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**CRIMINAL LIABILITY FOR CREATING OR LEADING A  
CRIMINAL ORGANIZATION**

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## CONCEPTUAL GUIDELINES OF RESEARCH

**The actuality and importance of the problem proposed for research:** The evolution of the process of globalization, which characterizes contemporary civilization in an accentuated way, causes the emergence of various forms of organized crime, whose activity is accessed globally in the form of transnational, international and intercontinental crimes.

In the context of appearance of new directions of activity in criminal organizations, as well as in the conditions of global spread of terrorist acts, it becomes increasingly clear and pronounced the need for Moldova to implement effective measures to prevent and combat this odious social scourge.

In conditions of existence of a law state, it is inconceivable to tolerate the facts that threaten the public security, and on this background their corresponding incrimination acquires a special relevance.

Official statistics data shows a growing dynamic for 2020 of crimes committed by organized groups, which requires prompt intervention, including those on the field of scientific research, which must substantiate the effectiveness of prevention measures applied by relevant bodies. The need to study this type of crime from the point of view of criminal science is largely conditioned by its „metamorphosis” tendencies, which currently constantly tend towards politicization, concealment, cybernetization and internationalization. Undoubtedly, these changes in the phenomenon also influence the statistical picture, which attracts an erroneous reflection of the real situation and current trends in organized crime. This state of affairs essentially delays the economic and social development of the Republic of Moldova and prolongs „to infinity” the difficult transition period we are going through.

In addition to legal nihilism, the fictive fight against organized crime, the difficulty of investigating crimes committed in groups, another factor that justifies the need for legal study of this subject lies in certain deficiencies presented by the national normative framework itself. Moreover, the crime of creating or leading a criminal organization has not been thoroughly and properly investigated from the perspective of the science of criminal law, unlike other sciences (criminology, forensics, victimology, etc.). Therefore, in the national criminal doctrine are found only some particular studies, usually fragmented and limited to certain aspects, which are directly related to the art. 284 Criminal code.

**Description of the situation in the research field and identification of the research problems.** A remarkable contribution to the study of the phenomenon of organized crime in general, as well as the crime of creating or leading a criminal organization in particular, has been made by local and foreign authors, including: A. Borodac, V. Bujor, Gh. Gladchi, S. Brînză, M. Gheorghîță, X. Ulianovschi, V. Stati, A. Barbăneagră, M. Bîrgău, V. Ursu, Ig. Ciobanu, O. Balan, R. Cojocaru, D. Postovan, O. Bejan, A. Pungă, Al. Pareniuc, F. Sterschi, M. Braloștițianu, A. Corîștin, P.Z. Nenov, I. Hurdubaie, A. Tighineanu, M. Bencheci, V. Sîli, V. Armașu, R. Pleșca, V. Untilă, G. Cristea; C.L. Stăncilă, C.G. Gîrleanu, N. Mappes-Niediek, L. Kovesi, I.

Tucmuruz, D. Miclea, A. Andreescu, N. Radu, M. Atanasiu, L. Stăncilă, I. Coman, C. Stan, F. Calderoni; A.V. Brilliantov, V. Şcolinîi, N. Igorova, K.V. Putuliko, I.V. Godunov, I.V. Kostiukovschii, D.M. Valeev, V.A. Jbankov, A.V. Tabakov, V.V. Romaniuc, A.V. Butîrscăia, A.V. Skaciko, D.A. Koreţchii, A.S. Ovcinskii, V.N. Petraşev, M.I. Kovalev, V.V. Palii, E.N. Fedik, A. Vozniuc, M.V. Kornienko, O.Y. Şostco, V.L. Groholiskii, V.V. Ucraineţ, O.O. Kvaşa, V.P. Kovaliciuc, V.V. Mercuşin, M. Semukov, N. Kaziuc, N. Scrît. and many others.

The scientific investigation of organized crime by the authors mentioned above has acquired a multilateral character, the priority area of their concerns being the criminological, criminological, historical, comparative aspect, etc. Therefore, we consider useful and necessary the scientific deepening of the issue of criminal liability for the creation or leading of a criminal organization (art. 284 of the Criminal code), which would re-evaluate, on the one hand, the elements and component signs of the crime in question, and on the other hand, of the punishment applicable for its commission.

It should be noted that the need for such study is also felt from the point of view of judicial practice, especially for police officers, prosecutors, judges, lawyers, etc. to whom will be useful the scientific and practical guide for qualification of the offense of creating or leading a criminal organization. In particular, such study would be a support for the activity of specialized structures, such as the P.C.C.O.C.S. (the prosecutor's office to fight organized crime and special cases), which, as shown by the elements of judicial practice, encounters certain difficulties in qualifying criminal activities carried out in groups. Therefore, in order to avoid arbitrariness, mediated even by specialists in the field [45], and strict observance of the principle of legality of incrimination, it is absolutely necessary the scientific-criminal study of the crime of creating or leading a criminal organization, including from a practical point of view.

**Purpose of the work.** The purpose of the paper consists in the multiaspective theoretical and practical examination of the crime of creating or leading a criminal organization, in order to solve the problems and difficulties that appear in the application of art. 284 of Criminal code, as well as the submission of some scientific and practical recommendations for perfection the national normative framework and its harmonization to the international requirements.

In this way, in order to achieve the goal, the following objectives were established: 1) research and appreciation of the degree of evolution of the national and foreign criminal doctrine, regarding the crime of creating or leading a criminal organization; 2) the multilateral analysis of the evolution of the incriminating normative framework of the crime of creating or leading a criminal organization in the criminal legislation of the Republic of Moldova.; 3) elucidation of the concept and correlation between the „organized criminal group” and the „criminal organization” in the light of the defining international standards and the appreciation of the degree to which these standards have been implemented at national level; 4) conducting a comparative criminal law study of the criminal laws of other states, including those belonging to different legal families, in relation to crimes similar or almost similar to that provided by art. 284 Criminal code of Republic of Moldova; 5) elucidation and theoretico-practical examination of

the objective and subjective signs related to the crime stipulated in art. 284 Criminal code; 6) evaluation of the requirements to quality of the norm stipulated in art. 284 Criminal code and determining the measure to which the internal incriminating rule achieve these requirements; 7) solving the practical problems faced by the law enforcement bodies when establishing the responsibility for the creation or leading of a criminal organization; 8) establishing the delimiting signs between the crime of creating or leading a criminal organization from other homogeneous crimes; 9) evaluation of the applicable sanctioning regime and the degree of congruence with the modern principles underlying the implementation of punitive policies; 10) formulation and submission of some proposals regarding the improvement of the incriminating norm from art. 284 Criminal code etc.

**Synthesis of the research methodology.** In order to achieve the purpose and objectives, in this paper was used the normative material (treaties, conventions, international agreements, codes, laws, decisions, decrees, etc.) and doctrinal (monographs, textbooks, doctoral theses, guides, materials of scientific conferences, journals, scientific articles, electronic databases, etc.) regarding the crime of creating or leading a criminal organization. At the same time, the theoretical aspect of the paper was completed with cases from the judicial practice (jurisprudence).

Also, in the paper were applied a series of general and special methods, among which are: historical, logical, comparative, systemic method, literary interpretation, statistical, prospective, teleological, sounding.

**The novelty and the scientific originality.** This study represents a complex and well-systematized research of the theoretical and practical problems regarding the crime of creating or leading a criminal organization.

The novelty of concepts are highlighted in the following fundamental theses of the paper: 1) was eloquently found the discrepancy between the notions of „organized criminal group” and „criminal organization”, provided by the national criminal legislation, with that of „organized criminal group”, established in the text of the Palermo Convention of 15.11.2000, and the „criminal organization” provided for in the EU Council framework decision on the fight against organized crime and the Joint Action on criminalizing participation in a criminal organization in the member states of the European Union; 2) as a result of the comparative analysis performed on the criminal laws of other states, was justified the inopportuneness of the reunification within the same article (art. 284 Criminal code) of two distinctive crimes, as well as the normative-applicative deficiencies resulting from this improper reunion; 3) have been assessed the objective and subjective signs of the creation or leading of a criminal organization in accordance with the principle of legality of incrimination and with the standards derived from the jurisprudence of the ECtHR; 4) it was argued the opportunity of changing and transposing the provision from art. 284, para. (2) Criminal code to a new article, with the adjustments strictly necessary in this case, with the connection of the provisions of the Criminal code to those of the national special laws and with the best practices from the criminal legislations of other states; 5) were highlighted the

gaps of the criminal norm of creation or leading of a criminal organization (art. 284 Criminal code) and were shown the vulnerable points of this criminal norm in the practical application; 6) were revealed the opportunity of unification the terminology used within art. 284 of the Criminal code, by substituting the lexemes „creation”, „organization”, „establishment” with the one of „constitution”; 7) it has been demonstrated the attribution of the crime component of the creation or management of a criminal organization to the category of the formally-reduced ones; 8) the presence of the special purpose was shown as a mandatory sign of the subjective side of the crime from art. 284, para. (2) Criminal code and, in the conditions of the absence of an explicit purpose for the prejudicial deed from art. 284, para. (1) Criminal code, the inclusion of an implicit purpose for the form of criminal participation - the criminal organization; 9) were revealed the signs that allow to delimitate the crime of creating or leading a criminal organization from other related crimes and were presented the differences between the notions of „group of two or more persons”, „criminal group”, „organized criminal group”, „terrorist group”, „criminal organization”, „terrorist organization”, „armed gang”, „illegal paramilitary formation”; 10) it was proposed to implement in the Decisions of the Plenum of Supreme Court of Justice of Republic of Moldova of some practical rules for qualifying the commission of crimes in the composition of organized criminal groups and criminal organizations, etc.

