

**TO**

**MR TONY PAGONE**

**INTERNATIONAL ASSOCIATION OF  
JUDGES**

**MR JOSÉ IGREJA MATOS**

**EUROPEAN ASSOCIATION OF JUDGES**

**MR FILIPE MARQUES**

**MAGISTRATS EUROPÉENS POUR LA  
DÉMOCRATIE ET LES LIBERTÉS**

**MS TAMARA TROTMAN**

**INTERNATIONAL FOUNDATION  
RECHTERS VOOR RECHTERS**

**COPY TO**

**MS VERA JOUROVA**

**VICE-PRESIDENT VALUES AND  
TRANSPERANCY**

**MR DIDIER REYNDERS**

**MEMBER OF THE COMMISSION  
JUSTICE**

**MR GIANNI BUQUICCHIO**

**EUROPEAN COMMISSION FOR  
DEMOCRACY THROUGH LAW**

**HONORABLE SIRS AND MADAMS,**

On February 5, 2020, the Secretary of State of the United States of America (USA) publicly disclosed the name of Specialized Criminal Court Judge Andon Mitalov for his involvement in ‘serious corruption’. The only factual clarification of the position is the following statement: ‘In his official capacity, Mitalov was involved in corrupt acts that undermined the rule of law and severely compromised the independence of democratic institutions in Bulgaria.’ It is then further clarified that the announcement was made pursuant to Section 7031 (c) of the State Department’s Budget Expenditure, Foreign Operations and Related Programs Act 2020 (Div. G, PL 116-94) and such disclosure of the names of foreign officials for their involvement, directly or indirectly in serious corruption renders these persons and their immediate relatives not eligible to enter the United States. It is also clarified that on the same legal basis, the Secretary of State can in addition to the

names of officials specify the names of their immediate relatives as well and he can opt for disclosing them publicly or keeping them confidential. In conclusion, the names of his wife and daughter were also disclosed in addition to the name of Judge Mitalov.

The case of the designation of the name of a judge in a political declaration of an international nature regarding ‘serious corruption’ is the first of its kind and urgently calls for the need to give principled answers to questions affecting the rule of law and judicial independence in Bulgaria. This is the reason why we ask you to come up with standards that, in the current situation, outline the behavior of the competent state institutions that does not endanger the rule of law, nor compromise fundamental human rights and provide an effective legal order for their protection.<sup>1</sup>

In this regard, we bring to your attention the facts that clarify the nature of the situation, its consequences, and the consequent immediate and long-term dangers.

1. The statement was made by a senior civil servant of another country on the basis of its legislation, which unconditionally has the sovereign right to grant or refuse visas to foreign nationals.
2. Although, under Section 7031 (c) of the US Department of State's Budget Expenditure, Foreign Operations, and Related Programs Act 2020 (Div. G, PL 116-94), disclosure of the names of the persons with denied access to the country due to involvement in ‘serious corruption’ could have been done confidentially, in this case it was made public. This made it publicly available, including to the parties to the cases before Judge Mitalov.
3. The US Secretary of State's political declaration does not contain a specific factual account of Judge Mitalov's corrupt behavior. Asked by the ‘CEFA’ newspaper<sup>2</sup>, the US Department replied that the law under which Judge Mitalov is sanctioned, ‘does not give a specific definition of ‘serious corruption’, in principle we look at the nature of corruption, including it’s possible effect on the national interests of USA’. It was further clarified that ‘generally speaking, corruption causes significant damage to a country's economy, society and security, can facilitate organized crime and weaken public confidence in the Rule of Law and governance. This has a direct impact on the national security of the United States, their economic and foreign policy interests and, we are convinced, those of US partner countries.’<sup>3</sup>
4. Neither before the political declaration nor after it were any criminal proceedings initiated against Judge Mitalov.
5. From the statements made by various representatives of the Bulgarian government, it is clear that the United States did not provide additional information about Judge Mitalov's specific conduct, which serves as reason to qualify him as ‘engaging in serious corruption’.
6. Despite the lack of specific information on the case, to which the Minister of Justice Mr. Danail Kirilov admitted on national television (Bulgarian National Television)<sup>4</sup>, he tabled a proposal

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<sup>1</sup> <https://www.svobodnaevropa.bg/a/30422038.html>

