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EUROPEAN COMMITTEE ON CRIME PROBLEMS

(CDPC)

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Discussion paper on MLA Requests to Carry Out In-Court Charging Procedures

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MLA Requests to Carry Out In-Court Charging Procedures

In the last few years Israel has received, primarily from Continental jurisdictions, an unusual type of request, or at least unusual from the point of view of our own legal system and procedures. These requests seek to have Israel courts conduct charging proceedings with respect to persons who are suspects in the foreign proceedings but who are located in Israel. Pursuant to the request, these suspects are to be summoned to an Israeli court and the charges against them in the requesting country read to them by the Israeli Court (something along the lines of what we might call an arraignment in our own common law system). These suspects are then to be given the opportunity of responding to the charges and are sometimes to be given the opportunity to receive the evidence file in the case against them (which evidence is to be provided by the requesting state). The suspects are to be permitted to bring their attorneys with them to the proceeding and some of the requests even ask that, if necessary, counsel be appointed for them by the Israeli authorities.

The requesting states have explained that the carrying out of this procedure assists in furthering the proceedings in their own states but it is obviously an unusual procedure to us and not what we usually associate with legal assistance. We have a number of concerns regarding such requests. One is that we are being asked to carry out a procedure that may, under the requesting state's domestic law, allow them to proceed with an in absentia prosecution (with uncertain consequences for the Israeli defendants) under circumstances where such in absentia proceeding would not be possible in Israel and might even violate Israeli ordre publique. The second, broader concern is that, by executing such requests, we may be starting down a slippery slope that will lead to carrying out significant portions of foreign trials in Israeli courts. Our authorities are understandably uneasy about this possibility.

On the other hand, we do wish to assist and, we understand, that there may actually potential benefits to suspects in having these types of procedures carried out. (In some cases, the alternative to carrying out the requested procedure may be the issuance by the foreign state of an international arrest order).

It does not appear to us that this type of requested procedure is specifically provided for in either the Convention on Mutual Legal Assistance or in the Second Additional Protocol to that Convention. The closest procedures that those instruments seem to contemplate are either the service of judicial notification documents on the suspect/defendant or the taking of a statement by an Israeli judicial authority. In the spirit of the flexible approach contemplated by Article 8 of the Second Additional Protocol¹, Israel attempted to carry out one of these requested procedures and we became enmeshed in complicated contested litigation that may likely result in abandoning the attempt in that case.

¹ "Notwithstanding the provisions of Article 3 of the Convention, where requests specify formalities or procedures which are necessary under the law of the requesting Party, even if unfamiliar to the requested Party, the latter shall comply with such requests to the extent that the action sought is not contrary to fundamental principles of its law, unless otherwise provided for in this Protocol".

It would seem to us that if Israel has begun to receive such types of requests, it is not improbable that other jurisdictions have received similar requests and we would be very interested in knowing if this is the case and, if so, how those requests are and have been handled. We would be interested in the experience and points of view of other States in either requesting or executing requests of this nature. Is it simpler for a Continental law jurisdiction to carry out such procedures? Is it considered that the Convention covers these procedures?

Regarding the issue that such requested procedures might lead to a trial in absentia, it has been suggested that guarantee against such use provided by the requesting state might solve at least that issue. Has there been any experience with this?