from the executive branch in order to become a completely independent institution** (see para. 30 below).

### Summary of Individual Measures

25. To sum up, the Government draws the Committee's attention to the following information concerning individual measures:
- ✓ Just satisfaction (EUR 4, 000) sum was fully paid to the applicant on 22 February 2018 in respect of non-pecuniary damages granted by the Court;
  - ✓ As the applicant serves his sentence on the basis of several final criminal judgements, the more severe sentence imposed on the applicant absorbed the less, and the final term to be served was defined - 6 years and 9 months imprisonment, to begin on 21 May 2013, **hence, his detention ends on 21 February 2020.**
  - ✓ With a view of carrying out a thorough and effective investigation on **12 July 2018 the investigation has been renewed into Merabishvili's alleged covert removal from the cell** and the case is being reexamined by an entirely new and independent investigative team.
  - ✓ To ensure further effectiveness of the investigation the relevant amendments to the Criminal Procedure Code has been approved by the Government on 25 October 2018 and submitted to Parliament for adoption.
  - ✓ For the aim of further tangible results, relevant subsequent investigative steps will be planned regarding which the Government will update the Committee accordingly.

### II. General measures

26. As for the activities carried out in respect of the general measures, aiming at eradicating the consequences of violations of articles 5 §3 and 18 taken in conjunction with article 5 §1, the Government of Georgia would like to refer to its previous Action Plan of 2 June 2018, as well as to update the Committee with the following information.

#### - Relevant legislative amendments

##### *Criminal Procedure Code of Georgia*

27. As the Government has already elucidated by the previous Action Plan of 2 June 2018, the legislative regulation of Criminal Procedure Code in force regarding the procedure of verifying telephone communications and cell towers has represented to date an obstacle

for the prosecution. The Government declared their readiness to adopt relevant legislative amendments in order to render it possible to carry out the above investigative measure.

28. As of today, pursuant to the draft legislative amendments mentioned above, the list of articles of the Criminal Code on which such investigative measures shall be carried out is being extended. Namely, the Chapter XXXIX (Criminal Offense in Office), including the afore-cited article 333 of the Criminal Code of Georgia, will be added to the list – in particular, to subparagraph “a”, paragraph 2 of article 143<sup>2</sup> of the Criminal Procedure Code of Georgia. The latter will allow conducting certain investigative activities related to the crimes of offenses committed by officials. The legislative amendments approved by the Government on 25 October 2018 will contribute to eliminate the obstacles for the execution of the present judgement and to prevent the violations similar to the ones found by the Court.
29. Upon adoption of the legislative amendments by Parliament, the investigative body will be able to carry out the investigative measure indicated by the Court in Merabishvili’s case according to paragraph 1 of article 2 of the Criminal Procedure Code: *‘The procedural rules that are in force at the time of an investigation and court hearing shall be applied during criminal proceedings’*. The concerns of the applicant’s representatives regarding retrospective application of the forthcoming legislative norms in the applicant’s case are therefore groundless and unfounded.

### *Constitutional amendments*

30. Under the constitutional amendments entering into force upon inauguration of the next President of Georgia in 2018 **Prosecutor’s Office will become a separate and completely independent constitutional institution**. Pursuant to the amendments, the Prosecutor General is elected by the Parliament for the term of 6 years, on the recommendation of the Prosecutorial Council. The Prosecutorial Council ensures **independence, transparency and efficiency of the Prosecutor’s Office**. The Prosecutor’s Office shall annually present a report of its activities to Parliament. Under the changes, the powers, structure and rules of operation of the Prosecutor’s Office shall be governed by an organic law.<sup>8</sup>

### *The Law on the State Inspector’s Service*

31. On 15 February 2018 the Government approved the package of the legislative amendments – **the bill on State Inspector’s Service**. The political will to create an independent investigative mechanism has been expressed by Georgia. In this regard the Ministry of Justice elaborated legal amendments in up to 30 legal acts. The aim of the legal amendments is to create an independent investigative mechanism in charge of impartial and effective investigation of the violation of human rights allegedly committed by the law enforcement officials, civil servants or persons equal in status to him/her.

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<sup>8</sup> New article 65 of the Constitution of Georgia, available at: <https://matsne.gov.ge/ka/document/view/30346>



32. **On 21 July 2018 the Parliament of Georgia adopted the aforesaid legislation which will enter into force from 1 January 2019.**<sup>9</sup>
33. Pursuant to the new legislation, the investigative authority of the State Inspector's Service extends to the offences that violate articles 2 and 3 of the European Convention.<sup>10</sup>
34. The State Inspector is accountable to the Parliament of Georgia. He/she is being elected by the Parliament. The Inspector shall submit an annual report to a legislative body.
35. Georgia has undertaken the obligation to create an independent investigative mechanism for the purpose of investigating torture, ill-treatment and other similar offenses committed by law enforcers pursuant to the Association Agenda with the European Union and the Human Rights Action Plan.
36. All members of the Criminal Justice Reform Inter-Agency Coordination Council had the opportunity to present their own remarks and opinions.<sup>11</sup>
37. As noted by the Public Defender in the annual report of 2017, the **draft bill on State Inspector's Service on its own was a step forward.**<sup>12</sup>
38. Notably, considering the fact that the position of the State Inspector was created in order to investigate the cases concerning alleged violations of articles 2 and 3 of the European Convention, the alleged covert removal of the applicant does not fall within the competence of the State Inspector.