<sup>2</sup> Name of the paper is in Cyrillic

<sup>3</sup> <https://segabg.com/node/119874>

<sup>4</sup> <https://www.bnt.bg/bg/a/kogato-posochat-korupsiyata-otvn-ministr-danail-kirilov>

for the disciplinary dismissal of judge Mitalov<sup>5</sup> in the competent Bulgarian authority for administration of judicial matters (the Judges College of the Supreme Judicial Council which is politically constructed insofar as only 6 of the majority of 14 judges are elected directly by other judges). The proposal states that ‘the adverse outcome for the judiciary and the Bulgarian state is present, affecting the credibility and independence of our judicial system, as well as the international assessment of the ability to apply the rule of law in our country’. It is also noted that ‘the impact of the damage is not only to our Bulgarian-American bilateral relations, but also among the EU Member States and all partners of the Republic of Bulgaria, working to promote this key principle of the rule of law’.

The Minister’s proposal indicates a specific case. This is the first time that this case is mentioned. According to the Minister, the negative impact to Bulgaria’s international reputation is caused by ‘violations of both the substantive and procedural law by the judge’, through which he simultaneously violated his official duties and undermined the prestige of the judiciary (i.e. has committed two disciplinary offenses under the Bulgarian Judicial System Act).

The reference to a specific criminal proceeding and to a court-order issued by Judge Mitalov requires that an account should be rendered of the facts the prosecutor's office made publicly available about it, as well as the information about the Prime Minister's visit to the United States made public in the media.

- 6.1. The Bulgarian citizen Nikolay Malinov is constituted as an accused party under Art. 105, para. 1, item 2 of the Criminal Code (CC) for the fact that from an unspecified date in January 2014 to July 3, 2019 he has placed himself in service of a foreign organization operating on the territory of the Republic of Bulgaria to serve as a spy<sup>6</sup>. The Prosecutor's Office has not requested the court to impose a measure of remand ‘remand in custody’ and instead applied a measure of remand ‘bail’. Since the Prosecutor's Office did not make a request for detention, this means that it accepted that the preconditions of Art. 63, para. 1 of the Code of Criminal Procedure (CPC) are not fulfilled, including that the accused party is not considered to pose a real risk of committing another criminal offence.
- 6.2. On September 10, 2019, the accused Malinov was prohibited from leaving the country. This is a type of measure of procedural coercion under Art. 68 of the CPC, which is imposed irrespective of the measure of remand, for serious premeditated crimes. In the pre-trial proceedings, the prohibition is enforced by an order of a prosecutor, providing for judicial review of its legality and proportionality. The accused has the right to appeal both the prohibition to leave the country and to ask the court within the effective prohibition to leave the country for a specific period (Art. 68, paras. 4 - 6 of the CPC).
- 6.3. On September 12, 2019, the Prosecutor's Office published on its official site some of the evidence of the investigation, ‘driven by the understanding that Bulgarian citizens have a right to information, which is their constitutional right’. It is stated that among the published materials is ‘a note in Russian, prepared by the accused Nikolay Malinov, in which he, as chairman of the National Movement Russophiles in the Republic of Bulgaria,

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<sup>5</sup> <https://news.lex.bg/wp-content/uploads/2020/02/iskane-1.pdf>

<sup>6</sup> <https://www.prb.bg/bg/sp/news/publikacii-i-intervyuta/syob-sht-enie-26>

presented his views on the geopolitical reorientation of Bulgaria and strategy through which it is to be achieved.’<sup>7</sup>

