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EVIDENCE IN CROSS-BORDER CASES AND ITS LEGAL ASSESSMENT

Author:

Sergei Khrabrykh — President of ARGA, PhD

Organization: Observatoire ARGA, ARGA Atlas

Mailing address: 21 route de l'Aviation, 12 C, 64600 Anglet, FRANCE

Contacts: info@argaobservatory.org, +33 7 58 49 62 27

Website: www.argaobservatory.org, <https://www.arga-atlas.com/>

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Purpose of the document:

To explain systematically why evidence in cross-border cases cannot be assessed solely through the internal logic of a single jurisdiction, which international and regional mechanisms govern its collection and transfer, how admissibility, reliability, provenance, electronic form, and procedural guarantees of the defense interact, and why, in a cross-border case, a dispute over evidence is almost always simultaneously a dispute about fair trial, judicial cooperation, and the limits of permissible state interference. The relevant legal framework is built primarily around Article 14 of the ICCPR, mutual legal assistance mechanisms, the 1970 Hague Evidence Convention in civil and commercial matters, the United Nations Convention against Transnational Organized Crime, the European Investigation Order within the EU, and the contemporary framework for electronic evidence under the Budapest Convention and its Second Additional Protocol. ([OHCHR](#))

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1. EXECUTIVE SUMMARY

A cross-border case almost always creates the illusion that evidence once “lawfully obtained” in one country automatically retains the same legal value in another. In reality, it does not. International cooperation may facilitate the obtaining and transfer of evidence, but it does not eliminate questions about provenance, authenticity, completeness, context, language, the manner of extraction, and the procedural possibility of meaningful challenge by the defense. For that reason, in cross-border disputes, legal assessment inevitably goes beyond a simple reference to a letter rogatory, a mutual legal assistance response, or an official foreign transmission. Article 14 ICCPR requires a genuine fair hearing, not decorative recognition of any paper or data set that happens to have crossed a border. ([OHCHR](#))

The specific feature of cross-border evidence is that it lives in several legal spaces at once. It may be collected under one set of rules, transmitted under another, translated under a third, and assessed by a court under a fourth. In civil and commercial matters, the Hague Evidence Convention establishes the principal channels for taking evidence abroad. In criminal matters, UNTOC treats mutual legal assistance as a core form of international cooperation, and within the European Union the European Investigation Order was designed to simplify and speed up cross-border criminal investigations. But the existence of a transmission mechanism does not resolve the legal quality of the resulting evidence. (hcch.net)

In practice, disputes over cross-border evidence usually arise around five questions at once: whether the material was obtained lawfully, whether its provenance can be established, whether its integrity was preserved, whether the defense had a real opportunity to challenge it, and whether its use undermines equality of arms. In that sense, evidence in cross-border cases is not merely technical material. It is a direct continuation of fair trial doctrine. The more evidence depends on digital extraction, cloud storage, foreign providers, and multilayered transmission, the sharper becomes the question of how much flexibility the state may claim in obtaining evidence without destroying the fairness of proceedings. (OHCHR)

2. WHAT CROSS-BORDER EVIDENCE MEANS IN LEGAL TERMS

In legal terms, evidence is cross-border not only when it is physically located in another country. Cross-border character arises whenever at least one decisive element of the evidentiary chain is connected with a foreign jurisdiction: the place where the document is held, the location of a server, a bank, a counterparty, a registry, a witness, an expert, a corporate structure, or a service provider, or the state authority through which the information was extracted. This is especially visible in digital evidence, where a communication may be created in one country, stored in another, routed through a third, and used in proceedings in a fourth. Cross-border evidence is therefore not simply a question of where the paper sat. It is a question of how many legal regimes were involved in generating its evidentiary value. (Portal)

In civil and commercial matters, the international legal framework has long recognized this reality. The Hague Conference explains that the 1970 Convention on the Taking of Evidence Abroad establishes two methods of cooperation between states for taking evidence abroad. That already implies that evidence in a cross-border dispute is not treated as a purely internal object, but as the result of interstate cooperation in which both the method of obtaining the evidence and the conditions of its use matter. (hcch.net)