Also, the scientific novelty of the study consists in the reasoned elaboration of a set of recommendations, in the form of *de lege ferenda*:

1. Modification of art. 46 Criminal code and reconceptualization of art. 47 Criminal code;
2. Completing the text of the legal norm from art. 284 Criminal code;
3. Modification and transposition of the provision from art. 284, para. (2) Criminal code to a new article - art. 284<sup>1</sup> Criminal code.

**The theoretical significance of the paper.** The theoretical importance of the study consists in the fact that the paper presents a well systematized and documented study, offering theoretico-practical solutions for the legal qualification of the crime of creating or leading a criminal organization. At the same time, the thesis highlights some current and perspective problems that may arise in the practice of applying the criminal law, but also of the ways of their adequate solution.

In this point of analysis, apart from the notorious doctrinal sources, were meticulously studied the provisions of the national legislation, of the international legal acts, of the criminal legislations of the states from all the known systems (families) of law.

**The applicative value of the work.** The applicative value of the paper lies in offering a compilation of the doctrinal material, useful for understanding of the investigated criminal norm, as well as formulating practical recommendations for solving uncertain situations, encountered in national jurisprudence. At the same time, was presented an eloquent interpretation of the elements and signs of the composition of the crime of creating or leading a criminal organization, which will facilitate the activity of the law enforcement bodies when applying this criminal norm. The conclusions, solutions and proposals of this study can be used in the training

of students, audiences of initial and continuing education courses, as well as practitioners directly involved in the process of preventing and combating organized crime, etc.

**The main scientific results** consist in: 1) the formulation of the definitions of „organized criminal group” and „criminal organization” in the light of international standards; 2) the evaluation of the objective and subjective signs of the creation or leading of a criminal organization in unison with the principle of legality and with the standards derived from the jurisprudence of the ECtHR; 3) arguing the need to establish a new incriminating model of the crime of creating or leading a criminal organization, with the identification of the existing deficiencies in the current criminal norm provided in art. 284 Criminal code; 4) revealing the rules of qualification of the investigated crime and the delimitations with other components of homogeneous crimes.

**Implementation of the scientific results.** The compilation of the theoretical and practical material finds its direct applicability in professional activity of the competent bodies, responsible for the fight against organized crime, especially to the application of the criminal law, the qualification of crimes, the interpretation of judicial practice. The scientific results can be used in the training of students, masters and doctoral students in higher education institutions with a legal profile, but can also be used to conduct new scientific investigations. At the same time, the recommendations and proposals, formulated by the author, can be useful in improving the normative framework regarding art. 284 Criminal code in accordance with the quality requirements of the incriminating norms resulting from the jurisprudence of the ECtHR, as well as the existing international standards on the prevention and eradication of organized crime, derived from the Palermo Convention adopted on 15.11.2000, framework decisions and joint actions of the U.E. Council etc.

**Approval of the results.** The results of the investigation regarding the legal aspects of the crime of creating or leading a criminal organization were discussed in the multiple national and international scientific forums. Also, the basic ideas of the paper were published in various scientific journals: scientific annals of the Academy „Ștefan cel Mare”; journal of the National Institute of Justice; journal of the Prosecutor's Office of the Republic of Moldova; „Legea și viața” magazine; National Law Review; Collection of scientific articles of international scientific and practical conference „European research: innovation in science, education and technology”; Collection of scientific works „Topical issues of law, education and psychology” and many others.

**Thesis publications.** 19 scientific papers have been published on the topic of the doctoral thesis.

**Keywords:** crime, criminal liability, criminal punishment, release from criminal responsibility, criminal organization, criminal group, organized criminal group, terrorist organization, terrorist group, organized crime, accession, creation, leadership, participation, constitution.



## CONTENT OF THE THESIS

**The introduction** of the thesis, which represents the beginning of the grounding and justification of the chosen topic for research, includes the following compartments: the actuality and importance of the problem proposed for research, description of the situation in the research field and identification of the research problems, purpose of the work, research hypothesis, synthesis of the research methodology, the empirical basis of the study, the novelty and the scientific originality, the solved scientific problem; the current scientific problem, of major importance, which has been solved, the applicative value of the work, implementation of the scientific results, approval of the results and the summary of the thesis compartments.

**Chapter I**, entitled „*Analysis of the situation in the field of investigation of organized crime phenomenon*”, structurally consisting of 3 subchapters, is devoted to research of the most relevant scientific materials (textbooks, monographs, doctoral theses, scientific articles, guides, studies, journals and even scientific conferences dedicated entirely to the phenomenon of organized crime) published on the topic of doctoral thesis in Moldova and abroad.

The usage of legal science in dealing with all forms of manifestation of the phenomenon of organized crime is observed on the background of studies in the country and abroad, which finally substantiate the theoretical and practical concepts and allow predicting the future evolution of organized crime and tools to prevent and combat it.

Among the first monographs on organized crime is the paper „*Organized crime: theoretical problems and tracking practices*” [53] by M. Gheorghită. The research highlights the theoretical and practical problems of the concept of organized crime and describes the forensic model of crimes committed by organized criminal groups.

The general analysis of the institution of criminal participation, including the organized forms of participation „organized criminal group” and „criminal organization”, was carried out in great detail by the author X. Ulianoschi in the paper entitled „Criminal participation” [47] and by the author M. Grama in the doctoral thesis entitled „Participants in crime and the peculiarities of their responsibility” [27].

In Phd thesis „*Legal and criminological aspects of organized crime*” [48], as well as in his other studies [6, 49], Veaceslav Ursu analyzes the phenomenon of organized crime from the perspective of the criminal policy of the Republic of Moldova, intervening with an extensive criminological research of this negative social phenomenon.

In Phd thesis „*Transnational crime: the criminal norm of sanctioning and prevention and combat policies*” [43], the author F.E. Sterschi draw as a central goal: determination of the conceptual dimensions of transnational organized crime and its defining features.

The difficult activity of defining the concepts of organized crime and criminal organization is attested in the study of criminologist V. Bujor, who, in the publication „References on the essence of organized crime” [13], highlights the essential features of organized crime: „the stable activity of a criminal group (organization, association);

specialization and distribution of roles among the members of the organization and between the criminal groups of which the respective criminal association is composed; strict hierarchy within the criminal group; strictly defined norms of behavior and the existence of criminal values; orientation of the activity of criminal groups and associations towards obtaining profit; producing or offering illicit products or services; gaining power; implications for legal business; corruption of civil servants”.

In the article „*Certain issues of responsibility for the creation or leading of a criminal organization*” [51] the authors V. Bujor and C. Telipiz, performing a juridical analysis of the criminal norm for creating or leading a criminal organization, present the vulnerability of the norm established in art. 284 Criminal code from the point of view of the evidence necessary to be accumulated for the demonstration of the criminal act, but also propose a new notion for the criminal organization (association).

The intercalation of the crime of money laundering with the phenomenon of organized crime is retained as a basic idea in a series of scientific articles published by M. Braloștițianu [11, p. 42], A. Corîstin [59, p. 34], C.L. Stăncilă and C.G. Gîrleanu [42], as well as others.

Close connections between criminal organizations and other categories of crime (terrorism, corruption, trafficking of human beings) have been reported by a number of local authors, their conclusions are set out in several scientific articles, including the following: „*Connections of Islamic terrorism with organized crime*” [10, p. 21] by M. Braloștițianu; „*Implications of corruption and organized crime on national and international security*” [44, p. 24] by F.E. Sterschi; „*Trade in human beings - one of the most widespread forms of illegal activity practiced by organized criminal groups*” [7, p. 52] by M. Bodean.