#### *Regulations on storing the video surveillance footage*

39. Pursuant to the Order N19 of 20 March 2017 of the Minister of Corrections<sup>13</sup> an important amendment was made to the Order N35. In particular, new regulation significantly extended the timeframe for storing the recordings – namely, the limit of at least 24 hours was changed to - at least 120 hours, which was assessed as an obvious step forward by the Public Defender of Georgia.<sup>14</sup>
40. Moreover, as a result of merging, in July 2018, of the Ministry of Justice and Ministry of Corrections, the Ministry of Justice has undertaken a study of practical and logistical modalities with a view of **prolonging the 120 hours' time-limit even further. The Committee of Ministers will be updated accordingly.**

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<sup>9</sup> Law of Georgia on State Inspector's Service, available at:

<https://matsne.gov.ge/ka/document/view/4276790?publication=0>

<sup>10</sup> Article 19 of the Law of Georgia on State Inspector's Service, available at:

<https://matsne.gov.ge/ka/document/view/4276790?publication=0>

<sup>11</sup> Available at: <http://www.justice.gov.ge/News/Detail?newsId=7637>

<sup>12</sup> Annual Report of the Public Defender of Georgia, the Situation of Human Rights and Freedoms in Georgia, 2017, p. 56.

<sup>13</sup> Order N19 of Minister of Corrections of Georgia, 20 March 2017, available at:

<https://matsne.gov.ge/ka/document/view/3584944>

<sup>14</sup> Public Defender of Georgia, Human Rights Situation in Closed Institutions (National Preventive Mechanism), 2016, p. 46.

**- Violation of article 5 §3**

41. Aimed at ensuring a genuine independence of the judiciary from any outside interference and building a public confidence in the courts' system, the Government has taken a number of steps to liberate the judicial branch from political, financial or any other influences whatsoever over the last five years. The major sets of amendments have already been enacted.
42. Notably, the lack of substantiation in the decisions of domestic courts was quite common in Georgia. As underscored in the Government's Action Plan of 2 June 2018, during the recent years common courts have significantly improved the degree of substantiation of the judgements/decisions. This is confirmed by the research conducted in January 2017 under the joint European Union/Council of Europe programme,<sup>15</sup> as well as by the Public defender of Georgia.<sup>16</sup>

**Summary of General Measures**

43. In addition to the general measures presented in previous Action Plan of 2 June 2018, the Committee's attention should be drawn to the following:
  - ✓ According to the constitutional amendments (enters into force upon inauguration of the next President of Georgia in 2018) the **Prosecutor's Office will become completely independent and separate constitutional institution**. The Prosecutor General will be elected by the Parliament for the term of 6 years, on the recommendation of the Prosecutorial Council, which ensures the **independence, transparency and efficiency of the Prosecutor's Office**.
  - ✓ On 21 July 2018 the Parliament of Georgia adopted the law on State Inspector's Service which will enter into force from 1 January 2019. As the latter was created in order to investigate the cases concerning alleged violations of articles 2 and 3 of the European Convention, the alleged covert removal of the applicant case does not fall within the competence of the State Inspector.

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<sup>15</sup> Joint Programme between the European Union and the Council of Europe "Application of the European Convention on Human Rights and harmonisation of national legislation and judicial practice in line with European Standards in Georgia", Application of the Standards of the European Convention on Human Rights by the Common Courts of Georgia, Nana Mchedlidze, Tbilisi, January 2017; For the purposes of the research around 3000 decisions of 2013-2016 rendered by the common courts of Georgia in regard to criminal, administrative and civil cases have been examined (p. 8.). Furthermore, according to the research "...From the studied decisions general approach of general courts of Georgia is clear – to fulfil commitments taken under by the state and apply ECtHR standards for appropriate construal of the substance and scope of human rights; for striking fair balance between conflicting interests, assessment of the lawfulness of interference and finally, practical implementation of human rights at the national level. **Examples of reasoning provided demonstrate that Georgian courts implement this successfully under the granted margin of appreciation.**" (p. 167), available at: <https://rm.coe.int/168070a54b>

<sup>16</sup> Annual Report of the Public Defender of Georgia on the Situation of Human Rights and Freedoms in Georgia, 2014, p. 221. Annual Report of the Public Defender of Georgia on the Situation of Human Rights and Freedoms in Georgia, 2015, p. 349, available at: <http://ombudsman.ge/uploads/other/3/3892.pdf>

- ✓ The relevant **legislative amendments** have been prepared to the Criminal Procedure Code by the Ministry of Justice of Georgia and approved by the Government on 25 October 2018, which will enable the Prosecutor's Office to check the mobile telephone records and the cell tower data in line with the Court's findings;

The Government reiterates readiness to continue complying with their obligations under article 46 of the Convention and to update the Committee regarding execution of the present case in respective time-frame.