

**S. Ya. Lykhova,**

Habilitated doctor of law, professor

ORCID ID: <https://orcid.org/0000-0003-4755-7474>

**N. O. Semchuk,**

PhD, associate professor

ORCID ID: <https://orcid.org/0000-0002-9357-9108>

## SOME FEATURES OF AVIATION CRIMES DURING MARTIAL TIME

National Aviation University

Liubomyra Huzara Avenue, 1, 03680, Kyiv, Ukraine

E-mails: [sofiia.lykhova@npp.nau.edu.ua](mailto:sofiia.lykhova@npp.nau.edu.ua), [natalybarrister@ukr.net](mailto:natalybarrister@ukr.net)

*The purpose of this article is to analyze aviation crimes in martial time and develop theoretical and practical recommendations to combat this phenomenon. **Methods:** general and special scientific methods were used to achieve this purpose. The use of these methods allowed to outline the problems of combating of aviation crimes from a criminal law point of view and to offer practical recommendations for combating this phenomenon. **Results:** during the preparation of the article, martial state was declared in Ukraine in connection with the attack of the Russian Federation. Contrary to international law, Russia has not officially declared war on Ukraine. In Ukraine war crimes introduced additional responsibility only for the Ukrainian military, there are special features of qualification. As Ukraine has now closed the airspace to all aircraft except Ukrainian state military aircraft, all Russian military pilots who perform combat sorties in Ukrainian airspace are liable both as ordinary airspace violators and as criminals against humanity. The article considers 3 main situations of war aviation crimes: investigation; flight with ammunition; bombing of non-residential buildings and bombing of civilian objects from the point of view of the criminal law and given practical recommendations on the possible qualification of such actions under the laws of Ukraine.*

**Key words:** armed aggression; war crimes; aviation crimes; aviation war crimes.

**Problem statement and its urgency.** During the armed aggression of the Russian Federation against Ukraine, the legal classification of such aggression in accordance with international law has great importance for criminal law in the context of aviation crimes. Ukraine is a victim of armed aggression. According to the law [1], martial law is currently imposed in the country by President [2]. However, declaring martial state in itself is not the same as declaring war. According to the rules of logic, it is necessary for two or more countries to declare a decision on the war and inform each other about it.

International agreements are of paramount importance in this context. According to Convention (III) relative to the Opening of Hostilities (The Hague, 18 October 1907) [3] the contracting Pow-

ers recognize that hostilities between themselves must not commence without previous and explicit warning, in the form either of a declaration of war, giving reasons, or of an ultimatum with conditional declaration of war. The USSR was a Party to this convention, so both Ukraine and the Russian Federation, as a rule of succession, also recognize these provisions.

Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land (The Hague, 18 October 1907) also contains certain provisions on this issue [4]. In particular, this Convention establishes provisions concerning the occupied territories.

The Russian Federation is currently violating these conventions [3; 4]. Currently, the Russian

Federation is violating these conventions by not declaring an official ultimatum and stubbornly calling its own aggression a "special operation" rather than a war.

From Ukraine's point of view, martial state has been imposed in the country [1; 2], but Ukraine, as a defending state, has also not declared war on the Russian Federation. However, as a country suffering from armed aggression, it had no obligation to do so.

As a result, martial state has now been declared in Ukraine, but no state has declared war. The Russian Federation also did not officially declare war (contrary to international law) and did not impose martial state on its own territory. In this case, as I. Sopilko notes, we have a situation of undeclared and unrecognized by one of the parties (in this case by the Russian Federation) war [5].

Given the above, **the purpose** of this article is to analyse the specifics of committing aviation crimes in an undeclared and unrecognized by one of the parties war, in terms of criminal law.

*Methodology.* As can be seen from the analysis, Ukrainian and foreign researchers in the actual legal research in the field of criminal law use quite similar methods. In the literature, such methods are divided into quantitative and qualitative (or empirical and theoretical) [6]. The basic for the science of criminal law is the normative analysis of the law (doctrinal analysis), which includes attempts to understand the best balance of rights and responsibilities within the framework defined by law. Ukrainian researchers know this method as system (method of system structural analysis). In essence, this method is inductive, i.e. begins with observations, and the theory is proposed at the end of the study and involves the search for patterns of observation and the development of explanations - theories - for these patterns through a number of hypotheses. Research that focuses on distinguishing between legal doctrines in cases should primarily rely on the circumstances of the case to compare cases with each other and laws between groups, institutions, and jurisdictions.

