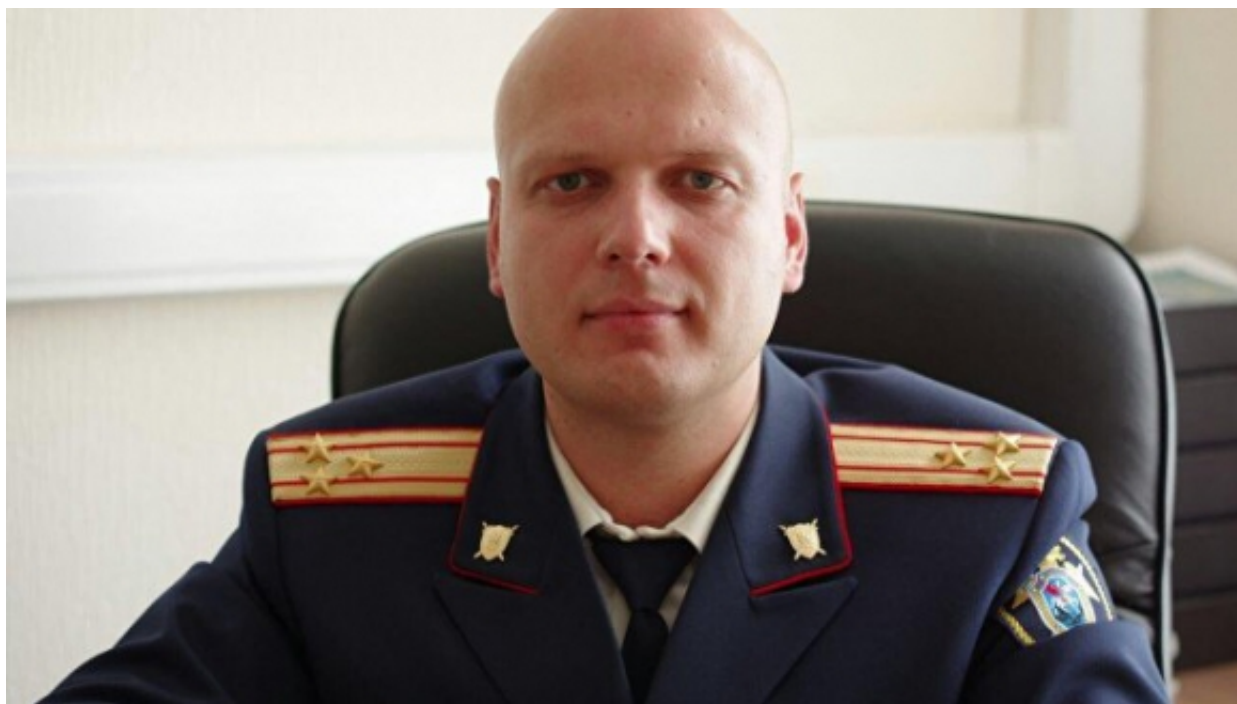

Interview of Pyotr Litvishko, Head of Division for International Cooperation of the Investigative Committee to Russia Today



Expert Opinion from Russia's Investigative Committee: Terrorist Attack Onboard the Aircraft A321 over Sinai as Background for July Package of Counter-Terrorism Laws

The terrorist attack onboard the aircraft A321 in October 2015 in Egypt remains one of the most heinous and tragic events for Russia and is far from closure. On Wednesday, the Investigative Committee's spokesman Vladimir Markin announced that criminal investigators identified the explosion locations onboard the crashed airliner after inspecting its surface layout at the Cairo Airport. According to Markin, this is the first instance of Russian authorities' performing criminal procedure activities abroad themselves. Pyotr Litvishko, Head of Division for International Cooperation of the Investigative Committee, PhD in Law, Colonel of Justice talked to the RIA Novosti Correspondent Maria Zueva about how the Sinai tragedy came to trigger the strengthening of Russian counter-terrorism legislation and adoption of the much discussed July law package, significant examples of the Investigative Committee's international efforts, including the Alexander

Litvinenko investigation, and other issues.

One of the most discussed amendments of Russian legislation is the July package of counter-terrorism laws. Would you tell us about its background relating to international law?

To begin with, in 2006, an armed attack on the Russian diplomatic mission's vehicle in Baghdad, Iraq, was committed resulting in the RF Embassy officers being taken hostage and killed; this crime triggered the amendment of Russian law on counteraction of terrorism providing for the use beyond the Russian Federation territory of the RF Armed Forces formations and Federal Security Service special task units for combating terrorist activities.

In 2013, the amendments were introduced into the RF Code of Criminal Procedure which defined the territorial jurisdiction (venue) of Russian investigative authorities and courts over crimes committed abroad.

Has the terrorist act onboard the aircraft A321 over Sinai any nexus to the subsequent adoption of the July package of counter-terrorism laws?