The close interactions between terrorist organizations and organized crime structures were reported by Gh. Gladchi in the scientific article „*Terrorism, organized crime and corporation*” [26, p. 56].

From another point of view, after insertion in 2008 of paragraph (2) in art. 284 Criminal code and attribution to this crime a terrorist character, there appeared a need to analyze the materials that explore the field of terrorist crimes and organized terrorist groups.

A relatively recent work in this field was M. Benchechi's Phd thesis, entitled „*Combating contemporary terrorism and strengthening the international security system*” [5]. In this paper, the author performs a historiographical analysis of contemporary terrorism, measures to combat it and the evolution of the international security system. Scientific research has a special chapter dedicated to the contribution of the Republic of Moldova in the process of fighting against terrorism and the consolidation of the international security system.

Another textbook elaborated by the group of authors S. Brînză, X. Ulianovschi, V. Stati, I. Țurcanu, Vl. Grosu, entitled „*Criminal law. The special part. Volume II*” [12], in chapter XIV (Offenses against public security and public order), section II (Offenses against public security), contains a separate paragraph devoted to the legal and juridical study of the crime of creating or leading a criminal organization.

A significant comment for the proper understanding of the composition of the crime of creating or leading a criminal organization is taken from the manual „*Criminal code. Commented and Annotated*” [4]. In this case, the understanding of the content of art. 284 Criminal code it is performed by explaining the particularities of this crime components, with the definition of the main actions that form the objective side of the crime.

Interpretation of the provisions of art. 284 Penl code continues with an updated commentary, entitled „*Criminal code of the Republic of Moldova. Commentary*” [19], which, in essence, is a concise explanation of the signs of the crime of creating or leading a criminal organization in accordance with the elements of the crime.

Internationally, some aspects of organized crime and mafia groups were examined by N. Mappes-Niediek in the study „*Mafia in the Balcans. States in the power of crime - a danger to Europe*” [33]. The paper focuses on a number of issues related to organized crime and describe the situation created in some European countries (Serbia, Albania, Montenegro), but does not contain any references to legal issues.

The author Laura Kovesi, in her work „*Combating organized crime through criminal law provisions*” [31], managed to reflect from a scientific and practical point of view all aspects of organized crime in Romania. In this sense, the paper describes not only the evolution of organized criminal groups and the forms of crimes they practice, but also the legislative possibilities and institutional measures to prevent and combat organized crime, as well as national and international cooperation strategies in the field.

In the work „*Cross-border organized crime. Insecurity factor for nations*” [46], I. Tucmuruz describes organized crime from the perspective of the risks it poses on the security of nations. Thus, in addition to the meticulous approach of threats to the international community through the proliferation of organized crime, the paper invokes some basic components of national security strategies and presents in various forms international cooperation aimed at preventing and combating this contemporary scourge.

The study „*Combating organized crime - evolution, typologies, legislation, peculiarities*” [35] highlights a deep analysis of criminal legislation and criminal procedure aspects of some states of the world in terms of organized crime. At the same time, this paper provides a description of the legislative realities and perspectives of criminalization of crimes related to organized crime.

In the works „*Organized crime*” [61] and „*Organized crime. Legislative, criminal procedural, forensic aspects*” [62], the collective of authors, led by K.V. Putuliko, highlighted the tactical aspects used to examine the cases both in the criminal investigation phase and in court, in terms of the legal provisions and the organizational basis of the activity of combating organized crime.

Monograph „*Organized crime. From heyday to sunset*” [54], published by I.V. Godunov, is dedicated to the analysis of the essence, specificity and evolution of organized crime. In the

carried out research, the role of international cooperation in combating organized crime is treated as a primary one.

In the monograph „*Special types of exemption from criminal liability of members of organized criminal associations*” [52] A. Vozniuc examines special rules for release from criminal liability of members of associations (organizations) criminal, justifying their necessity in terms of theoretical, methodological, regulatory and socio-historical aspects.

In F. Calderoni's paper entitled „*Organized crime legislation in the European Union*” [14] is analyzed the legislation of 27 member states of the European Union, highlighting the common features and those specific to each state with reference to criminal law.

A group of authors from the Republic of Belarus - M. Semukov, N. Kaziuc. N. Scřit, met for realization a study on cases of misconduct in the criminal prosecution phase of the criminal investigation of the creation of a criminal organization and participation in it, with subsequent retraining by the courts. Their study was called „*Criminal law assessment of crimes committed by criminal organizations*” [63], being published in 2002.

The textbook „*Organized Crime and the Challenge to Democracy*” [3] by F. Allum and R. Siebert, which later evolves into an even more comprehensive and thorough study: „*Handbook of Organized Crime and Politics*” [2], proposes an international and intercontinental analysis of the phenomenon of organized crime. Thus, if the first study conducts a comprehensive research on the definition of concepts and the enunciation of the issue of transnational organized crime, then the second study is remarkable in that the criminogenic situation in each state of the 5 continents investigated (Europe, Asia, North America, South America and Africa) is described by a particular author (for example Russia is analyzed by A.V. Orlova, and Ukraine – by I. Zabyelina and A. Markovska), depending on the specific cultural and existing criminal policy.

The analysis of scientific materials published on the thesis theme highlights the considerable contribution in the form of textbooks, monographs, Phd theses, scientific articles, guides, studies, journals and even scientific conferences devoted entirely to the phenomenon of organized crime developed and published by academics, professors, experts, doctors in law, researchers, practitioners, leaders of the subdivisions involved in preventing and combating organized crime.

Although the activity of investigation of organized crime has acquired a multilateral and multiaspectual character, there is still a gap in the in-depth investigation of criminal responsibility for creating or leading a criminal organization, most often the study being limited to the general characterization of the crime provided by art. 284 Criminal code.

**Chapter II**, entitled „*General considerations regarding the crime of creating or leading a criminal organization*”, is dedicated, on the one hand, to the diachronic study of the normative framework of the crime of creating or leading a criminal organization, and, on the other hand, to a detailed analysis of notions of organized criminal group and criminal organization.

Thus, in the opinion of most researchers, organized crime, as a phenomenon, is a creation of the last centuries of this millennium and has appeared in various parts of the world [35, p. 9].

However, the problem of organized crime is not a new problem in human history [18, p. 22]. We consider that the phenomenon of organized crime appeared long before this period, but for various reasons it did not take the name known today. This is the case of illegal slave trafficking, robberies, piracy - crimes known since ancient times.

At the time of the entry into force of the Criminal code (12.06.2003), art. 284 had a single paragraph, respectively the crime of creating or leading a criminal organization or an organized criminal group for the purpose of committing one or more terrorist offenses was not provided (criminalized). From this point of view, the name of art. 284 Criminal code - the creation or leading of a criminal organization, was fully justified by the content of the provisions of the incriminating norm.

At the adoption of the Criminal code of 1961, neither the notion of criminal organization nor any separate criminal norm that would incriminate the act of creating or leading a criminal organization wasn't provided. Until the mid-1980's, in the U.S.S.R. (Union of the Soviet Socialist Republics) the reference to the concept of organized crime was not practiced, although every fifth crime was committed in a group and, respectively, if there was an appropriate normative basis, it could be attributed to organized crime [64, p. 62].

Only in 1994, by Law no. 316-XIII of December 9, 1994, the crime of foundation or leading of a criminal organization and belonging to it was introduced, being provided in art. 74<sup>2</sup> Criminal code.

During the evolution of the incrimination of the act of creation or leading of a criminal organization, the social value protected by the corresponding criminal norm was related either to the public peace, or to the social security, or to the integrity of the state. The concept of public security, although not a new one (for example it is found in the Criminal code of 1903), does not enjoy protection against the foundation or leading of criminal associations regardless of their form and/ or name.

Until 1994, there was no distinctive legislative concept of „criminal organization” and, therefore, separate responsibility for its creation or leading was not provided (criminalized). However, forms similar to a criminal organization have been identified in several criminal laws applicable in the territory of the actual Republic of Moldova.

Currently, however, it is attested that the definition of the concept of organized criminal group according to the criminal legislation of the Republic of Moldova is an obsolete reminiscence on the background of the provisions of the Convention against transnational organized crime [23]. In this case, the current legal framework may be powerless to prevent or combat the criminal activity of specific criminal groups or organizations [37, p. 53].

The terminology used by the Convention indicated above with reference to the forms of manifestation of organized crime differs from the one used in the legislative technique of domestic incrimination, which conditions a distinct exegesis [36, 24].