**Analysis of research and publications on the problem.** Since the situation, which is analysed in

the article, has emerged recently, this article is the first comprehensive study in this area. As a basis used general works on war crimes, based on the work of M. Karpenko [7] and O. Myronets [8] on liability for aviation offenses, were used.

**Main material.** As noted above, the current Russian aggression was not accompanied by an official declaration of war between the countries, contrary to international law. In this situation, this means that all Russian servicemen fighting illegally in Ukraine are subject to the full jurisdiction of the Ukrainian Criminal Code [9] (hereinafter - the CC).

It should be noted that in accordance with Art. 401 CC, "under Section 19 of CC, military offences shall mean criminal offences against the procedure established by law for the performance or military service committed by servicemen, as well as conscripts and reservists during the training session. Servicemen of the Armed Forces of Ukraine, the Security Service of Ukraine, the State Border Guard Service of Ukraine, the National Guard of Ukraine and other military groups formed in accordance with the laws of Ukraine, the State Special Transport Service, the State Special Communications and Information Protection Service of Ukraine, as well as other persons specified by law, shall be liable under the respective Articles of this Section".

That is, military criminal offenses in Ukraine can be committed only by legitimate military formations of Ukraine. Enemy troops are not responsible for this section.

In the case of aviation crimes, this has the following consequences. As Ukraine has now closed the airspace to all aircraft except Ukrainian state military aircraft, all Russian military pilots who perform combat sorties in Ukrainian airspace are liable both as ordinary airspace violators and as criminals against humanity. Let's analyze what responsibility they should be incriminated for such illegal actions, on the example of specific situations. Note that in all cases we have in mind both flights of aircraft and unmanned aircraft, as the current rules on aviation safety also apply to unmanned aircraft.

We emphasize that in this case we describe only the presence of certain signs of criminal offenses. The scheme proposed by us is not a final qualification according to all the rules of the theory of qualifi-

cation of crimes. These issues will be explored in the following works.

The first case is the conduct of regular military reconnaissance, without the presence of ammunition. In these cases, there are signs of even more crimes, there is, above all, provided for in Art. 282 of the CC violation of rules related to the use of airspace, as well as provided for in Art. 333-2 of the CC illegal crossing of the state border of Ukraine. There is also a violation of rules of the warfare (art. 438 of the CC) in the form of other violations of rules of the warfare stipulated by international treaties - participation in an aggressive undeclared war.

The second situation arises when the aircraft had ammunition on board, but did not hit the target or was neutralized before the first shot.

In this case, also there are signs of even more crimes and violation of a number of the above articles of the CC – art. 282 of the CC (violation of rules related to the use of airspace), art. 333-2 of the CC (illegal crossing of the state border of Ukraine), art. 438 of the CC (violation of rules of the warfare). And also, in addition there is a violation of Art. 269 of the CC (Illegal transportation of explosive or flammable substances by aircraft).

In the third case, in addition to the illegal crossing of the state border with ammunition, there is a bombing of a military facility. In this case, in addition to the above articles 282, 333-2, 438, 269 of the CC additional qualification required.

Undoubted presence of a qualified type of criminal offense under Art. 194 CC - intended destruction or endamage of somebody else's property, where it caused heavy damage, where it caused a particularly heavy damage to property, or death of people, or any other grave consequences. As an alternative, we can offer Art. 113 of the CC «Sabotage». The definition of this crime as in the CC is provided «... committing other actions for the purposes of mass destruction of people, or causing bodily injuries or any other harm to their health, or destruction or damaging of important industrial or defence facilities...».

If the church is damaged during the air attack, additional qualifications are required under the

article 178 of the CC «damage of religious architecture or houses of worship».

If illegal bombing of a civilian object has taken place, there are signs of even more crimes.

