

**Bills Committee on
Evidence (Miscellaneous Amendments) Bill 2002**

**Response by the Administration to suggestions made by
Members at the meeting on 14 March 2003
on Part II of the Bill**

During the meeting held on 14 March 2003, Members suggested that the Administration should, in respect of Part II of the Bill-

- (a) include other factors of which the court must be satisfied before granting permission for giving evidence via live television link in criminal proceedings, such as in the interest of justice, in the interest of the defendant, the importance of the evidence to the case, and circumstances of the case, in the proposed section 79I(2) of the Criminal Procedure Ordinance and improve the drafting of the section generally;
- (b) improve the drafting of the proposed section 79I(2)(a) by using “the person concerned is not ordinarily resident in Hong Kong” and amend proposed section 79I(2)(b) to read “It is not convenient for the person to come to Hong Kong”.
- (c) provide a comparison of the proposal in the Bill with the arrangements adopted by other overseas jurisdictions, in terms of actual operation and statutory provisions;
- (d) explain as a matter of policy whether it would be permissible for an overseas witness who might be arrested upon return to Hong Kong (e.g. a fugitive from justice) to give evidence via live television link; and
- (e) consider whether the meaning of “the place from which the person is giving evidence” in proposed section 79J of the Criminal Procedure Ordinance should be more clearly specified.

2. The letter dated 10 March 2003 from Mr. Andrew Bruce, SC raised the issue of evidence being taken by live video link and recorded in the absence of the jury but played back to it subsequently and suggested that this possibility be made explicit.

Other factors of which the court must be satisfied before granting permission for giving evidence via live television link in criminal proceedings

3. Items (a) and (b) in the first paragraph will be dealt with together in this part of the paper.

4. Members' concerns are noted and the Administration proposes to add the following criteria of which the court must be satisfied before giving permission under the proposed section 79I(1) -

- (a) proper safeguards are or can be put in place to ensure that the witness will not be subject to any coercion and that these can be checked by the Hong Kong court at any time during the giving of evidence; and
- (b) the granting of permission would be in the interests of justice.

5. The Administration does not propose to specify a list of factors of which the court must be satisfied. Such list cannot be exhaustive for the reason that the factors to be considered will vary from case to case. It is submitted that "in the interests of justice" is wide enough to encompass the interests of the defendant, the importance of the evidence and other circumstances of the case.

6. In the Administration's view, it is unnecessary to provide that the overseas witness must be ordinarily resident outside Hong Kong. The term "ordinarily resident" is not without ambiguity. Unless the court is satisfied that the overseas witness will not come or return to Hong Kong within a practical timeframe, it is unlikely to grant permission for taking of evidence from an overseas location by live television link.

Comparison of the proposal in the Bill with the arrangements adopted by other overseas jurisdictions, in terms of actual operation and statutory provisions

The Position in the UK

7. A person other than the accused may give evidence from abroad through live television link with leave of the court under section 32 of the Criminal Justice Act 1988 (**Tab 1**). This is the same as the present proposal. The accused may not give evidence from abroad.

8. The Crime (International Co-operation) Bill has recently been introduced into the House of Lords making wider provision for hearing witnesses abroad through live television link. In particular, section 29 of the Bill permits the Secretary of State by order to provide for section 32 of the Criminal Justice Act 1988 to apply to any further description of criminal proceedings, or to all criminal proceedings.

9. In addition, section 30 of the Bill allows foreign jurisdictions to make requests to the UK to arrange the hearing of witnesses in the UK through live television link for the purpose of criminal proceedings in the foreign jurisdiction. Schedule 2, Part 1 of the Bill provides for rules governing the taking of the evidence in the UK on behalf of the foreign jurisdiction. A copy of sections 29 and 30 and Schedule 2 Part 1 of the Bill is at **Tab 2**.

10. There are no provisions at present stipulating whether in relation to evidence received under section 32 of the Criminal Justice Act 1988, the evidence from abroad must be given in a court or under judicial supervision. Neither, for the purposes of section 32, is a distinction necessarily drawn between voluntary and involuntarily witnesses. It appears that these issues are left to be regulated by the requested jurisdiction under its law.

The Position in Australia

11. Australia does not have federal legislation governing the receipt of evidence into Australian courts by live television link. Various States have,

however, introduced their own legislation to regulate the procedure.