On 17.05.2005, the Republic of Moldova ratified the United Nations Convention against transnational organized crime, and in accordance with art. 5 of the ratification law [32] has undertaken to bring the legislation in force in accordance with this law and the conventional provisions. In the same context, the process of legislative harmonization was started in 2006, with the publication of Government Decision no. 1345 of 24.11.2006 on the harmonization of the legislation of the Republic of Moldova with the legislation of the European Union [28].

In accordance with art. 43 of the Criminal code are generalized 4 forms of criminal participation: simple participation, complex participation, organized criminal group, criminal organization (association).

However, the criminal law also operates with other forms of criminal participation, among which are, with the dislocation in the special part of the Criminal code, the following: the armed gang (art. 283 Criminal code - Banditry), groups or organizations set up for the purpose of contribution to the commission of one or more crimes of a terrorist nature (art. 279/1 Criminal code), criminal groups (art. 286 Criminal code), illegal paramilitary formations (art. 282 Criminal code), as well as and other forms of organization of criminal activity: a group of administrators and / or shareholders (art. 252, paragraph (4), letter a) of the Criminal code), a group carrying out an activity in the form of religious preaching and religious rites (art. 185 Criminal code). At the same time, some special laws, such as the Law on preventing and combating terrorism, the Law on counteracting extremist activity, provide other forms of criminal organization, for example terrorist group, terrorist organization, extremist organization.

The notion of „organized criminal group” is defined in art. 46 of the Criminal code, according to which *„an organized criminal group shall be a stable union of persons that organized themselves in advance in order to commit one or more crimes”*.

The compulsory features of an organized criminal group are: the reunion of persons, their organization in advance, the stability of the group, the purpose of committing one or more crimes.

However, those features, as the practice shows, are not sufficient to delineate it from other forms of participation [34, p. 354].

The Convention against transnational organized crime operates with the following notions:

- 1) Organized criminal group – shall mean a structured group of three or more persons, existing for a period of time and acting in concert with the aim of committing one or more serious crimes or offences established in accordance with this Convention, in order to obtain, directly or indirectly, a financial or other material benefit;
- 2) Structured group – shall mean a group that is not randomly formed for the immediate commission of an offence and that does not need to have formally defined roles for its members, continuity of its membership or a developed structure [23].

If the „organized criminal group”, in accordance with national law, contains three basic features: 1) the stability (perseverance) of the group; 2) organization in advance of group

members; 3) the purpose of committing one or more crimes, then the „organized criminal group”, in accordance with convention provisions, contains a wider range of features, including: a) structured group; b) the minimum composition of 3 people; c) durability over time, d) operation with understanding; e) the primary purpose of committing serious or other offenses provided by Convention; f) the subsidiary purpose of obtaining a financial advantage or other material advantage.

The overlap of the notions of „organized criminal group”, as shown in national legislation and conventional one, denotes a narrower scope of applicability of the last concept, defined by the convention, but, *per se*, this concretization offers a more successful protection, attributing to the law a predictability character corresponding to ECHR standards.

The European Union, being threatened and concerned about the danger of criminal organizations, adopted on 21 December 1998 *Joint Action 98/733/JAI on criminalizing participation in a criminal organization in the member states of the European Union* [1], as well as the *Framework Decision of the European Union Council of 24 October 2008 on the fight against organized crime* [25].

The difference between the notion of the *criminal organization* from the Framework Decision no. 2008/841/JAI of 24 October 2008 and the notion with the similar name in Joint Action no. 98/733/JAI of 21 December 1998 provides in the purpose of setting up the structured group: in the Framework Decision the purpose which must exist for the structured group is to commit offenses of a certain gravity in order to obtain, directly or indirectly, a financial or other material benefit; in the case of the Joint Action, the aim is also to commit crimes of a certain gravity, but it is not absolutely necessary that they constitute a means of obtaining material advantages [17, p. 195].

**Chapter III**, entitled „*Elements of comparative criminal law regarding the crime of creating or leading a criminal organization*”, presents an analysis of the criminally sanctioned forms of crime, similar in essence to the crime established in art. 284 Criminal code of the Republic of Moldova, from the perspective of major legal systems (families): Roman-Germanic (continental), Anglo-Saxon (Common-Law) and other legal systems, such as religious and traditional one.

In the countries of the continental (Romanian-German) legal system, the criminal liability for the creation or leading of a criminal organization is included in the text of the provisions of the Law, as the main source of law.

According to art. 210 Criminal code of the Russian Federation (Criminal code of R.F.) is provided criminal liability for the organization of the criminal community (criminal organization) or participation in it.

The distinctions between the corresponding norm of the criminal legislation of the Republic of Moldova and that of the Russian Federation are the following:

- 1) In art. 201, para. (1) Criminal code of R.F., the purpose of creating the criminal community (criminal organization) is well highlighted, *id est* the purpose of committing one or more serious or particularly serious crimes.
- 2) Article 284, para. (1) Criminal code of R.M. is characterized by a higher number of normative ways of committing the crime compared to art. 210 Criminal code of R.F., because of the description of the ways of creating a criminal organization or its leading.
- 3) In contrast to Criminal code of R.M., art. 210 Criminal code of R.F. provides as aggravating circumstances: „committed by the person using the employment situation” and also „committed by the person occupying the leading position in the criminal hierarchy”. This moment delimits and rationally shares the criminal responsibility for committing the deed by persons with certain qualities that facilitate the commission of the crime.
- 4) Art. 210, para. (2) Criminal code of R.F. has a distinctive and independent crime component - participation in the criminal community (criminal organization) [65].
- 5) Final note of art. 210 Criminal code of R.F. allows the release of criminal liability of members of the criminal community (organization) in a more restrictive situation than the provision with similar orientation in Moldovan law.

Criminal liability for setting up an organized criminal group, according to art. 367 Criminal code of Romania (Criminal code of Ro.), presents a series of discrepancies in relation to art. 284 Criminal code of R.M., from which:

1. The criminal legislation of Romania establishes criminal liability, *inter alia*, for the accession or support, in any form, of the organized criminal group.
2. The form of criminal participation, taking over the conventional connotations, retains the name of „organized criminal group” in accordance with Convention against transnational organized crime, moving out from the typical forms found in states of the ex-soviet space of organized criminal group and criminal organization.
3. The impunity clause inserted in art. 367, para. (4) Criminal code of Ro. operates only if the organized criminal group has not been discovered prior to the denunciation and the commission of any of the crimes falling within the group's purposes has not begun.
4. The norm of criminalization of the creating of an organized criminal group provides, as an innovation, mitigating circumstances of criminal liability in case of facilitating the conduct of criminal investigation, finding out the truth, prosecuting the members of the group.
5. The Criminal code of Romania does not establish criminal liability for creating, association or directing of a terrorist entity.

In the countries of the Anglo-Saxon legal family, the basic source of law is the norm formulated by judges and expressed in judicial precedents. Anglo-Saxon law has a triple structure, consisting of common law based on precedent, as a basic source - *common-law*; the



right of equity, which completes and corrects the basic source - *equity*; statutory law, which is the written law of parliamentary origin - *statutory-law*.

Currently, about a third of the world's population lives within the common-law jurisdictions or in systems with its implications [30].

The advanced countries, with an economic and social stability and possibilities for long-term criminological study, among which England is a part, quite late adopted the criminal means to fight organized crime [35, p. 134].

In England and Wales, section 1 of the Criminal Justice Act 1977 provides crime of conspiracy in the following terms:

*„(1) Subject to the following provisions of this Part of this Act, if a person agrees with any other person or persons that a course of conduct shall be pursued which, if the agreement is carried out in accordance with their intentions, either –*

*(a) will necessarily amount to or involve the commission of any offence or offences by one or more of the parties to the agreement, or*

*(b) would do so but for the existence of facts which render the commission of the offence or any of the offences impossible,*

*he is guilty of conspiracy to commit the offence or offences in question” [39].*

However, the basic law governing the prevention and legal control of organized crime is the *Serious Crime Act 2015*, which succeeded the *Serious Organized Crime and Police Act 2005*. The last one, in Part 4, entitled „Public order and behavior in public places”, listed a series of crimes, among which: art. 125-127 - harassment; art. 128-131 - offenses regarding the violation of areas with limited access; art. 132-138 - demonstrations in the vicinity of the Parliament; art. 139-143 - antisocial behavior [40], but neither the concept of criminal organization nor the distinctive responsibility for creating, leading, facilitating the activity or participating in the activity of a criminal organization were found.

In the U.S. justice system, part of the Anglo-Saxon tradition of common law, codified law, as in the continental legal system, predominates over that generated by judges.