In criminal matters, the issue is even more complex. Here evidence does not merely support a private version of events. It may lead to arrest, indictment, confiscation, extradition exposure, or other severe consequences. For that reason, the mere existence of a mutual legal assistance channel does not remove the need to assess whether the use of the material is compatible with fair trial standards. General Comment No. 32 emphasizes that equality before courts and the right to a fair trial serve as safeguards of the rule of law. The international dimension of the case therefore does not weaken procedural guarantees. It makes them more important. (TB Internet)

3. THE BASIC INTERNATIONAL MECHANISMS FOR OBTAINING AND TRANSFERRING EVIDENCE

In civil and commercial matters, the principal international instrument remains the 1970 Hague Evidence Convention. The Hague Conference explains that it establishes two independent channels: letters of request and the taking of evidence by diplomatic or consular agents and commissioners. That matters because the Convention itself already distinguishes who gathers evidence, on whose initiative, and in what procedural form. It follows that later judicial assessment cannot ignore the path by which the material was obtained. (hcch.net)

In criminal matters, the classic framework is mutual legal assistance. UNODC describes the United Nations Convention against Transnational Organized Crime as the main international instrument against transnational organized crime, and the Convention text provides in Article 18 that mutual legal assistance shall be afforded to the fullest extent possible. UNODC's mutual legal assistance materials also emphasize that MLA is the central channel for obtaining documents, testimony, banking records, searches, seizures, and other forms of evidentiary cooperation across borders. Yet the breadth of the mechanism does not replace judicial scrutiny of the admissibility, integrity, or fairness of the material ultimately transmitted. ([UNODC](http://unodc.org))

Within the European Union, the most important instrument is the European Investigation Order. EUR-Lex states that Directive 2014/41/EU was adopted to simplify and speed up cross-border criminal investigations in the EU. That means that inside the Union evidence increasingly moves not through the older, slower MLA logic, but through a framework of mutual recognition. For the defense, that creates a distinct challenge: speed of transfer must not turn into speed of procedural blindness. The easier the instrument becomes, the stricter the later judicial scrutiny must be. ([EUR-Lex](http://eur-lex.europa.eu))

4. ADMISSIBILITY, RELIABILITY, AND PROVENANCE OF EVIDENCE

In a cross-border case, three questions must be kept separate. First, was the evidence obtained lawfully. Second, is it authentic, and can its provenance be traced. Third, can it be used without destroying the fairness of proceedings. These questions are often collapsed into one. The party relying on the material prefers to stop at the first stage: "it came through an official channel, therefore everything is fine." Fair trial standards do not permit such simplification. Even if the state complied with a formal interstate mechanism, the court must still assess whether the opposing party can genuinely understand, verify, and challenge the material. ([OHCHR](http://ohchr.org))

The problem of provenance becomes especially acute where evidence appears in the form of a bank extract, a summary, a digital extraction, a translated copy, or an expert compilation. The longer the chain between the primary source and the form in which the material is produced in court, the more important become questions of completeness, integrity, and context. The Hague Convention facilitates the taking of evidence abroad, but it does not displace the court's later duty to ask what exactly was obtained and in what form. In criminal proceedings, Article 14 ICCPR requires not mere formal transfer of information, but a fair opportunity to challenge the case. (hcch.net)

This is why chain of custody and chain of transformation matter so much in cross-border cases. If it is impossible to determine who extracted the digital material, who copied it, who translated it, who produced the extract, who defined the selection criteria, and who excluded the "irrelevant" parts, then the dispute over admissibility quickly becomes a dispute over the integrity of the evidence itself. People are very fond of the word "official." Official status does not substitute for a traceable chain of origin. ([Portal](http://portal.unhcr.org))

5. ELECTRONIC EVIDENCE AND THE NEW ARCHITECTURE OF CROSS-BORDER ACCESS

Electronic evidence has radically changed the cross-border evidentiary environment. The Council of Europe explains that the Second Additional Protocol to the Budapest Convention provides tools for enhanced cooperation and disclosure of electronic evidence, including direct cooperation with service providers and registrars, means to obtain subscriber information and traffic data, emergency cooperation, and other mechanisms. That means electronic evidence is no longer a niche issue associated only with cybercrime. It has become a universal category in modern proceedings. ([Portal](#))