- 6.4. In the period between the 14<sup>th</sup> and the 17<sup>th</sup> of October 2019, Prosecutor General Sotir Tsatsarov and his Deputy Ivan Geshev (currently Prosecutor General) were visiting the United States at the invitation of the US.
- 6.5. On October 28, 2019, Judge Mitalov ruled on the motion of the accused Malinov for annulment of the prohibition to leave the country. The petition is filed with the court through the relevant prosecutor’s office, which administers the case, and, before forwarding it to the court, checks whether the request falls within its competence and, if so, adjudicates. Since the prosecutor’s office has forwarded the request to the court for a ruling, this means that the prosecutor has found that it is unfounded – neither the prohibition to leave the country should be annulled nor the accused should be allowed to leave the country temporarily. Judge Mitalov's ruling is published on the website of the Supreme Court of Cassation and is publicly available<sup>8</sup>. It indicates that the defendant Malinov's request contained arguments about his public engagements and the need for frequent trips to Russia, specifying events for the period from the 1<sup>st</sup> to the 5<sup>th</sup> of November 2019 in the cities of Yaroslavl and Nizhny Novgorod, for which the ticket was purchased on 26.08.2019. Written evidence is provided in this regard. Judge Mitalov rejected the request for the annulment of the entire prohibition to leave the country and allowed the accused to leave the country for the duration of the specific events – 5 days. The reasoning of the ruling assumes that there is no danger of the accused absconding outside the country, which is the danger that is prevented with the imposed restrictive measure. In this regard, the evidence was assessed that Malinov had frequently traveled to the Russian Federation and had returned; his family – his wife and children, live in Bulgaria; he did not obstruct the investigative authorities and the court in securing him to participate in the criminal proceedings.
- 6.6. On November 4, 2019, the defendant Malinov received a medal handed over by the President of the Russian Federation Vladimir Putin.<sup>9</sup>
- 6.7. On November 5, 2019, within the term specified in the court ruling, the accused Malinov returned to Bulgaria.<sup>10</sup>
- 6.8. On November 4, 2019, the Prosecutor General referred the case to the Inspectorate to the Supreme Judicial Council (the competent authority to carry out preliminary disciplinary inspections and in case of sufficient data on a disciplinary violation to refer to the Judges College of the Supreme Judicial Council for initiating disciplinary proceedings against a judge) asking whether Judge Mitalov, by rendering the aforementioned ruling, committed a disciplinary violation. According to the Prosecutor General, the authorization was issued in

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<sup>7</sup> <https://www.prb.bg/bg/sp/news/publikacii-i-intervyuta/syob-sht-enie-26>

<sup>8</sup> <http://www.vks.bg/analizi-i-dokladi/mitalov-ivss.pdf>

<sup>9</sup> <https://tass.ru/obschestvo/7077432>

<https://offnews.bg/bulgaria/putin-vrachi-orden-na-druzhbata-na-nikolaj-malinov-v-moskva-714779.html>

<sup>10</sup> <https://fakti.bg/bulgaria/422410-nikolai-malinov-rusia-e-priatelaska-darjava-nama-kak-da-si-shpionin-na-takava>

violation of the procedure because the prosecutor did not explicitly refuse the accused to leave the country, which could then be appealed to the court.<sup>11</sup>

6.9. On November 25, 2019, Bulgarian Prime Minister Mr. Boyko Borisov went on an official visit to the United States, where he meets with President Donald Trump.

After the meeting, Mr Borisov told the media that he had discussed the court ruling issued by Judge Mitalov. The Bulgarian prime minister told reporters that he had difficulty explaining how it is possible for the court to allow a person accused of espionage to leave the country: *‘When there is malicious influence, the Bulgarian security services and the prosecutor’s office have shown that they act immediately. I couldn’t explain it (to President Trump) after the prosecutor’s office and the Ministry of Interior and the State Agency for National Security arrested the accused for espionage, pressed charges , and that a Bulgarian judge let him go to get a medal from Trump, and I could hardly understand, but, and forgive me for the slip of the tongue – from President Putin.’*<sup>12</sup>

6.10. On February 2, 2020, the Inspectorate to the Supreme Judicial Council (ISJC) announced that it had carried out a preliminary investigation. It found that there was no reason to initiate a disciplinary examination as no violations were found in the organization of the institution and the general procedure of the case and intended within the timeframe – these are the only issues the ISJC is competent to rule upon, so as not to enter into the merits of the case and thus violate judicial independence. The Inspectorate to the Supreme Judicial Council notes that the Prosecutor General has requested a ruling on the correctness of the court’s act, but the authority does not have such powers.<sup>13</sup>

7. The proposal of the Minister of Justice for disciplinary dismissal of Judge Mitalov gives rise to an active public debate on whether his action serves a conjectural geopolitical interest or it is an act of incompetence, whether it constitutes interference with the judiciary and what its consequences may be.<sup>141516</sup>