The American criminal system states crimes in the field of organized crime at the state and federal levels, without defining its legal name. In order to fight against the phenomenon by means of criminal law, the legislator provides clarifications, regarding the institution of the „conspiracy” and the conditions of the R.I.C.O. (The Racketeer Influenced and Corrupt Organizations [38, p. 922-962].

The existence of religious and traditional systems confuses all classifications, they escape any criteria that are based on them [50, p. 13].

Religious and traditional systems are characterized by the fact that they do not apply to all persons resident in a particular state or territory, but to all those who, having a certain religion, regardless of which state they reside, are subject to a personal status based on in the precepts of that religion. An example, in this sense, is islamic law, which is an unity of norms practically inseparable from the Mohammedan religion and morality, addresses all followers of

islam, no matter where they are in the world [50, p. 8]. Along with it, we must mention other interesting legal constructions such as jewish law, hindu law, traditional chinese law, japanese law, etc. [50, p. 13] .

The impressive rate of change in the social situation and criminal law in China led to the need to adopt a new Criminal code in 1997; before this moment were adopted 107 laws on other issues governing social relations, but containing criminal law rules (130 norms) [60, p. 59].

The art. 26 Criminal code of the People's Republic of China (Criminal code of the P.R.C.) provides the notion of organizer and criminal union. Thus, according to par. (1) of the mentioned article: „*The main offender is the one who organizes and leads a criminal group in carrying out criminal activities or plays a main role in a common crime*”, and according to par. (2): „*The criminal union is a relatively permanent criminal organization, composed of three or more persons for the purpose of committing common crimes*” [24].

The direct criminal liability for the tangential activities of a criminal organization is provided in art. 294 Criminal code of the P.R.C.

According to the Constitution of the Islamic Republic of Iran (I.R.I.): „The judge is obliged to find a decision in each case in the codified laws, and if he cannot do so, he is obliged to rule based on authoritarian islamic sources or recognized *fetves* (فتوى)” (art. 167 of the Constitution), the principle of state government being „*velayat-e-faqih*”, in translation - the leadership by the islamic theologian (Preamble of the Constitution) [58].

Article 130 of Part II (Offenses) of Chapter 4 (Leading a group of organized criminals) of Criminal code of the I.R.I., contains the following legislative text: „*Whoever holds the position of leader of a criminal group is to be sentenced to the maximum penalty provided for the most serious crime committed by the members of the group, in accordance with the purposes of the given group; unless the offense committed is punishable by the penalties of had, qisas or diya, in which case he or she is to be sentenced to the maximum penalty provided for instigation / complicity in that offense. In the case of moharebeh or efsad-e-fel-arz, if the leader of the group can be considered as moharebeh or mufsed-e-fel-arz, he or she will be sentenced to the punishment provided, respectively, for mohareb or efsad-e-fel-arz.*

*Note 1 – A criminal group is a relatively organized group of more than 3 persons, which has been formed for the commission of a crime, or where the purpose is aimed at committing a crime immediately after its formation [...]*” [8, p. 31].

The general view of the significant aspects of criminal legislation, aiming at criminal liability for complex forms of criminal organization, of states in all existing legal systems, on all continents of the world, allows finding legalities and drawing meaningful conclusions.

Thus, in most countries subject to investigation (73,91 %), criminal law provides liability for activities related to the terrorist group or organization, the latter being a form of independent criminal participation. With few exceptions (France and Sudan), there is a division of criminal responsibility for the criminal group/ organization from that of the terrorist group/ organization, either by different legal norms in the same Criminal code, or by criminalizing and sanctioning

acts concerning a group/ terrorist organization under special criminal laws (Romania, Brazil, United Kingdom, USA, Iran, United Arab Emirates).

Even higher (86,95 %) is the tendency to criminalize the activity of participation in a criminal group/ organization, some states differentiating between participation in the criminal group/ organization (Ukraine, Canada) or terrorist (Russia) from participation in activities or the crimes committed by these associations of persons. In turn, only one state (China) admits criminal liability for participating in a criminal group/ organization only if it is characterized by an „active” involvement.

**Chapter IV**, with the name „*Legal and criminal analysis of the crime of creating or leading a criminal organization*”, includes a complex investigation of the elements and constitutive signs of the crime of creation or leading of a criminal organization.

Contrary to the opinion expressed in the literature, that par. (2) of art. 284 Criminal code is an aggravating factor of the crime component from par. (1) of art. 284 Criminal code [41], we would like to note the distinctive nature of the provisions of the criminal norm from par. (1) and (2) of art. 284 of the Criminal Code, which unequivocally reveals the presence of two components of independent crimes, a fact that will be presented and argued in detail below.

The general legal object of the offenses established in art. 284 Criminal code is a totality of social values and social relations created around them, protected by criminal law against crimes.

The generic legal object of the crime of creating or leading a criminal organization and the crime of creating or leading a criminal organization or organized criminal group for the purpose of committing one or more terrorist offenses consists of all social relations whose existence and normal development is conditioned by the protection of public security and public order [15, p. 46].

Therefore, as long as the special legal object of the crime follows, *per se*, from the name of the chapter that groups the homogeneous values and social relations, we consider that the special legal object of the crime of creating or leading a criminal organization (art. 284, para. (1) Criminal code) is social relations regarding public security, which is seriously endangered by the acts of creation or leading of criminal organizations.

The special legal object of the crime of creating or leading a criminal organization or of an organized criminal group for the purpose of committing one or more terrorist offenses (art. 284, para. (2) of the Criminal code) is the totality of the social relations regarding public security, endangered by the acts of creation or leading of organized criminal groups or criminal organizations with terrorist tendencies.

The offenses provided in art. 284 Criminal code have no material object and victim.

The prejudicial deed provided in par. (1) in art. 284 Criminal code consists in creating or leading a criminal organization. Both deeds are active forms of manifestation of criminal behavior, therefore they are actions.

In the present case, the legislature provided for two alternative actions which form the prohibited act of conduct. Respectively, the objective side is considered sufficiently accomplished even by performing a single incriminated action, the cumulation of both criminal actions not being able to attract the incidence of the competition of crimes, but influences the individualization of liability and criminal punishment in line with the general criteria set out in art. 75 Criminal code.

It is remarkable that in the disposition of the norm from art. 284, para. (1) Criminal code is provided a concise explanation of the two actions by which the prejudicial act of the crime is committed. Thus, as normative ways by which the actions of creation or leading of the criminal organization materialize are: the establishment of such an organization; organizing its activities; searching for and recruiting members for the criminal organization; organizing meetings of its members; creating financial and other funds for their financial support and for the criminal activity of the organization; providing the criminal organization with weapons and tools for the commission of crimes; organizing the collection of information on potential victims and the activities of law enforcement bodies; coordinating criminal plans and actions with other criminal organizations and groups of criminals both in the country and abroad.

The composition of the crime of creating or leading a criminal organization is formally reduced one.

Thus, the offense provided in art. 284, para. (1) Criminal code is considered consumed from the moment of creating or leading a criminal organization [51, p. 26], *i.e.* at the realization of prejudicial actions in any of the eight normative ways.

It is worth noting that the normative ways of creating or leading a criminal organization indicate, in essence, the preparation of a crime/ crimes, which in this case takes form of a consumed crime [55, p. 26].

The prejudicial deed provided in par. (2) in art. 284 of the Criminal code is realizing in the following alternative ways:

- *Creating a criminal organization or an organized criminal group* (in order to commit one or more crimes of a terrorist nature)
- *Leading a criminal organization or an organized criminal group* (in order to commit one or more crimes of a terrorist nature)

The composition of the crime in the case of the offense provided in art. 284, para. (2) Criminal code is a formal-reduced one, which is consumed from the moment of creating or leading a criminal organization or an organized criminal group whose purpose is to commit one or more terrorist offenses.

The subject of the crimes provided at the art. 284 Criminal code is a person (individual), responsible, who at the time of commission of the crime reached the age of 14 years.

In the case of the crime of creating or leading a criminal organization (art. 284, para. (1) Criminal code), the subjective side is expressed through guilt, which takes the form of direct intention.

In the case of art. 284, para. (1) Criminal code, we conclude that the direct intention of the perpetrator presupposes the following: the person who committed the crime realized the prejudicial character of the act of creation or leading of a criminal organization, provided the danger determined by the creation or leading of a criminal organization projected on the social relations for the protection of public security, wanted to achieve such a prejudicial deed.

In the context in which the offense provided in art. 284, para. (1) Criminal code has a formal-reduced composition, for the qualification of the deed the existence and nature of the prejudicial consequences do not involve any importance. However, we join the view expressed by the author Al. Borodac, as each crime is material, and the legislative description of the formal components does not exclude the occurrence of the consequences or the real danger of their occurrence [9, p. 72].