12. For example, under section 5B(1) of the NSW Evidence (Audio and Audio Visual Links) Act 1998 (**Tab 3**), a New South Wales court may direct that a person give evidence by audio-visual link from any place, including a place outside Australia.

13. Australia has, at a federal level, amended sections 12 and 13 of the Mutual Assistance in Criminal Matters Act 1987 (**Tab 4**) to permit Australia to make requests for video link evidence abroad, and to process incoming requests for video link evidence.

14. On the issue of judicial supervision, s. 19 of the NSW Evidence (Audio and Audio Visual Links) Act 1988 (**Tab 3**) provides that an officer of a NSW court may, at the request of a recognized court (i.e. the requesting court in another State) attend the place in NSW where the evidence is being taken and provide such assistance as is necessary. It is suggested that this may be one of the directions that the Hong Kong court can hand down when considering applications for permission to give evidence from overseas by means of live television link. Under s. 13(4A) of the Mutual Assistance in Criminal Matters Act 1987 (**Tab 4**), the evidence in a request from abroad must be taken before a magistrate. But the Attorney General's Department in Canberra has advised that it is generally unaware of any legal prohibition at either a federal or state level against taking evidence outside a courtroom, in respect either of requests made by Australia or requests made to Australia. In the case of voluntary witnesses, it does happen that arrangements are simply made without judicial supervision in Australia. This may also occur in respect of requests made abroad by Australia, depending on the particular law and procedures in the requested jurisdiction.

The European Union Mutual Legal Assistance Treaty 2000 (“EU-MLAT 2000”)

15. Article 10 of the EU-MLAT 2000 provides for the taking of evidence by video-conference. The circumstances in which a request for video-conferencing may be made out are that the judicial authorities of the requesting Member State require the person in question to be heard as a

witness or expert and “it is not desirable or possible for the witness or expert to attend in person”.

16. The Explanatory Report on Article 10 notes that “not desirable” could apply in cases where the witness is very young, very old, or in bad health whereas “not possible” could cover cases where the witnesses would be exposed to serious danger by appearing in the requesting Member State. A copy of Article 10 is at **Tab 5**.

As a matter of policy whether it would be permissible for an overseas witness who might be arrested upon return to Hong Kong (e.g. a fugitive from justice) to give evidence via live television link

17. The policy intent is to allow a witness to give evidence through live television link because he cannot come to Hong Kong for an innocent reason, not because he is afraid of being arrested if he comes to Hong Kong.

18. The Administration notes the concern, raised by the Hon Miriam Lau at the last meeting, that it may be unfair to a defendant if his/her potential overseas witness is liable for arrest in Hong Kong for another offence that is entirely unrelated to the case in which he/she is willing to give evidence. This is an area where the discretion of the court will apply and the court will decide whether it is in the interests of justice that permission be granted.

Whether the meaning of “the place from which the person is giving evidence” in proposed section 79J of the Criminal Procedure Ordinance should be more clearly specified

19. The emphasis is on the technical ability to link up the overseas location with the Hong Kong courts in a way that permits clear and uninterrupted two-way audio and visual transmission and production/transmission of documents. This could be possible from a variety of locations, for example, an overseas courtroom, conference room of a corporation, an audio-visual studio, a correctional institution, a hospital ward or even a private residence. The address of the location and the reason for choosing that location would be disclosed in the application for

permission to provide evidence from overseas by way of live television link. The court and parties concerned will have ample opportunities to consider whether such location is proper and should be deemed to be part of the Hong Kong court for giving evidence from overseas.

20. Details of the attributes that the “place” will have to possess may be set out in the rules that are to be made by the Chief Justice under the proposed section 79L (the Rules).

21. Members may wish to note that the “place” from which overseas evidence may be given is also not specifically defined in the UK and Australian legislation.

Evidence being taken by live video link and recorded in the absence of the jury but played back to it subsequently

22. It is agreed that the present proposal permits evidence taken by live television link and recorded in the absence of the jury can be played back to it subsequently. Relevant detailed provisions may be set out in the Rules.