The Bulgarian Judges Association, the largest professional organization of judges in Bulgaria released a statement<sup>17</sup> addressed to the Judges College of the Supreme Judicial Council in which it states that the initiation of disciplinary proceedings with the subject matter referred to by the Minister of Justice would in itself undermine the reputation of the judiciary and would affect its independence. On the one hand, such a procedure would create an unpleasant impression on the Bulgarian state that, if the position of the US Secretary of State had not been expressed, the alleged violations of the procedural and substantive law would not be a cause for concern to the Bulgarian authorities. On the other hand (and this is referred to as a matter of major

<sup>11</sup> [https://prb.bg/media/cms\\_page\\_media/CCE\\_000045\(1\).pdf](https://prb.bg/media/cms_page_media/CCE_000045(1).pdf)

<sup>12</sup> [https://dariknews.bg/novini/bylgariia/borisov-ubeden-sym-che-vizite-shte-padnat-podarihme-na-trymp-karta-za-golf-videosnimki-2199381?fbclid=IwAR2Q9NUjdE2R2CchIFrhcKGPHV\\_shCLpX5J1ovcS1gBcEN\\_hL0dbCe93\\_yM](https://dariknews.bg/novini/bylgariia/borisov-ubeden-sym-che-vizite-shte-padnat-podarihme-na-trymp-karta-za-golf-videosnimki-2199381?fbclid=IwAR2Q9NUjdE2R2CchIFrhcKGPHV_shCLpX5J1ovcS1gBcEN_hL0dbCe93_yM), в 10:50 от записа.

<sup>13</sup> <http://www.vks.bg/analizi-i-dokladi/mitalov-ivss.pdf>

<sup>14</sup> <https://segabg.com/category-video/zashto-tochno-sudiya-mitalov-se-okaza-simvol-na-korupciyata-u-nas>

<sup>15</sup> <https://glasove.com/categories/na-fokus/news/d-r-nikolaj-mihajlov-amerikancite-izvyrshiha-patetichna-glupost-s-vyzpitatelna-vel>

<sup>16</sup> [https://www.capital.bg/politika\\_i\\_ikonomika/sviat/2020/02/07/4026253\\_amerikanskoto\\_kleimo\\_za\\_korupciia/](https://www.capital.bg/politika_i_ikonomika/sviat/2020/02/07/4026253_amerikanskoto_kleimo_za_korupciia/)

<sup>17</sup> [http://judgesbg.org/wp-content/uploads/2020/02/Stanovishte\\_-10\\_Feb\\_2020.pdf](http://judgesbg.org/wp-content/uploads/2020/02/Stanovishte_-10_Feb_2020.pdf)

importance), a judge is being persecuted for misapplying the law. The assessment of the correct application of the law is not within the competence of the Minister of Justice or the administrative body of the Supreme Judicial Council, but only of the court in the respective criminal proceedings. Violation of this clear tenet will undermine the rule of law and it will constitute an interference of political power in the independence of the adjudication justice. It will have a chilling effect on other judges, including by adversely affecting the freedom to form their inner conviction in the exercise of judicial review in pre-trial proceedings, where a substantial restriction of fundamental human rights is sought. Ultimately, this will have detrimental effects on citizens and the independence of the judiciary.

8. The Judges College of the Supreme Judicial Council held an extraordinary hearing on February 6, 2020, and upon the proposal of the President of the Supreme Court of Cassation unanimously decided to request information from the US regarding the publicly disclosed complicity of Judge Mitalov to 'serious corruption'.<sup>18</sup>

No such information has been received thus far. Due to the nature of the legal framework relied on by the US Secretary of State, it may not be sent.

9. At a regular hearing on February 11, 2020, the Judges College of the Supreme Judicial Council unanimously agreed that Mr. Kirilov's proposal did not meet the legal requirements to describe the specifics of the act from an objective and subjective side by indicating the violated provisions of the law. Therefore, in accordance with the requirements of the procedure (Article 316, Paragraph 2 of the Judiciary Act), he was granted a 7-day time limit to remedy the shortcomings of the request.
10. On February 14, 2020, the Minister of Justice re-submitted a motion for dismissal of Judge Mitalov.<sup>19</sup> The same evening on national public television<sup>20</sup>, the Minister of Justice, Mr. Kirilov, stated that the only thing he added was facts from the inspection of the Inspectorate to the Supreme Judicial Council, which did not find any violations that fall within the competence of a disciplinary authority. The announcement makes it clear that he is again seeking dismissal for alleged violations of procedural law and for damaging our country's international reputation.
11. On February 18, 2020, a disciplinary proceeding against Judge Andon Mitalov was initiated by a decision of the Judges College (by a majority of 7 to 4 votes). Following the announcement of the ruling, the President of the Supreme Court of Cassation publicly stated that all lines have been crossed because the SJC is becoming a judicial body that can hear non-appealable courtacts. In his opinion, magistrates are already aware that disciplinary liability may be sought even for infringements related to their judicial activity, and the proposal of the Minister of Justice installed in the Judges College not just politics but geopolitics.<sup>21</sup>
12. At the same time, US Secretary of State's public action was announced in advance by the US Ambassador to Bulgaria as a measure of support and strengthening the rule of law. After the