Viewed from this perspective, the crime of creating or leading a criminal organization is a crime of the dangerous nature, not of the result one.

The provision of the criminal norm from art. 284, para. (1) of the Criminal code does not specify a specific reason or a general mandatory purpose.

The purpose of the crime provided in art. 284, para. (1) Criminal code is expressly provided only for the normative modalities of „creation of money funds and of the other nature” and „endowment of the criminal organization with weapons and tools” and consists in: financial support of the members of the criminal organization and the criminal activity of the organization, respectively, commission of crimes.

In the case of the other normative modalities for committing the crime provided in art. 284, para. (1) Criminal Code, the purpose is deduced from the definition of the criminal organization, stipulated in art. 47, para. (1) Criminal code. Therefore, the purpose of the crime from art. 284, para. (1) Criminal code is an implicit one.

In the case of the crime of creating or leading a criminal organization or an organized criminal group for the purpose of committing one or more terrorist offenses (art. 284, paragraph (2) of the Criminal code), the subjective side is expressed through guilt, which takes the form of direct intention, and the purpose becomes an integral part, mandatory for attesting the completeness of the crime component.

**Chapter V**, entitled *„Delimiting aspects and the sanctioning regime of the crime of creating or leading a criminal organization”*, is dedicated to a delimiting study between the criminal norm stipulated in art. 284 Criminal code of other similar offenses, provided for in articles 141, 282, 283, 285, 286, 340 Criminal code. Also, this chapter analyzes the punitive regime of the crime of creating or leading a criminal organization, viewed through the prism of the practices of other states and international standards.

In the literature, there are dissensions regarding the concrete criteria for delimiting the criminal organization from organized criminal groups, armed gangs, illegal paramilitary formations, terrorist groups or organizations, the participatory activity of mercenaries, to which

are added the differences between the creation activity or leading the criminal organization with actions that disorganize the activity of penitentiaries (prisons), armed rebellion, mass riots, etc.

The correct application of the criminal norm that regulates the crime of creating or leading a criminal organization specified in art. 284 Criminal code involves also conducting a comparative study of other types of crimes whose components resembles.

The delimitation of the offenses provided in art. 284 Criminal code from other related crimes can be done both in terms of signs (objective and subjective) of the components of crimes, but also in terms of the distinctive features of forms of criminal participation: armed gang, illegal paramilitary formation, criminal group, organized criminal group, criminal organization.

The discrepancy between the qualified components of crimes that contain the aggravating circumstance „of a criminal organization” (for example, art. 189, para. (3), let. a) Criminal code - blackmail committed by a criminal group or a criminal organization) and the offense of creating or leading a criminal organization arises from:

- a) The form of criminal participation. Thus, at art. 284 Criminal code the organizer or leader of the criminal organization is strictly liable, in which case the offenses stipulating the aggravating circumstance „by an organized criminal group or a criminal organization” provide for an aggravation of the criminal liability for any participant in the criminal organization. Respectively, the organizer and/ or leader of the criminal organization are liable both according to the crime committed and for art. 284 Criminal code.
- b) Dangerousness of the deed. Therefore, the creation or leading of a criminal organization is a dangerous crime and does not involve, as a premise or condition, the commission of any actual crime.
- c) The form of accomplishing prejudicial deeds. Art. 284 Criminal code criminalizes the creation or leading of an organized criminal entity, but offenses which retain as a circumstance of aggravation of criminal liability the commission of „a criminal organization” establish a wide range of harmful actions/ inactions involving the criminal organization, but exclude its creation or leading.

An organized criminal group or a criminal organization whose purpose is to commit one or more terrorist offenses (the creation or leading of which is sanctioned by art. 284, para. (2) of the Criminal code) cannot be matched with the forms of criminal organization - terrorist group or organization (defined by the *Law on preventing and combating terrorism no. 120 of 21.09.2017*), the latest concepts being more specific and more complex.

In the part of criminal penalties, it is unequivocally observed that the criminal policy of the Republic of Moldova tends towards the proportional application of the principle of humanism.

According to point 17, para. (2) of the Decision of the Plenum of Supreme Court of R.M.: „Courts must ensure the application of harsh punitive measures against adults who have

committed serious, particularly serious and exceptionally serious crimes, especially in the case of a plurality of perpetrators, such as organized criminal group and criminal organization” [29].

In result of the comparative analysis of the criminal legislation of other states, we reach 2 important conclusions: 1) the size of the criminal punishment in the form of imprisonment from 8 to 15 years for the crime provided in art. 284, para. (1) Criminal code of R.M. is one corresponding to the size of the criminal penalties practiced in other states; 2) a single type of punishment for art. 284, para. (1) Criminal code of R.M. is sufficient in the conditions in which the institution of confiscation of property exists separately.

In art. 3 of the *Framework Decision of the Council of the European Union on the fight against organized crime* is divided the punishment for „participation in the activity of the criminal organization” from „the activity of concluding an agreement on the activity of the criminal organization” [25, p. 42-45].

In the first case, is provided a maximum custodial sentence of at least 2 to 5 years; in the second case - imprisonment as the offense for which the agreement is concluded, or a maximum term of imprisonment of at least two to five years.

Taking into account the social danger created by any terrorist crime, the inclinations of this truly odious social scourge and worldwide tendencies of criminal sanctioning of the activity of organizing terrorist groups and organizations, we consider the current punishment provided in art. 284, para. (2) Criminal code as fair and appropriate to the purpose of a criminal sanction.

What is natural is that the constitution or leading of organized criminal groups have to be punished more gently than in relation to the same actions for the criminal organization. In turn, the activity of participating in the activity of an organized criminal group must be punished more gently than for constitution or leading of such an entity.

States that clearly delineate the criminalization of illegal behavior in relation to the terrorist group or terrorist organization, establish a lower sanctioning regime for the terrorist group and a harsher regime for terrorist organizations (associations).

In our opinion, joining a terrorist group/ organization or participating in the activity of such a group/ organization cannot be sanctioned as drastically as the activity of constitution or leading such terrorist entities.

## GENERAL CONCLUSIONS AND RECOMMENDATIONS

**The scientific results** obtained from the elaboration of this study consist in: 1) evaluation of the impact that community and international regulations had on the incriminating model provided in art. 284 Criminal code; 2) finding the historico-evolutionary premises that were the basis for criminalizing the act of creating or leading a criminal organization; 3) comparative analysis of the creation or leading of a criminal organization in the light of the criminal legislation of other states; 4) the evaluation of the objective and subjective signs of the creation or leading of a criminal organization in unison with the principle of legality of incrimination, including the standards resulting from the jurisprudence of the ECtHR; 5) fundamentation of the thesis according to which the crime from art. 284 Criminal code is described from an objective point of view by a formal-reduced composition, and from a subjective point of view it is characterized by a direct intention and specialized purpose; 6) identification of the existing deficiencies in the criminal norm provided in art. 284 Criminal code and the ways to exclude them, including reformulating the definitions of „organized criminal group” and „criminal organization” in the light of international standards; 7) argumentation of some practical solutions that would optimize the legality in the field of the applications of the norm from art. 284 Criminal code; 8) formulation of proposals in order to perfect the incriminating normative framework in the matter of research, etc.

Among the most relevant general **conclusions** we mention the following:

1. The research of the materials published on the topic of the doctoral thesis attests the lack of special and constant preoccupations in investigating the problems of criminal liability for the crime of creating or leading a criminal organization, as well as other organized criminal formations [22, p. 48], ground that serves us in expectation to contribute in solving scientific problems in the mentioned field.

2. The historical inquiry shows that the complex forms of organization of criminal participation (organized criminal group, criminal organization) represent relatively recent creations, the first steps on this land being made only in the nineteenth century and, until this period, the simple association between persons for criminal purposes was not a separate convictable activity, but was qualified as an aggravated form of the actual crime committed by the members of the respective criminal entity [16, p. 178].

3. As a result of researching of the concept of „organized criminal group” provided by Criminal code of Republic of Moldova and that of the „organized criminal group” provided in the UN Convention, it has been found that the second notion has a narrower sphere of application than the first one. We choose the second concept, keeping the current name of art. 46 Criminal code of R.M. because, *per se*, the notion provided by the United Nations Convention of 15.11.2000 assigns to the criminal law a predictability character corresponding to the ECHR standards, and to the specialized law enforcement bodies - additional, fixed criteria for delimiting the „organized criminal group” by other criminal entities [36, p. 30].