Department of Justice
April 2003



[\[Home\]](#) [\[Databases\]](#) [\[World Law\]](#) [\[Search\]](#) [\[Feedback\]](#)

United Kingdom Acts

You are here: [BAILII](#) >> [Databases](#) >> United Kingdom Acts >> CRIMINAL JUSTICE ACT 1988

[\[Index\]](#) [\[Table\]](#) [\[Search\]](#) [\[Notes\]](#) [\[Noteup\]](#) [\[Previous\]](#) [\[Next\]](#) [\[Download\]](#) [\[Context↗\]](#) [\[Help\]](#)

CRIMINAL JUSTICE ACT 1988 (C. 33) - SECT 32

Evidence through television↗ links.

32. -(1) A person other than the accused may give **evidence through↗** a live **television↗** link on a trial on indictment or an appeal to the criminal division of the Court of Appeal or the hearing of a reference under [section 17](#) of the [1968 c. 19 .] Criminal Appeal Act 1968 if-

- (a) the witness is outside the United Kingdom; or
- (b) the witness is under the age of 14 and the offence charged is one to which subsection (2) below applies, but **evidence↗** may not be so given without the leave of the court.

(2) This subsection applies-

- (a) to an offence which involves an assault on, or injury or a threat of injury to, a person;
- (b) to an offence under [section 1](#) of the [1933 c. 12 .] Children and Young Persons Act 1933 (cruelty to persons under 16);
- (c) to an offence under the [1956 c. 69 .] Sexual Offences Act 1956, the [1960 c. 33 .] Indecency with Children Act 1960, the [1967 c. 60 .] Sexual Offences Act 1967, [section 54](#) of the [1977 c. 45 .] Criminal Law Act 1977 or the [1978 c. 37 .] Protection of Children Act 1978; and
- (d) to an offence which consists of attempting or conspiring to commit, or of aiding, abetting, counselling, procuring or inciting the commission of, an offence falling within paragraph (a), (b) or (c) above.

(3) A statement made on oath by a witness outside the United Kingdom and given in **evidence through↗** a link by virtue of this section shall be treated for the purposes of [section 1](#) of the [1911 c. 6 .] Perjury Act 1911 as having been made in the proceedings in which it is given in **evidence**.

(4) Without prejudice to the generality of any enactment conferring power to make rules to which this subsection applies, such rules may make such provision as appears to the authority making them to be necessary or expedient for the purposes of this section.

(5) The rules to which subsection (4) above applies are-

- (a) Crown Court Rules; and
- (b) Criminal Appeal Rules.

[\[Index\]](#) [\[Table\]](#) [\[Search\]](#) [\[Notes\]](#) [\[Noteup\]](#) [\[Previous\]](#) [\[Next\]](#) [\[Download\]](#) [\[Help\]](#)

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Crime (International Co-operation) Bill [HL]

A

B I L L

[AS AMENDED IN GRAND COMMITTEE]

To make provision for furthering co-operation with other countries in respect of criminal proceedings and investigations; to extend jurisdiction to deal with terrorist acts or threats outside the United Kingdom; to amend section 5 of the Forgery and Counterfeiting Act 1981 and make corresponding provision in relation to Scotland; and for connected purposes.

The Lord Filkin

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Crime (International Co-operation) Bill [HL]
Part 1 — Mutual assistance in criminal matters
Chapter 3 — Hearing evidence through television links or by telephone

Chapter 3

Hearing evidence through television links or by telephone

29 Hearing witnesses abroad through television links

(1) The Secretary of State may by order provide for section 32(1A) of the Justice Act 1988 (c. 33) or Article 81(1A) of the Police and Criminal Evidence (Northern Ireland) Order 1989 (S.I. 1989/1341 (N.I.12)) (proceedings in which evidence may be given through television link) to apply to any further description of criminal proceedings, or to all criminal proceedings.

(2) The Scottish Ministers may by order provide for section 273(1) of the Criminal Procedure (Scotland) Act 1995 (c. 46) (proceedings in which evidence may be given through television link) to apply to any further description of criminal proceedings, or to all criminal proceedings.

30 Hearing witnesses in the UK through television links

(1) This section applies where the Secretary of State receives a request, from an authority mentioned in subsection (2) (“the external authority”), for a person in the United Kingdom to give evidence through a live television link in criminal proceedings before a court in a country outside the United Kingdom.

Criminal proceedings include any proceedings on an appeal before a court against a decision in administrative proceedings.

(2) The authority referred to in subsection (1) is the authority in that country which appears to the Secretary of State to have the function of making requests of the kind to which this section applies.