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<sup>18</sup> <https://news.lex.bg/инспекторатът-не-открил-нарушения-на/>

<sup>19</sup> <https://news.lex.bg/данаил-кирилов-изпрати-на-вс-допълне/>

<sup>20</sup> <https://www.bnt.bg/bg/a/kogato-posochat-korupsiyata-otvn-ministr-danail-kirilov>

<sup>21</sup> <https://www.bnr.bg/horizont/post/101229365>

statement, Ambassador Herro Mustava stated that ‘the ban announced a week ago, is the first ban, but not the last. I hope people see this as a first step.’<sup>22</sup>

We allow ourselves to list the whole sequence of events, because it outlines the systematic, repetitive and focused **the actions of the Bulgarian government, which are dangerous for the independence of the judiciary and the checks-and-balances, as well as for eroding citizens' trust in state institutions and their legitimacy to govern abiding by the rule of law.** The US Secretary of State has chosen to disclose Judge Mitalov's name publicly, but the general declaration of his involvement in ‘serious corruption’ (a term that, as reported by the US Department, is not tied to a specific crime) cannot be grounds for taking any sanctioning actions against him. At the same time, Judge Mitalov has not been removed from office and enjoys all the powers of a judge under Bulgarian law, including immunity in the performance of his official duties. On the other hand, from now on, after the US political act and the reaction of the Bulgarian government, the exercise of Judge Mitalov’s judicial functions will bear all the marks of compromised judicial independence and a compromised confidence in the ability to achieve justice, which is unacceptable for the Bulgarian state, and the community it belongs to – the European Union.

The gravity of the damage to the reputation of justice also stems from the fact that Judge Andon Mitalov serves in the Specialized Criminal Court, competent to hear cases concerning both organized crime and crimes committed by high-level representatives of state authorities. This court was established by the initiative of MPs of the ruling party, initially only as a court dealing with organized crime charges. Subsequently, its jurisdiction was expanded to include crimes committed by high-ranking government officials and persons with immunity, giving rise to widespread public debate and objection that this court was extraordinary in nature. The concerns expressed are mainly because its jurisdiction does not determine specialization according to the subject matter of the cases and the type of legal matter (similarly to the specialization achieved by creating labor, family, administrative courts), nor is it specialization according to the subjects (such as for example, juvenile and military courts). The jurisdiction of this court selectively includes certain categories of crimes when committed by certain categories of persons. At the same time, all other crimes of the same kind or all other crimes committed by the selected categories of persons remain within the overall jurisdiction of the regular courts. An argument was put forward that was rejected by the government, the majority in the National Assembly and the Constitutional Court. The argument was that the mix of specialization in matter with specialization in subject is in contradiction with the idea of the effectiveness of this kind of organization of courts. It is further pointed out that the appropriation of part of the jurisdiction of other courts and not the whole jurisdiction over specific crimes – property, economy, corruption, documentary crimes and those against justice, committed by persons with immunity and high positions in the executive branch, and providing it to the Specialized Criminal Court is a sign of extraordinariness. Insofar as any selectivity and deviation from the introduction of a general principle applicable to all cases, all subjects or a whole category of subjects is understood as political violation of the institutional independence of the court. In addition, it is noted that after appropriation of the pre-existing special jurisdiction (that of the Sofia City Court under Article 35 (3) of the CPC) from judges with years of experience in these cases, without giving arguments in support of the effectiveness of this decision, raises considerable doubt that the actual aim was to effectively eliminate judges from whom the other authorities and the prosecutor’s office have not been satisfied. In support of this particular concern is the fact that it

<sup>22</sup> <http://news.bnt.bg/bg/a/khero-mustafa-zabranata-ot-minalata-sedmitsa-e-prvata-no-ne-i-poslednata>

was difficult to staff the newly established court with experienced judges, which necessitated the addition of mostly jurists with experience in prosecuting and investigating. In addition to the arguments for the unconstitutionality of the Specialized Criminal Court, the debate also points to another detrimental for the social development effect. The very idea that high officials of state authorities are prosecuted by a specialized court for organized crime, along with the organizers and participants of organized crime groups, is defined as a devaluation of the idea of statehood and allows for the suggestion of possible political arbitrariness.