4. In 73.91% of the studied criminal legislation is provided the distinct criminal liability for the crime of creation or leading of a criminal organization from the crime of creation or leading of the terrorist group or terrorist organization. At the same time, the tendency to criminalize the activity of participation or association with a criminal group/ organization is 86.95% [56, p. 243, 57, p. 144].

5. Impunity clauses for acts related to criminal (terrorist) groups/ organizations, in the form of exemption from criminal liability/ punishment, are retained in almost all states of Europe and the Arabian Peninsula [21, p. 70].

6. The special legal object of the offenses stipulated in art. 284 Criminal code is formed by the totality of social relations whose existence and normal development are conditioned by the protection of public security [15, p. 46], which is endangered by the acts of creation or leading of criminal organizations, as well as by their existence, the danger being more pronounced in the case of terrorist groups or organizations.

7. The criminal component described in art. 284 Criminal code is formally reduced, as the normative modalities consist, in essence, in committing a preparation for a crime/ crimes, which in this case takes the form of a consumed crime [21, p. 70].

8. The crime provided in art. 284, para. (2) Criminal code does not indicate the normative ways of creating or leading a criminal organization or an organized criminal group, which creates a confusing interpretation of its provisions in relation to para. (1) of the same article [21, p. 68]. Also, the name of art. 284 Criminal code does not adequately reflect the essence of the criminal norm from par. (2), omitting the reference to the form of participation - *organized criminal group*.

9. The subjective side of the offenses provided in art. 284 Criminal code is expressed through guilt in the form of direct intention, and the purpose is a mandatory sign, with implicit provision in the case of art. 284, para. (1) Criminal code and with explicit provision in the case of art. 284, para. (2) Criminal code.

10. Despite the provisions of art. 5 of the Palermo Convention, the activity of creating or leading an organized criminal group is not criminalized as a separate crime under national law, unless it is constituted for the purpose of committing one or more terrorist crimes. At the same time, it is attested an omission of the criminalization of the adherence activity and the contribution to the activity of a „criminal organization” or „criminal group” [21, p. 67, 73].

11. The delimitation of the offenses provided in art. 284 Criminal code with homogeneous crimes (art. 282, 283, 286 Criminal code) can be performed both in terms of the constitutive signs of the components of crimes, but also in terms of the distinctive features of forms of criminal participation: armed gang, illegal paramilitary formation, criminal group, organized criminal group, criminal organization.

**The current scientific problem**, of major importance, which has been solved consists in the following: elaboration of an original conceptual framework that will allow the uniform interpretation by official interpreters of the objective and subjective signs of the crime

incriminated in art. 284 Criminal code in strict accordance with the principle of legality; connecting the model of criminalization of the crime of creation or leading of the criminal organization to the existing international and regional standards in the field; identification of the imperfections admitted in formulation of art. 284 Criminal code and offering proposals for their exclusion.

Based on the conclusions noted in the paper, the following general scientific **recommendations** can be outlined:

1. We propose to modify art. 46 Criminal code and, *de plano*, of art. 47 of the Criminal code, in accordance with the provisions of international legal instruments, with adaptation to the national context, as follows:

**„Article 46. Organized criminal group**

An organized criminal group is a structured group, consisting of three or more persons, which has existed for a certain period of time and acts in a coordinated manner, in order to commit one or more crimes.

**Article 47. Criminal organization (association)**

(1) A criminal organization (association) shall be considered a union of criminal groups organized into a stable community whose activity is based on a division between the members of the organization and its structures, the functions of administration, insurance and execution of the criminal intentions of the organization, in order to obtain, direct or indirect, financial or other material benefits and the pursuit of economic, financial or political interests.

(2) A crime shall be considered committed by a criminal organization (association) if it was committed by one of its members for the benefit of the organization or by a person who is not a member of the respective organization and who committed the crime on the order of the organization.

(3) The organizer or leader of a criminal organization shall be liable for all the crimes committed by such an organization. A member of a criminal organization shall be criminally liable for only the crimes in which he/ she participated in the preparation or commission thereof.

2. Reformulation of the name of art. 284 Criminal code of R.M. from „Creating or leading a criminal organization” to „Constitution of an organized criminal group or of a criminal organization”.

3. We propose the following text for the norm from art. 284 Criminal code:

**„Article 284. Constitution of an organized criminal group or of a criminal organization**

*(1) Constitution or leading of a criminal organization, namely the establishment of such an organization and organizing its activities or searching for and recruiting members for the criminal organization or organizing meetings of its members, or creating financial and other funds for their financial support and for the criminal activity of the organization, or providing the criminal organization with weapons and tools for the commission of crimes or organizing the collection of information on potential victims and the activities of law enforcement bodies, or coordinating criminal plans and actions with other criminal organizations and groups of criminals both in the country and abroad, or providing logistics, or providing services of any kind, is punishable by imprisonment from 8 to 15 years.*

*(1<sup>1</sup>) Constitution or leading an organized criminal group by the modalities stipulated in art. 284, para. (1) shall be punished by imprisonment of 3 to 7 years.*

*(1<sup>2</sup>) Joining a criminal organization or organized criminal group, as well as participation, in any form, in their activity, is punishable by imprisonment from 1 to 5 years.*

*(3) The member of the criminal organization or organized criminal group may be released from criminal liability if he voluntarily ceased to participate in the activity of the criminal organization or organized criminal group, declared voluntarily about their existence and helped to discover the crimes committed by them or contributed to expose the organizers, leaders or members of the organization or group concerned, if its actions do not contain signs of another crime”.*

4. Taking into account the previous proposal, regarding the criminalization of the activity of constitution or leading an organized criminal group, joining a criminal organization or organized criminal group, as well as participating, in any form, in their activity, we consider it appropriate to repeal art. 283 Criminal code (Banditry).

5. We propose to modify and transpose the provision from art. 284, para. (2) Criminal code to a new article, as follows:

„**Article 284<sup>1</sup>** Constitution of a terrorist group or terrorist organization

(1) Constitution or leading a terrorist group or a terrorist organization through the modalities stipulated in art. 284, para. (1) shall be punished by imprisonment of 15 to 20 years or by life imprisonment.

(2) Joining a terrorist group or a terrorist organization or participating in the activity of such a group or organization shall be punished by imprisonment from 5 to 10 years.

(3) The member of the terrorist group or terrorist organization may be released from criminal liability if he voluntarily ceased to participate in the activity of the terrorist group or terrorist organization, voluntarily declared their existence and helped to discover the crimes committed by them or helped to expose the organizers, of the leaders or members of the group or organization concerned, if its actions do not contain signs of another crime”.

**Suggestions regarding the potential future research directions** related to the approached topic: 1) study of the necessity and the perspective of incriminating some qualified forms of the crime established in art. 284 of the Criminal code, as well as the sanctioning of the legal person for committing this criminal act; 2) analysis of the criminological aspects of the crime of creating or leading a criminal organization; 3) carrying out the study of the crime provided in art. 284 Criminal code in terms of forensic investigation methodology.

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## ADNOTARE

### **Andrei Cazaciov. Răspunderea penală pentru crearea sau conducerea unei organizații criminale. Teză de doctor în drept. Chișinău, 2021**

**Structura tezei:** introducere, cinci capitole, concluzii generale și recomandări, bibliografie din 407 titluri, 208 pagini de text de bază, 6 anexe. Rezultatele obținute sunt publicate în 19 lucrări științifice.

**Cuvinte-cheie:** organizație criminală, grup criminal, grup criminal organizat, organizație teroristă, grup terorist, criminalitate organizată, creare, conducere, participare.

**Scopul lucrării** constă în examinarea teoretico-practică a infracțiunii de creare sau conducere a unei organizații criminale, în vederea rezolvării problemelor și dificultăților care apar la aplicarea acesteia, precum și înaintarea unor recomandări de ordin științifico-practic de perfectare a cadrului normativ național.

**Obiectivele cercetării:** aprecierea gradului de evoluție a doctrinei penale naționale și a celei străine, cu privire la infracțiunea de creare sau conducere a unei organizații criminale; analiza evoluției cadrului normativ incriminator al infracțiunii; elucidarea conceptului de „grup criminal organizat” și a celui de „organizație criminală” prin prisma standardelor definitorii internaționale; realizarea unui studiu de drept penal comparat a legislațiilor penale ale altor state în raport cu infracțiunile similare celei prevăzute de art. 284 C. pen. al R.M.; examinarea semnelor obiective și subiective aferente infracțiunii cercetate și evaluarea cerințelor de calitate a normei; rezolvarea practică a problemelor cu care se confruntă organele de drept la stabilirea răspunderii pentru crearea sau conducerea unei organizații criminale; stabilirea delimitărilor cu alte componente de infracțiuni asemănătoare; înaintarea unor propuneri *de lege ferenda*.