(3) Unless he considers it inappropriate to do so, the Secretary of State may by notice in writing nominate a court in the United Kingdom where the witness may be heard in the proceedings in question through a live television link.

(4) Anything done by the witness in the presence of the nominated court which would be treated for that purpose as done in proceedings before the court, would constitute contempt of court if it were done in proceedings before the court.

(5) Any statement made on oath by a witness giving evidence in pursuance of this section is to be treated for the purposes of—

- (a) section 1 of the Perjury Act 1911 (c. 6),

(b) Article 3 of the Perjury (Northern Ireland) Order 1979 (S.I. 1999 (N.I. 19)),

(c) sections 44 to 46 of the Criminal Law (Consolidation) (Scotland) Act 1995 (c. 39) or, in relation to Scotland, any matter pertaining to the common law crime of perjury,

as made in proceedings before the nominated court.

(6) Part 1 of Schedule [2](#) (evidence given by television link) is to have effect

Crime (International Co-operation) Bill [HL]

Part 1 — Mutual assistance in criminal matters

Chapter 3 — Hearing evidence through television links or by telephone

(7) Subject to subsections (4) and (5) and the provisions of that Schedule, evidence given pursuant to this section is not to be treated for any purpose as evidence given in proceedings in the United Kingdom.

(8) In relation to Scotland, references in this section and Part 1 of Schedule 2 to the Secretary of State are to be read as references to the Lord Advocate.

Schedule 2

Evidence given by television link or telephone

Part 1

Evidence given by television link

Securing attendance of witnesses

1 The nominated court has the like powers for securing the attendance of witness to give evidence through the link as it has for the purpose of proceedings before the court.

2 In Scotland the nominated court has power to issue a warrant to officer: law to cite the witness for the purpose of securing his attendance to give evidence through the link, and section 156 of the Criminal Procedure (Scotland) Act 1995 (c. 46) applies in relation to the witness if so cited.

Conduct of hearing

3 The witness is to give evidence in the presence of the nominated court.

4 The nominated court is to establish the identity of the witness.

5 The nominated court is to intervene where it considers it necessary to do so to safeguard the rights of the witness.

Crime (International Co-operation) Bill [HL]

Schedule 2 — Evidence given by television link or telephone

Part 2 — Evidence given by telephone

6 The evidence is to be given under the supervision of the court of the country concerned.

7 The evidence is to be given in accordance with the laws of that country with any measures for the protection of the witness agreed between the Secretary of State and the authority in that country which appears to him to have the function of entering into agreements of that kind.

8 Rules of court under section [49](#) must make provision for the use of interpreters.

Privilege of witness

9 (1) The witness cannot be compelled to give any evidence which he could not be compelled to give in criminal proceedings in the part of the United Kingdom in which the nominated court exercises jurisdiction.

(2) The witness cannot be compelled to give any evidence if his doing so would be prejudicial to the security of the United Kingdom.

(3) A certificate signed by or on behalf of the Secretary of State or, w

court is in Scotland, the Lord Advocate to the effect that it would be so prejudicial for that person to do so is to be conclusive evidence of that fact.

(4) The witness cannot be compelled to give any evidence in his capacity as an officer or servant of the Crown.

(5) Sub-paragraphs (2) and (4) are without prejudice to the general effect of paragraph (1).

Record of hearing

10 Rules of court under section [49](#) must make provision—

- (a) for the drawing up of a record of the hearing,
- (b) for sending the record to the external authority.



New South Wales Consolidated Acts

[\[Index\]](#) [\[Table\]](#) [\[Search\]](#) [\[Search this Act\]](#) [\[Notes\]](#) [\[Noteup\]](#) [\[Previous\]](#) [\[Next\]](#) [\[Download\]](#) [\[Help\]](#)

EVIDENCE (AUDIO AND AUDIO VISUAL LINKS) ACT 1998 - SECT 5B

Taking evidence and submissions from outside courtroom or place where court is sitting—proceedings generally

5B Taking evidence and submissions from outside courtroom or place where court is sitting—proceedings generally

(1) Subject to any applicable rules of court and subsection (2A), a NSW court may, either on its own motion in, or on the application of a party to, a proceeding before the court, direct that a person (whether or not a party to the proceeding) give evidence or make a submission to the court by audio link or audio visual link from any place within or outside New South Wales, including a place outside Australia, other than the courtroom or other place at which the court is sitting.