We highlight the key stages of public and professional discussion because, despite the initially high distrust in the Specialized Criminal Court as a court loyal to the executive power, which eliminated criminal judges from traditional courts from certain categories of cases vital to the current state government, the Bulgarian government does not refrain from demonstrating special treatment of the court within whose jurisdiction the offenses committed by the ministers themselves are prosecuted. By decree No. 255 of the Council of Ministers of October 10, 2019, approving additional expenditures/transfers for 2019, the government allocated earmarked funds of BGN 1 000 000 for the payment of additional salaries to the judges of the Specialized Criminal Court. The Supreme Judicial Council cannot dispose of such funds at its discretion, despite the fact that under Art. 117, para. 3 of the Constitution of the Republic of Bulgaria the judiciary has an independent budget. Moreover, Art. 4 of the decree stipulates that the Supreme Judicial Council should notify the Minister of Finance about the use of these funds for the intended purpose. The extraordinary funding of the Specialized Criminal Court in itself creates the impression of power corruption and of undermining the independence of the judiciary through selective financial gain.

This last event, which cannot be underestimated in the process of clarifying the context, further substantiates our concern that public trust in specialized criminal courts (first instance and court of appeal) is consistently discredited. And it is namely the specialized criminal courts which must persuade society that they are providing fair justice on the charges pressed by the prosecutors on corruption offenses and malfeasances committed by high-level representatives of state authorities. Further, yet another consideration of the Government's special treatment of the prosecution should be considered. On July 17, 2019, the government allocated BGN 2,000,000 to pay additional salaries to the prosecutor's office. An interesting detail about the institutional culture and mentality is that the official website of the government states that these funds represent approved additional costs to the judiciary<sup>23</sup>. This gives the impression that for the government the prosecutor's office is the judiciary, or at least that part of it, that is worthy of financial gain. Subsequently, the same approach is seen in the additional funds allocated to remuneration of judges from the specialized courts competent in prosecuting the ministers.

We are convinced that we should not allow strengthening of the suspicion already present among Bulgarian citizens that the dignity of a judge may be politically undermined without this being conditioned or followed by the correct application of the law by the competent Bulgarian authorities. An impression should not be given that in order to avoid negative political qualifications and serious inconveniences for himself and his family, a judge should consider a case not only following the law and the evidence, but also other non-procedural factors, political and geopolitical tendencies and conflicts or in the interest of the executive. Therefore, we address you and ask you, according to your competences, capabilities and authority, to express a position which supports the

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<sup>23</sup> <https://www.gov.bg/bg/prestentor/zasedaniya-na-ms/dneven-red-na-zasedanieto-na-ministerskiya-savet-na-17-07-2019-g>



Bulgarian state and the Bulgarian judiciary more specifically in their need to **formulate standards applicable in such cases**. Standards that are based on the priority values of each country upholding the rule of law – protection of the human dignity, the presumption of innocence and judicial independence, justice and legal certainty. In this regard, we call for the definition and validation of international standards that:

- establish a **clear margin of restraint for political authorities** to publicly disclose the names of magistrates who are deemed to be involved in corrupt practices when they do not specify their general declarations and do not initiate the legally established procedure to prove the committed act and guilt of the magistrate;
- formulate a **system of measures** that should be undertaken by each judiciary to overcome reputational damage from unspecified political charges against a particular judge – both his or her personal and those of his or her family and to the professional community of judges as a whole;
- establish a **protocol of diplomatic response** when political action is taken by another sovereign state.

Kind regards,

**FOR THE MANAGING BOARD OF  
THE BULGARINA JUDGES ASSOCIATION**

**KALIN KALPAKCHIEV - CHAIRPERSON**