Last year's tragedy in Egypt was one of the factors behind its adoption. The RF Criminal Procedure Code was amended, creating the possibility for Russian pre-trial investigation authorities and courts' conducting investigative and other procedural activities (including arrests and other restraint/coercive measures) abroad themselves (not necessarily in the country of the locus delicti) in accordance with the Code, including in respect of foreign nationals and stateless persons (also when they are suspects or accused), in cases of any extraterritorial crime falling within Russia's prescriptive jurisdiction and providing for legal effect of evidence so gathered which was, admittedly, called for by investigatory practices for quite a long time.

Has the amendment been already used in practice?

These regulations were applied for the first time two days ago when criminal investigators and forensic experts from the RF Investigative Committee carried out an inspection of the surface layout of fragments of the crashed Airbus A321 at the Cairo Airport themselves with participation of Egyptian counterparts.

And how were such things dealt with before that provision was adopted?

Before those amendments were introduced, such actions could only be conducted by foreign authorities under legal assistance requests, at best in the presence of Russian investigators.

The new regulation does not concern, e.g., cross-border operations of non-extradition transfer or lure of suspects and accused persons since they are regarded, with some exceptions, as contrary to international law.

Is this amendment consistent with international law?

In terms of the scope of its extension abroad, such enforcement jurisdiction is unique in itself. But the absence of such specialized provisions in foreign domestic laws should not raise any doubts as to their compatibility with international law. The fact is that, as opposed to criminal procedure codes of Russia and other CIS states, laws of many countries, especially common law ones, in principle do not make admissibility of evidence in any way conditional on its territorial or extraterritorial provenance, the location of sources of evidence is irrelevant to assessing its admissibility. In other words, there is simply no need for such a special rule there since foreign proceedings employ criteria and standards of proof different from those used in Russia; the practice of US courts applying the so-called Ker–Frisbie doctrine can be mentioned here as an example.

In what way can Russia apply these regulations then?

It goes without saying that this new provision is to be applied not in isolation but only in conjunction with international law norms which have priority. These are international law principle of the sovereign equality of states and its derivative principle of non-interference in the internal affairs of another state that in the modern environment have acquired an additional dimension in exercising enforcement jurisdiction in cyberspace, trans-border access to information and telecommunications systems and data, including cloud computing.

But in this case such activities are surely supposed to require the approval of the state concerned...

And so they do. International law requires the receiving state's consent or sometimes acquiescence to such non-treaty unilateral activities in the first place expressed in each individual case or enshrined in a treaty or other international document containing obligations recognized by a relevant state, or without such a consent in exceptional cases not contrary to international law, for instance, to preserve evidence during extraterritorial operations in exercise of a nation's right to self-defence.

A hotly debated subject is the new rule introducing a duty for telecom service providers and persons that organize circulation of information in Internet to retain on the territory of Russia and provide to the competent authorities communications data and content data...

These provisions are also of considerable significance for international cooperation between judicial and law enforcement authorities since Russian competent authorities can transmit those data to their foreign counterparts for countering crime based on official requests and of course observing the necessary procedural safeguards such as demanding a respective court warrant. Flagrant violations by some countries of the procedures for sharing metadata with foreign partners without employing such safeguards within the global signals surveillance programs entailed the persons concerned filing their complaints with international human rights bodies (ECtHR cases “Big Brother Watch and Others v. the United Kingdom” et al.).

Therefore, it is always important to strike the right balance between the competing interests of international anti-crime cooperation, protection of territorial sovereignty of states and ensuring of human rights.

What other amendments of legislation are, in your view, necessary for combating terrorism as well as improving international cooperation efforts in this field?

The fact is that many forms of international cooperation in fighting crime are rather intrusive in respect of foreign sovereign territory and to some extent fraught with voluntary sovereignty concessions. These are, e.g., cross-border surveillance and hot pursuit, transnational access to computer systems and data, and some others. These very forms of international cooperation in combating crime are deemed progressive and efficient, hence it will be worth developing them in relevant conditions.

Does Russia actually permit other countries to carry out such activities on its soil?

The Russian Federation generally does not readily concede its sovereignty for the benefit of international fight against crime and so far does not accede to the said cooperation forms, and for good reason so in the current circumstances.

This is also the reason for Russia having signed but subsequently refusing to become a party to the CoE Budapest Convention on Cybercrime of 2001 and CIS Minsk Treaty on the Procedure for the Stay and Interaction of Law Enforcement Officers on the Territories of Member States of the Commonwealth of Independent States of 1999. The 2015 Agreement on the Procedure for Establishing and Operation of Joint Investigative and Operational Teams in the Territories of the Member States of the Commonwealth of Independent States, as opposed to similar EU instruments, does not provide for a state party's authorities conducting activities on their own on the territory of another state party.

What else could the Investigative Committee suggest and what practical measures does it undertake to improve the state of affairs in this field?