In addition to the above signs of crimes under Art. 282, 333-2, 438, 269 of the CC and, depending on the circumstances, provided for in Art. 194 or 113 of the CC, it is also necessary to pay additional attention to other types of crimes. If in this case there is a purpose to intimidate the population, then the actions have signs of a terrorist attack punishable under Art. 258 CC. In the case of deliberate bombing of peaceful objects, the purpose of intimidation is one way or another, it can be absent only in case of error or accident.

Additionally, it should be noted that in accordance with the basic amendments to the Art. 43-1 CC, the right of citizens to counteract military aggression, including aviation war crimes, is significantly expanded. According to this article, an act (act or omission) committed during martial law or during an armed conflict and aimed at repelling and deterring armed aggression of the Russian Federation or aggression of another country, if it caused harm to life or health, is not a criminal offense a person who commits such aggression or harms law enforcement interests in the absence of signs of torture or use of means of warfare prohibited by international law, other violations of laws and customs of war provided by international treaties approved by the Verkhovna Rada of Ukraine.

According to the content of this article, every person has such a right. In this case the use of weapons is allowed. Based on the above, in the event of a catapult, the pilot of the aggressor country, as an armed soldier, can also be killed on the spot by any of the civilians, as it poses a threat. Similarly, anyone, if technically possible, can shoot down enemy aircraft with impunity.

From the above we can draw the following **conclusions**. During the preparation of the article, martial state was declared in Ukraine in connection with the attack of the Russian Federation. Contrary to international law, Russia has not officially declared war on Ukraine.

In Ukraine for war crimes introduced additional responsibility only for the Ukrainian military, there are special features of qualification. As Ukraine has

now closed the airspace to all aircraft except Ukrainian state military aircraft, all Russian military pilots who perform combat sorties in Ukrainian airspace are liable both as ordinary airspace violators and as criminals against humanity.

All options for illegal actions of enemy aircraft in terms of criminal law can be divided into 3 main situations. We emphasize that in these cases we describe only the presence of certain signs of criminal offenses. The scheme proposed by us is not a final qualification according to all the rules of the theory of qualification of crimes. These issues will be explored in the following works.

In the first case, illegal aerial reconnaissance without weapons, there are the presence of *corpus delicti* under Art. 282, 333-2, 438 of the CC.

The second situation arises when the aircraft had ammunition on board, but did not hit the target or was neutralized before the first shot. In this case, in addition to the offenses mentioned in the first case, there are signs of an offense under 269 of the CC.

In the third case, in addition to the illegal crossing of the state border with ammunition, there is a bombing of a military facility. In this case, in addition to the offenses provided for in the second situation, there may be signs of offenses under Art. 113 or 194 of the CC. If the church is damaged during the air attack, additional qualifications are required under the article 178 of the CC «damage of religious architecture or houses of worship».

If illegal bombing of a civilian object has taken place, there are signs of even more crimes.

In addition to the above signs of crimes under Art. 282, 333-2, 438, 269 of the CC and, depending on the circumstances provided for in Art. 194 or 113 of the CC, it is also necessary to pay additional attention to other types of crimes. If in this case there is a purpose to intimidate the population, then the actions have signs of a terrorist attack punishable under Art. 258 CC. In the case of deliberate bombing of peaceful objects, the purpose of intimidation is one way or another, it can be absent only in case of error or accident.

