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EUROPEAN COMMITTEE ON CRIME PROBLEMS
(CDPC)

Committee of Experts on the Operation
of European Conventions in the Penal Field

(PC-OC)

COUNCIL OF EUROPE'S CONVENTION
ON THE TRANSFER OF SENTENCED PERSONS – THE REQUIREMENT OF
DOUBLE CRIMINALITY – QUESTIONS TO THE COMMITTEE OF EXPERTS

Submitted by Mr Johan BERG
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According to Article 3 (1) (e) of the Convention, one of the conditions for a transfer is that the act constitute a criminal offence according to the law of the administering State or would constitute a criminal offence if committed on its territory.

In one case, a Norwegian citizen has been transferred to Norway to serve a sentence imposed on him in a State party to the Convention. He has claimed that he was provoked by the police to perform the illegal act, a method accepted and legal in the sentencing State. In connection with the transfer procedure, the Director of Public Prosecution was asked to consider the punishment according to Norwegian law. It was concluded that had the act been committed in Norway, no punishment could have been imposed due to the provocation.

The Norwegian authorities thus first rejected the application for a transfer. On appeal, according to the Norwegian Public Administration Act, we found that the conditions in Article 3(1)(e) had been met and therefore agreed to the transfer. In reaching this conclusion, emphasis was put on the aims of the Convention, as stated in the Preamble and in Article 2 of the Convention and the opinion of Mr. Michal Plachta stated in the book «Transfer of Prisoners under International Instruments and Domestic Legislation» (1993) page 315.

The transferred person has now claimed that he is illegally detained in Norway because the act for which the sentence has been imposed, does not constitute a criminal offence in Norway.

The Ministry of Justice would like to ask the Committee of Experts the following questions:

1. Should the expression «the law» be interpreted only as the written law, i.e. the Penal Code, or can it also include the interpretation of «the law» as in «the whole body of such customs or practices», i.e. also case law etc.?
2. Is the expression «double criminality» to be interpreted as double criminality *in concreto* or double criminality *in abstracto*? There seems to be a difference in opinion between the «Explanatory Report» and Mr. Plachta as the latter finds it sufficient with double criminality *in abstracto* while the report indicates the opposite.