(2) The court must not make such a direction if:

- (a) the necessary facilities are unavailable or cannot reasonably be made available, or
- (b) the court is satisfied that the evidence or submission can more conveniently be given or made in the courtroom or other place at which the court is sitting, or
- (c) the court is satisfied that the direction would be unfair to the party, or
- (d) the court is satisfied that the person in respect of whom the direction is sought will not give evidence or make the submission.

(2A) A court must not make such a direction in relation to the giving of evidence or making of a submission by audio visual link by any accused detainee in any preliminary criminal proceeding or relevant criminal proceeding concerning the offence in respect of which he or she is in custody. However, this subsection does not prevent the making of such a direction in relation to an accused detainee in any other proceeding to which this Part applies.

Note: Part 1B of this Act contains provisions with respect to the appearance of accused detainees who are in custody in preliminary criminal proceedings and relevant criminal proceedings.

(3) In a proceeding in which a party opposes the making of a direction for the giving of evidence or making of a submission to the court by audio link or audio visual link from any place within New South Wales other than the courtroom or other place where the court is sitting, the court must not make the direction unless the party making the application satisfies the court that it is in the interests of the administration of justice for the court to do so.

[\[Index\]](#) [\[Table\]](#) [\[Search\]](#) [\[Search this Act\]](#) [\[Notes\]](#) [\[Noteup\]](#) [\[Previous\]](#) [\[Next\]](#) [\[Download\]](#) [\[Help\]](#)



New South Wales Consolidated Acts

[\[Index\]](#) [\[Table\]](#) [\[Search\]](#) [\[Search this Act\]](#) [\[Notes\]](#) [\[Noteup\]](#) [\[Previous\]](#) [\[Next\]](#) [\[Download\]](#) [\[Help\]](#)

EVIDENCE (AUDIO AND AUDIO VISUAL LINKS) ACT 1998 - SECT 19

Assistance to recognised court

19 Assistance to recognised court

An officer of a NSW court may, at the request of a recognised court:

- (a) attend at the place in the State where evidence is to be or is being taken, or submissions are to be or are being made, in a proceeding of the recognised court, and
- (b) take such action as the recognised court directs to facilitate the proceeding, and
- (c) assist with the administering by the recognised court of an oath or affirmation.

[\[Index\]](#) [\[Table\]](#) [\[Search\]](#) [\[Search this Act\]](#) [\[Notes\]](#) [\[Noteup\]](#) [\[Previous\]](#) [\[Next\]](#) [\[Download\]](#) [\[Help\]](#)



Commonwealth Consolidated Acts

[\[Index\]](#) [\[Table\]](#) [\[Search\]](#) [\[Notes\]](#) [\[Noteup\]](#) [\[Previous\]](#) [\[Next\]](#) [\[Download\]](#) [\[Context\]](#) [\[Help\]](#)

MUTUAL ASSISTANCE IN CRIMINAL MATTERS ACT 1987 SECT 13

13 Requests by foreign countries

- (1) Where a request is made by a foreign country (*requesting country*) that:
- (a) evidence be taken in Australia; or
 - (b) documents or other articles in Australia be produced;

for the purposes of a proceeding in relation to a **criminal matter** in the requesting country or another foreign country, the Attorney-General may, in his or her discretion, by writing in accordance with the approved form, authorise the taking of the evidence or the production of the documents or other articles, and the transmission of the evidence, documents or other articles to the requesting country.

- (2) Where the Attorney-General authorises the taking of evidence or the production of documents or other articles under subsection (1):
- (a) in the case of the taking of evidence—a Magistrate may take the evidence on oath of each witness appearing before the Magistrate to give evidence in relation to the **matter**, and a Magistrate who takes any such evidence shall:
 - (i) cause the evidence to be put in writing and certify that the evidence was taken by the Magistrate; and
 - (ii) cause the writing so certified to be sent to the Attorney-General; or
 - (b) in the case of the production of documents or other articles—a Magistrate may, subject to subsection (6), require the production of the documents or other articles and, where the documents or other articles are produced, the Magistrate shall send the documents, or copies of the documents certified by the Magistrate to be true copies, or the other articles, to the Attorney-General.
- (3) The evidence of such a witness may be taken in the presence or absence of the person to whom the proceeding in the requesting country relates or of his or her legal representative (if any).
- (4) The Magistrate conducting a proceeding under subsection (2) may permit:
- (a) the person to whom the proceeding in the requesting country relates;
 - (b) any other person giving evidence or producing documents or other articles at the proceeding before the Magistrate; and
 - (c) the relevant authority of the requesting country;

to have legal representation at the proceeding before the Magistrate.