## References

1. On the legal regime of martial state: Law of Ukraine from 12.05.2015 № 389-VIII: as of 1 Apr. 2022. URL: <https://zakon.rada.gov.ua/laws/show/389-19#Text> (date of access: 06.04.2022).
2. On the imposition of martial state in Ukraine: Decree of the President of Ukraine of 24 February 2022 № 64/2022: as of March 18 2022 (date of access: 06.04.2022).
3. Convention (III) relative to the Opening of Hostilities: Convention Organisation United Nations dated 18.10.1907. URL: [https://zakon.rada.gov.ua/laws/show/995\\_b85#Text](https://zakon.rada.gov.ua/laws/show/995_b85#Text) (date of access: 06.04.2022).
4. Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land: Convention Organisation United Nations dated 18.10.1907. URL: <https://zakon.rada.gov.ua/laws/show/64/2022#Text> (date of access: 06.04.2022).
5. Information wars as a threat to the information security of Ukraine / I. Sopilko et al. *Conflict resolution quarterly*. 2021. Vol. 39. № 3. P. 189–347. URL: <https://onlinelibrary.wiley.com/doi/abs/10.1002/crq.21331>
6. Semchuk N.O., Timush D.I. Qualitative methods of criminal law research: Ukrainian and foreign experience. *Scientific works of National Aviation University. Series: Law Journal «Air and Space Law»*. 2020. Vol. 4. № 57. URL: <https://doi.org/10.18372/2307-9061.57.15083> (date of access: 06.04.2022).
7. Karpenko M. Crimes against the established order of military service (war crimes): theoretical and applied aspects. Kyiv: National Academy of Management, 2018. 420 p.
8. Hutsal I.Y., Luchok A.M., Myronets O.M. Theoretical-legal aspects of civil aviation protection against acts of illegal intervention. *Juridical scientific and electronic journal*. 2020. № 1. P. 285–287. URL: <https://doi.org/10.32782/2524-0374/2020-1/70> (date of access: 08.04.2022).
9. Criminal Code of Ukraine: Code of Ukraine of 05.04.2001 № 2341-III: as of 3 April 2022. URL: <https://zakon.rada.gov.ua/laws/show/2341-14#Text> (date of access: 08.04.2022).

Софія Лихова, Наталя Семчук

## ДЕЯКІ ОСОБЛИВОСТІ ВЧИНЕННЯ АвіАЦІЙНИХ ЗЛОЧИНІВ ПІД ЧАС ВОЄННОГО СТАНУ

Національний авіаційний університет  
проспект Любомира Гузара, 1, 03680, Київ, Україна  
E-mails: sofia.lykhova@npp.nau.edu.ua, natalybarrister@ukr.net

*Метою цієї статті є аналіз особливостей вчинення авіаційних кримінальних правопорушень під час неоголошеної і невизнаної однією із сторін війни, з точки зору кримінального права. Основною методологією є доктринальний аналіз, який, по суті, є індуктивним, тобто починається із спостережень, а теорія пропонується наприкінці дослідження і передбачає пошук закономірностей спостереження та розробку пояснень – теорій – для цих закономірностей за допомогою ряду гіпотез. Використання такої методології дозволило окреслити проблеми вчинення авіаційних злочинів під час воєнного стану з точки зору кримінального права. **Результати:** під час підготовки статті в Україні було оголошено воєнний стан у зв'язку з нападом Російської Федерації. Всупереч міжнародному праву, Росія офіційно не оголошувала війну Україні. При цьому, оскільки в Україні за військові кримінальні правопорушення передбачена додаткова відповідальність лише для українських військових, є особливості кваліфікації кримінальних правопорушень, вчинених ворожою авіацією. Оскільки Україна зараз закрила повітряний простір для всіх літаків, крім українських військових повітряних суден, усі російські військові льотчики, які виконують бойові вильоти в українському повітряному просторі, несуть відповідальність і як порушники повітряного простору, і як особи, що вчиняють кримінальні правопорушення проти миру, безпеки людства та міжнародного правопорядку. Наголошуємо, що в даному випадку ми описуємо лише наявність певних ознак кримінальних правопорушень. Запропонована нами схема не є остаточною кваліфікацією за всіма правилами теорії кваліфікації злочинів. Ці питання будуть розглянуті в наступних роботах.*

*Протиправні дії ворожої авіації з точки зору кримінального законодавства можна умовно поділити на три підтипи. У першому випадку це незаконна повітряна розвідка без зброї. Друга ситуація виникає, коли літак мав на борту боєприпаси, але не влучив у ціль або був знешкоджений до першого пострілу. Третя ситуація наявна, якщо відбулося незаконне бомбардування цивільного об'єкта.*

***Ключові слова:** збройна агресія; військові кримінальні правопорушення; авіаційні кримінальні правопорушення; авіаційні військові правопорушення.*

Стаття надійшла до редакції 16.05.2022