But the digital form of evidence also makes legal assessment more fragile. It becomes easy to lose context, metadata, completeness of the data set, file version, access sequence, or information about whether the extract was full or selective. Moreover, digital evidence is often held by private providers rather than by states, which introduces another layer to the question of lawful access and disclosure. The acceleration of international access to data therefore does not free the court from the duty to examine what exactly was disclosed, in what form, and what remained outside the record. Otherwise, digital efficiency simply becomes a faster road to digital blindness. ([Portal](#))

For the defense, the implication is fundamental: disputes over electronic evidence cannot be confined to the question whether the data was obtained through an official request. One must examine the scope of disclosure, the extraction method, preservation of technical information, existence of alternative versions, storage conditions, and whether the evidence package is in reality a curated subset assembled to fit the prosecutorial theory. It is in this field that cross-border electronic evidence most often becomes the point of highest tension between investigative efficiency and fair trial. ([Portal](#))

6. PROCEDURAL GUARANTEES: EQUALITY OF ARMS, DISCLOSURE, AND THE RIGHT TO CHALLENGE

Article 14 ICCPR and OHCHR fair trial materials proceed from the premise that a party must have a real opportunity to answer the case against it, to call and examine witnesses, including experts, and to benefit from a genuinely adversarial procedure. In cross-border cases this becomes especially difficult, because evidence may formally exist while being practically unchallengeable: the original is abroad, the witness is unavailable, metadata has not been disclosed, the storage device is not produced, or the translation is selective. In that situation equality of arms is not destroyed by a dramatic judicial declaration. It is destroyed by the structure of access itself. ([OHCHR](#))

Disclosure becomes a separate problem in the cross-border setting. One side may present an officially transmitted package while never disclosing what did not make it into that package, which selection criteria were applied, and which materials were deemed irrelevant. The court then sees not the universe of evidence, but a curated narrative. In fair trial terms, that is critical, because adversarial proceedings require the ability to challenge not only the final conclusion, but also the logic by which the evidentiary record was assembled. Where the record has already been cleaned and shaped by someone else's hand, the defense is arguing not with facts, but with someone else's montage of facts. ([OHCHR](#))

The practical consequence is that defense rights in cross-border cases must be formulated with technical precision rather than general rhetoric. Access is needed to the original, or to a court-verifiable copy, to the full version of correspondence, to metadata, to the grounds of the request, to information about the person or authority that extracted the data, to the methodology of selection, and

to the possibility of counter-expertise. Without that, international legal assistance turns into a one-sided supply line for ready-made evidence. That is not cooperation. It is evidentiary asymmetry with official decoration. ([OHCHR](#))

7. THE ROLE OF THE COURT, THE PROSECUTOR, AND THE DEFENSE IN ASSESSING A CROSS-BORDER EVIDENTIARY RECORD

A court in a cross-border case must not replace legal scrutiny with deference to a foreign official document as such. The Basic Principles on the Independence of the Judiciary require judges to decide matters impartially, on the basis of facts and in accordance with law, free from pressure and interference. That means the international origin of evidence gives it no presumption of truth. On the contrary, the longer the international chain, the more attentive judicial review must become. Otherwise, the court turns into a station for the legalization of someone else's procedural product. ([OHCHR](#))

The prosecutor, or other accusing authority, likewise cannot stop at the phrase "the material was received through official channels." The Guidelines on the Role of Prosecutors require fair, consistent, and rights-respecting conduct. That is incompatible with the use of cross-border evidence as a black box whose contents the defense is expected to accept on trust. If the prosecution cannot explain the provenance, completeness, and selection logic of the material, it does not strengthen the case. It weakens its legitimacy. ([OHCHR](#))

For the defense, cross-border evidence must be broken down into layers: channel of transmission, legal basis, provenance, integrity, completeness, language, technical verifiability, and challengeability. The Basic Principles on the Role of Lawyers protect the ability of counsel to represent and assist clients effectively throughout proceedings. In a cross-border case, that means meaningful work with evidence, not symbolic access after the fact. Counsel is often fighting not only the accusation, but distance, translation, technology, and bureaucracy all at once. An elegant arrangement, if one enjoys asymmetrical misery. ([OHCHR](#))