The RF Criminal Procedure Code does not provide for a procedural instrument of consular legal assistance in criminal matters that is laid down in multiple treaties and other sectoral legislation of the Russian Federation and is extensively used by other countries, e.g., Poland. The conduct of investigative and other procedural actions by Russian consular officers in respect of citizens of the Russian Federation, and in the countries allowing it, also in respect of citizens of foreign states, including defendants, may play a decisive role in the cases where filing a request for legal assistance or police-to-police cooperation to a foreign state is impossible or undesirable. The Investigative Committee together with Russia's MFA and its missions abroad has been gradually introducing this method of evidence gathering in its operations, but its full-blown implementation requires relevant amendment of the Russian Criminal Procedure Code.

In what ways do criminal investigators cooperate with other countries?

The main form of the RF Investigative Committee's international cooperation is forwarding abroad of Russian requests for conducting investigative actions and executing foreign ones in Russia, thus collecting evidence overseas that is often essential to the investigation, the protection of rights and legal interests of the victims and international asset recovery, as well as assisting foreign counterparts in gathering evidence in Russia.

Our investigators surely participate in foreign judicial proceedings...

Yes, they do. These are less traditional forms of cooperation, such as participation of the Investigative Committee's officials, among others, as representatives of a party to a proceeding, in examining evidence and other issues pending with foreign judicial authorities, in particular, under requests for extradition and legal assistance in criminal matters.

In addition to that, with the Ministry of Foreign Affairs of the Russian Federation being the coordinating party, the employees of the RF Investigative Committee take part in international events, among others, as go-to experts within delegations to the agencies of the UN and other international organizations, also participating in negotiations over difficult issues such as the ongoing Russia–Ukraine consultations on interpretation and application of a number of treaties; contribute to the development of international instruments and mechanisms concerning the agency's scope of competence.

A new but already yielding positive results line of activity involves the organization of professional development in the Academy of the Investigative Committee for representatives of foreign competent authorities as well as their practical training in the Main Department of Forensics.

Would you give some interesting examples of international activities of the Investigative Committee?

A significant portion of the crimes being investigated by the agency is of a transnational nature or is otherwise complicated by a foreign component, therefore the number of outgoing and incoming international requests for judicial and law enforcement assistance is high. As an example of other cooperation forms, for several years the RF Investigative Committee took part in the UK coroner's inquest into the death of Alexander Litvinenko in 2006 in London, adduced valuable evidence in those proceedings. Regrettably, the public inquiry which replaced that inquest was devoid of an adversarial nature and closed to the public, ignored significant evidence and breached some rules of international cooperation, and after proceeding in closed sessions, came to the contradictory and legally untenable conclusions. This is a stark illustration of how serious damage can be inflicted on the anti-crime cooperation efforts of states for the sake of current nonlegal considerations.

Would you provide some details of the investigations into war crimes?

These are complex proceedings. I would just indicate that the agency is conducting criminal investigations into the circumstances of the Georgian-South Ossetian armed conflict that took place in August 2008, the use of prohibited means and methods of warfare in Ukraine, and other war crimes – serious violations of international humanitarian law, crimes against humanity and genocide. The issues of international legal cooperation also arise in the operations of military investigative units of the RF Investigative Committee involving cases related to the stationing of Russian military formations abroad, cases of piracy as well as in the operations of the investigative authorities on the territory of the Baikonur complex in Kazakhstan.

What is the legal basis for international cooperation of the Investigative Committee?

In terms of direct communications, i.e. those not involving the RF Prosecutor General's Office as a central authority for international legal assistance, at the moment the Investigative Committee is a competent authority that directly interacts with authorities of foreign states and foreign and international organizations under 79 interstate and intergovernmental treaties to which the Russian Federation is a party, bilateral interagency international agreements, as well as based on reciprocity principle.

In May 2016, the Protocol on Holding Joint Sessions of the Collegiums of the Investigative Committee of the Russian Federation and the Investigative Committee of the Republic of Belarus was signed. There are also instances of interagency international agreements concluded by the RF Investigative Committee and foreign counterparts on specific criminal cases, e.g. the Memorandum of Understanding between the Investigative Committee of the Russian Federation and the Prosecutor General's Office of the Arab Republic of Egypt on Interaction in Investigating the Crash of the Airbus A321 Airliner on October 31, 2015 in the Territory of the Arab Republic of Egypt signed this year in Cairo.

Concluding, does the Investigative Committee contribute to the protection of our compatriots' rights overseas?

The Investigative Committee consistently employs the extraterritorial means of criminal procedure for the protection of rights and legal interests of Russian nationals as well as the interests of the Russian Federation, mainly, through initiating and carrying out relevant criminal proceedings on the basis of international law principles of extraterritorial criminal jurisdiction. For instance, the Committee is investigating into a number of abductions of Russian citizens outside the Russian Federation committed by foreign law enforcement agents. The other day the Committee launched investigations into Ukrainian radicals' obstructing Russian State Duma elections at Russia's embassy in Kiev.

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