- (4A) If the requesting country has so requested, the Magistrate conducting a proceeding under subsection (2) may permit:
- (a) any person to whom the proceeding in the requesting country relates or that person's legal representative; or
 - (b) the legal representative of the relevant authority of the requesting country;

to examine or cross-examine, through a video link, from the requesting country any person giving evidence or producing a document or other article, at the proceeding.

- (5) The certificate by the Magistrate under subsection (2) shall state whether, when the evidence was taken or the documents or other articles were produced, any of the following persons were present:
- (a) the person to whom the proceeding in the requesting country relates or his or her legal representative (if any);
 - (b) any other person giving evidence or producing documents or other articles or his or her legal representative (if any).
- (6) Subject to subsections (7) and (8), the laws of each State or Territory with respect to the compelling of persons to attend before a Magistrate, and to give evidence, answer questions and produce documents or other articles, upon the hearing of a charge against a person for an offence against the law of that State or Territory apply, so far as they are capable of application, with respect to the compelling of persons to attend before a Magistrate, and to give evidence, answer questions and produce documents or other articles, for the purposes of this section.
- (7) For the purposes of this section, the person to whom the proceeding in the requesting country relates is competent but not compellable to give evidence.
- (8) For the purposes of this section, a person who is required to give evidence, or produce documents or other articles, for the purposes of a proceeding in relation to a **criminal matter** in the requesting country or another foreign country, is not compellable to answer a question, or produce a document or article, that the person is not compellable to answer or produce, as the case may be, in the proceeding in that country.
- (9) A duly authenticated foreign law immunity certificate is admissible in proceedings under this section as *prima facie* evidence of the **matters** stated in the certificate.
- (10) Subsection (8) does not apply in a case where its application would be inconsistent with a provision of a **mutual assistance** treaty between Australia and the requesting country concerned.

[\[Index\]](#) [\[Table\]](#) [\[Search\]](#) [\[Notes\]](#) [\[Noteup\]](#) [\[Previous\]](#) [\[Next\]](#) [\[Download\]](#) [\[Context\]](#) [\[Help\]](#)

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ARTICLE FROM THE EU-MLAT 2000

ARTICLE 10

Hearing by videoconference

1. If a person is in one Member State's territory and has to be heard as a witness or expert by the judicial authorities of another Member State, the latter may, where it is not desirable or possible for the person to be heard to appear in its territory in person, request that the hearing take place by videoconference, as provided for in paragraphs 2 to 8.

2. The requested Member State shall agree to the hearing by videoconference provided that the use of the videoconference is not contrary to fundamental principles of its law and on condition that it has the technical means to carry out the hearing. If the requested Member State has no access to the technical means for videoconferencing, such means may be made available to it by the requesting Member State by mutual agreement.

3. Requests for a hearing by videoconference shall contain, in addition to the information referred to in Article 14 of the European Mutual Assistance Convention and Article 37 of the Benelux Treaty, the reason why it is not desirable or possible for the witness or expert to attend in person, the name of the judicial authority and of the persons who will be conducting the hearing.

4. The judicial authority of the requested Member State shall summon the person concerned to appear in accordance with the forms laid down by its law.

5. With reference to hearing by videoconference, the following rules shall apply:

(a) a judicial authority of the requested Member State shall be present during the hearing, where necessary assisted by an interpreter, and shall also be responsible for ensuring both the identification of the person to be heard and respect for the fundamental principles of the law of the requested Member State. If the judicial authority of the requested Member State is of the view that during the hearing the fundamental principles of the law of the requested Member State are being infringed, it shall immediately take the necessary measures to ensure that the hearing continues in accordance with the said principles;

between the Member States concerned, in accordance with their national law and relevant international instruments, including the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms.

Any Member State may, when giving its notification pursuant to Article 27(2), declare that it will not apply the first subparagraph. Such a declaration may be withdrawn at any time.

Hearings shall only be carried out with the consent of the accused person. Such rules as may prove to be necessary, with a view to the protection of the rights of accused persons, shall be adopted by the Council in a legally binding instrument.