8. TYPICAL RISKS: FRAGMENTATION, SELECTIVITY, TRANSLATION, CHAIN OF CUSTODY, AND PARALLEL JURISDICTIONS

The first typical risk is fragmentation. In cross-border cases, what reaches the court is often not the full evidentiary universe but an extract. This is especially common with banking materials, correspondence, corporate files, and digital logs. Formally, the extract may be official. Substantively, it may be inadequate if it is unclear what remained outside it. The second risk is selectivity, where either the requested state, the requesting state, or an expert constructs a narrative subset from a larger body of material. These two risks are particularly dangerous because they often present themselves as ordinary and sensible "data handling." ([UNODC](#))

The third risk is translation. In cross-border cases, translation is not a secondary clerical exercise. It is part of the evidentiary fate of the material. A mistranslated contractual term, authority clause, time reference in a message, or accounting concept may shift the legal meaning of the whole document. Yet the defense is often confronted with a ready-made translated version while the original is

inaccessible or practically unusable. The dispute is then no longer only over the document, but over whose language version of reality becomes the court's reality. Humanity, in its usual style, has managed to turn grammar into a weapon too. ([OHCHR](#))

The fourth risk is chain of custody and technical integrity. For digital material in particular, it matters who extracted the data, how it was copied, who had access to it, whether it was converted into another format, what software was used, and whether markers of integrity were preserved. The fifth risk is parallel jurisdictional use, where the same material appears in several countries in different legal roles: as civil evidence, criminal evidence, a basis for asset freezing, or a foundation for international search measures. In that situation it becomes particularly easy to lose control over where cooperative use of evidence ends and opportunistic re-use begins. ([Portal](#))

9. A PRACTICAL MODEL OF DEFENSE

In practical terms, the defense must begin not with the abstract objection that “foreign evidence is doubtful,” but with forensic mapping of the entire evidentiary chain. It is necessary to determine in which jurisdiction the material arose, through which channel it was obtained, who selected its scope, who translated it, who stored it, who created any extract, what legal regime governed the original seizure, and what role was played by the provider, bank, registry, expert, or other intermediate actor. Until those questions are asked, the defense is arguing not with evidence, but with its facade. ([UNODC](#))

The second step is to translate the dispute into the language of fair trial. The point is not merely to say, “we disagree with this document,” but to show that the use of the material without access to the original, without full disclosure, without the ability to test the selection process, without counter-expertise, and without genuine adversarial proceedings undermines equality of arms and the integrity of the process. That is what transforms a technical dispute about a file, email, or bank extract into a strong legal challenge about admissibility and procedural fairness. ([OHCHR](#))

The third step is distinct work on electronic evidence. Here the defense must demand not only content, but context: metadata, logs, extraction method, chain of custody, and scope of disclosure. The fourth step, where appropriate, is to anchor the argument in the relevant international regime: the Hague Convention for civil and commercial evidence, MLA and UNTOC for criminal matters, the European Investigation Order within the EU, and the Budapest framework for electronic evidence. This is not decorative comparative law. It is how one shows the court that the problem is not that the evidence came “from abroad,” but that its cross-border legal life never underwent sufficient scrutiny. That is a very different argument, and a much more useful one. ([hcch.net](#))

10. CONCLUSION

Evidence in cross-border cases cannot be assessed through the lazy formula that “if it arrived through an official channel, it may be used without further questions.” International cooperation creates channels for obtaining and transmitting material, but it does not erase the problems of lawfulness, provenance, integrity, completeness, and fairness of use. For that reason, the legal assessment of cross-border evidence must be more rigorous, not more trusting, than the assessment of domestic material. The more complex the route of the evidence, the greater the duty of the court and the parties to show that it crossed not only geographical borders, but also the boundaries of legal admissibility. ([hcch.net](#))