**Noutatea și originalitatea științifică.** Studiul reprezintă o cercetare complexă a problemelor teoretico-practice privind infracțiunea de creare sau conducere a unei organizații criminale. Cercetarea evolutivă, comparativă și juridico-penală permite înaintarea unor recomandări de ameliorare a cadrului normativ național, *i.e.*: modificarea conceptului de grup criminal organizat (art. 46 C. pen.) și organizație criminală (art. 47 C. pen.); perfectarea și completarea textului preceptului incriminator de la art. 284 C. pen. (Constituirea unui grup criminal organizat sau a unei organizații criminale); modificarea și transpunerea prevederii de la art. 284, alin. (2) C. pen. la un articol nou – art. 284<sup>1</sup> C. pen. (Constituirea unui grup terorist sau a unei organizații teroriste).

**Problema științifică soluționată** constă în elaborarea unui cadru conceptual ce va permite interpretarea uniformă a semnelor obiective și subiective ale infracțiunii incriminate la art. 284 C. pen., cu racordarea modelului de incriminare la standardele internaționale; identificarea imperfecțiunilor admise la formularea art. 284 C. pen. și oferirea unor propuneri *de lege ferenda* de remaniere ale acestora.

**Semnificația teoretică.** Prin faptul că studiul este bine sistematizat și documentat, se oferă soluții teoretico-practice de calificare juridică a infracțiunii de creare sau conducere a unei organizații criminale. Teza scoate în evidență unele probleme curente și de perspectivă care pot apărea în practica de aplicare a legii penale, dar și a căilor de soluționare adecvată ale acestora.

**Valoarea aplicativă** constă în oferirea unei compilații a materialului doctrinar, formularea recomandărilor practice de soluționare a unor situații incerte, prezentarea interpretării elocvente a elementelor și semnelor componente infracțiunii.

**Implementarea rezultatelor științifice.** Constatările și concluziile studiului pot fi utilizate în procesul de instruire a studenților instituțiilor de învățământ și în activitatea practicienilor implicați nemijlocit în procesul de prevenire și combatere a infracționalității organizate. Propunerile și recomandările vor fi utile perfecționării de perspectivă a cadrului normativ național.



## АННОТАЦИЯ

**Андрей Казачков. Уголовная ответственность за создание или руководство преступной организацией. Докторская диссертация. Кишинев, 2021**

**Структура диссертации:** введения, 5 глав, основных выводов и рекомендаций, библиографии, включающей 407 наименований, 208 страниц основного текста, 6 приложений. Результаты исследования были опубликованы в 19 научных работах.

**Ключевые слова:** преступная организация, преступная группа, организованная преступная группа, террористическая организация, террористическая группа, организованная преступность, создание, руководство, участие.

**Цель статьи** состоит в теоретическо-практическом исследовании преступления «создание преступной организации или руководство ею» с целью решения проблем и трудностей, возникающих при ее применении, а также предоставлении научно-практических рекомендаций по совершенствованию национального законодательства.

**Задачи работы:** оценка степени развития национальной и зарубежной уголовной доктрины в отношении преступления; анализ эволюции инкриминирующей нормативной базы преступления; разъяснение понятий «организованная преступная группа» и «преступная организация» с точки зрения международных стандартов; проведение сравнительного анализа уголовного законодательства других стран в отношении преступлений, аналогичных предусмотренному ст. 284 УК Р.М.; изучение объективных и субъективных признаков, связанных с расследуемым преступлением; практическое решение проблем с которыми сталкиваются правоохранительные органы в связи с данным преступлением; разграничение с аналогичными преступлениями; предоставление предложений о законодательных изменениях.

**Научная новизна и оригинальность исследования.** Данное исследование представляет собой комплексное и хорошо структурированное исследование теоретических и практических проблем, касающихся создания или руководства преступной организации. Эволюционное, сравнительное и уголовно-правовое исследование позволяет выработать рекомендации по совершенствованию национальной нормативной базы, а именно: изменение концепции организованной преступной группы (статья 46 УК) и преступной организации (статья 47 УК); дополнение и усовершенствование текста уголовной нормы предусмотренной ст. 284 УК; изменение положения ст. 284, ч. 2) УК и создание новой статьи – ст. 284<sup>1</sup> УК (Создание террористической группы или террористической организации).

**Решённая научная проблема** заключается в разработке концептуальной основы, которая позволит единообразно интерпретировать объективные и субъективные признаки преступления, связав модель инкриминирования с международными стандартами; выявление недостатков ст. 284 УК и внесение предложений по их исключению.

**Теоретическая значимость работы.** Исследование хорошо систематизировано и задокументировано, оно предлагает теоретические и практические решения по квалификации исследуемого преступления. В диссертации освещены нынешние проблемы, но и проблемы в перспективе, которые могут возникнуть в практике применения уголовного законодательства, а также способы их решения.

**Практическое значение исследования** заключается в обобщении научного материала, формулировании практических рекомендаций по разрешению неопределённых ситуаций, всесторонней интерпретации элементов и признаков состава преступления.

**Внедрение научных результатов.** Выводы исследования могут быть использованы в процессе обучения студентов юридических вузов, в работе сотрудников, непосредственно вовлечённых в процесс борьбы с организованной преступностью. Предложения и рекомендации будут полезны в перспективе улучшения национальной нормативно-правовой базы.

## ANNOTATION

**Andrei Cazacicov. Criminal liability for creating or directing a criminal organization. PhD thesis in law. Chişinău, 2021**

**Thesis structure:** introduction, 5 chapters, general conclusions and recommendations, bibliography of 407 titles, 208 pages of basic text, 6 annexes. The results are published in 19 scientific papers.

**Key words:** criminal organization, criminal group, organized criminal group, terrorist organization, terrorist group, organized crime, creation, direction, participation.

**Goal of dissertation.** The purpose of the paper consists in the theoretical and practical analysis of the crime of creating or leading a criminal organization, in order to solve the problems and difficulties that arise in its application, as well as submitting scientific and practical recommendations to improve the national normative framework.

**Objectives of dissertation:** estimation the degree of evolution of the national and foreign criminal doctrine, regarding to the crime of creating or leading a criminal organization; analysis the evolution of the incriminating normative framework of the crime; explanation the concept of „organized criminal group” and „criminal organization” in terms of international standards; performing a comparative study of criminal laws of the other states in relation to similar crimes to those provided by art. 284 Criminal code of R.M.; examining the objective and subjective signs related to the investigated crime and evaluating the quality of requirements for this norm; practical solving of the problems faced by law enforcement agencies in establishing responsibility for the creation or leading of a criminal organization; establishing delimitations with other components of similar crimes; submission of legislative proposals to perfect the legislative framework.

**Scientific novelty and originality.** This PhD thesis is a complex and well-structured research of the theoretical and practical problems considering the crime of creating or directing a criminal organization. Historical, comparative and legal research offers an opportunity to advance some recommendations of improving the national regulatory framework, *i.e.*: changing the concept of organized criminal group (art. 46 of the Criminal code) and criminal organization (art. 47 Criminal code); improving the text of the art. 284 Criminal code (constitution of an organized criminal group or a criminal organization), modifying art. 284, par. (2) Criminal code and removing it to a new article – art. 284<sup>1</sup> Criminal code (constitution of a terrorist group or a terrorist organization).

**The important scientific problem solved** consists in elaboration of a conceptual framework that will allow the uniform interpretation of the objective and subjective signs of the crime provided in art. 284 of the Criminal code and relates the incrimination model to the international standards; identification of imperfections admitted in art. 284 Criminal code, with offering of proposals for their exclusion.

**Theoretical significance.** Due to the fact that the study is well systematized and documented, it offers theoretical and practical solutions for the qualification of the crime of creating or leading a criminal organization. The thesis highlights some current and forward-looking problems that may arise in the practice of applying the criminal law, and their solution.

**The applicative value** consists in offering a compilation of the doctrinal material, the formulation of practical recommendations for solving uncertain situations, the presentation of the eloquent interpretation of the elements and signs of the composition of the crime.

**Implementations of scientific results.** The judgments and conclusions of this study can be used in the education process of students of higher education institutions and in the activity of practitioners directly involved in the process of preventing and combating organized crime. The proposals and recommendations will be useful for the perspective improving of the national regulatory framework.

**CAZACICOV Andrei**

**CRIMINAL LIABILITY FOR CREATING OR LEADING A  
CRIMINAL ORGANIZATION**

**Speciality:**

**554.01 – Criminal law and criminal enforcement**

**Summary of the PhD thesis**

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