The main practical conclusion is simple. In a cross-border case, one must challenge not only the content of the evidence, but also its route: who obtained it, how it was transmitted, what was excluded, who gave it the language of the court, and what opportunities the defense had to open it up and test it. Where those questions remain unanswered, the material may retain an official appearance while losing legal reliability. At that point, the issue is no longer technical. It is about the honesty of the proceedings themselves, which is rather more important than authorities usually admit when they are delighted to receive another impressive folder from abroad. ([OHCHR](#))

APPENDIX A. TERMINOLOGY

Cross-border evidence
Evidence whose origin, storage, extraction, transmission, or assessment is connected with more than one jurisdiction. This may concern paper documents, witness testimony, banking records, and digital data. ([hcch.net](#))

Mutual legal assistance
An interstate mechanism of legal cooperation in criminal matters through which states provide one another assistance in obtaining evidence and carrying out procedural acts, generally to the fullest extent possible under the applicable framework. ([UNODC](#))

European Investigation Order
A judicial instrument within the EU designed to simplify and accelerate cross-border criminal investigations and the obtaining of evidence among Member States. ([EUR-Lex](#))

Electronic evidence
Data in digital form used to establish facts in proceedings. In international cooperation, access to and disclosure of such evidence is increasingly regulated by specialized instruments, including the Second Additional Protocol to the Budapest Convention. ([Portal](#))

Equality of arms
An element of fair trial requiring that each party have a real procedural opportunity to know, test, and challenge the evidence and arguments of the opposing side without substantial disadvantage. ([TB Internet](#))

APPENDIX B. MATRIX FOR THE LEGAL ASSESSMENT OF CROSS-BORDER EVIDENCE

Criterion	How it appears	Legal significance
Lawfulness of obtaining	Evidence was gathered through MLA, an EIO, a Hague request, or another channel	Does not by itself settle later admissibility or fairness of use
Provenance	It is possible to identify where the document or data came from and who transmitted it	Foundational for authenticity and contextual assessment
Integrity	The file, document, extract, or copy remained intact	Central to confidence in content
Completeness	The court received the full body of material or only a selected fragment	Reveals whether the record is a curated narrative
Disclosure	The defense has access to the original, metadata, versions, and translation basis	Necessary for equality of arms

Challengeability	Counter-expertise, witness examination, or technical verification is possible	Core element of adversarial process
Language translation	Meaning has not been distorted through translation or adaptation	Directly affects legal qualification and factual understanding
Parallel use across jurisdictions	The same material is used in multiple countries and legal contexts	Increases the risk of disconnect between origin and judicial function

The legal significance of these criteria follows from the combined operation of fair trial standards, international judicial-cooperation regimes, and modern instruments governing electronic evidence. ([TB Internet](#))

OFFICIAL SOURCES

1. **International Covenant on Civil and Political Rights** - the core international norm on equality before courts and fair trial. ([OHCHR](#))
2. **Human Rights Committee, General Comment No. 32** - the key interpretation of Article 14 ICCPR, equality before courts and tribunals, and fair hearing. ([TB Internet](#))
3. **OHCHR, Right to a Fair Trial and Due Process** - practical guidance on answering the case against a person, examining witnesses and experts, and ensuring equality of arms. ([OHCHR](#))
4. **HCCH 1970 Evidence Convention** - the principal international framework for taking evidence abroad in civil and commercial matters. ([hcch.net](#))
5. **UN Convention against Transnational Organized Crime and UNODC MLA materials** - the main criminal-law framework for cross-border mutual legal assistance. ([UNODC](#))
6. **Directive 2014/41/EU on the European Investigation Order** - the EU instrument for faster and more efficient cross-border criminal investigations. ([EUR-Lex](#))
7. **Second Additional Protocol to the Budapest Convention** - the framework for enhanced cooperation and disclosure of electronic evidence. ([Portal](#))
8. **Basic Principles on the Independence of the Judiciary** - standards of judicial independence relevant to the assessment of disputed evidentiary material. ([OHCHR](#))
9. **Guidelines on the Role of Prosecutors** - standards of fair and consistent prosecutorial conduct in the use of evidence, including evidence received from abroad. ([OHCHR](#))
10. **Basic Principles on the Role of Lawyers** - guarantees for effective defense work at every stage of proceedings. ([OHCHR](#))