

Aurel Octavian Pasat

Customs offenses according to the legislation of the Republic of Moldova and Romania



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Table of Contents

Preface	7
List of abbreviations	11
Introduction	12
 Chapter I. Analysis of the situation in the science of criminal law in the matter of customs offenses	15
Section 1. Analysis of scientific materials related to customs offenses published in the Republic of Moldova.....	15
Section 2. Research of scientific papers published in Romania	26
Section 3. Analysis of scientific papers on customs offenses published in other countries	31
Section 4. Conclusions to Chapter I.....	39
 Chapter II. Customs offenses. Notion. Normative framework. Comparative law study	41
Section 1. The concept of customs offenses. Criteria for assigning of the socially dangerous facts to the category of customs offenses.....	41
Section 2. Normative connotations on customs offenses.....	50
Section 3. Comparative law study on customs offenses	59
Section 4. Conclusions to Chapter II	70
 Chapter III. Pre-existing elements of customs offenses in the legislation of the Republic of Moldova and Romania	72
Section 1. The object of the offense.....	72
§1. The legal object of the offense	72
§2. The material/immaterial object of the offense	84
Section 2. The subject of the offense	109
Section 3. Conclusions to Chapter III	116
 Chapter IV. The constitutive and circumstantial elements of the customs offenses, according to the legislation of the Republic of Moldova and Romania	118
Section 1. The objective side of the offense	118
Section 2. The subjective side of the offense	156
Section 3. Aggravating circumstantial elements of customs offenses ...	168
Section 4. Conclusions to Chapter IV	178

Chapter V. General conclusions and recommendations	180
Bibliography	183
I. Monographs, courses, treatises	183
II. Articles	189

Preface

Crime as a phenomenon has a wide expansion in the customs field, causing considerable losses to the state interests of the Republic of Moldova and Romania. Control over the transport of goods and cultural and historical values across the customs border is one of the most important activities of law enforcement. A real danger to the social and state interests is represented by well-established and functional schemes of smuggling of drugs, weapons and ammunition, nuclear materials, import of counterfeit goods, including low-quality consumer products.

The democratization of the society, the social-economic transformations, the liberalization and the reform of the foreign policy have determined a new attitude of the state towards the problems regarding the juridical-criminal regulation of the offenses in the customs sphere, especially the smuggling offenses. By committing smuggling, the organizational and economic functions of the rule of law are threatened or seriously damaged, and for the deterrence of committing this crime, all countries apply criminal sanctions. The Republic of Moldova and Romania do not make an exception in this respect. The injurious degree of smuggling, as the most dangerous customs offense, has also been emphasized in the wording of judicial practice. Thus, for example, in one of its Decisions, the High Court of Cassation and Justice of Romania indicates the following: *"The profits from smuggling are high not only because of the differences between the prices of cigarettes practiced in the Republic of Moldova and Ukraine, on the one hand, and in Romania, on the other hand, but also by the fact that by their introduction into the country, they are unlawfully removed from payment of import customs duties, VAT on import and excise duty. Also, their subsequent "black" marketing generates significant profits, given that the payment of corporation tax and VAT is avoided."*¹

Failure to comply with customs regulations is characterized by high social hazards, as the economic interests of any country are harmed and thus seriously harm the economic security of the state. In this context, within the framework of the system measures undertaken by the Republic of Moldova and Romania to consolidate the general principle of law, the lawfulness, on the basis of which the authorities, public institutions and citizens are obliged to respect the law, the rule of law, to take measures to prevent and combat economic crime, an important place is given to the legal-criminal mechanism of regulation of social relations in the sphere of customs policy.

¹ Decision of the Criminal Section of the High Court of Cassation and Justice, no.3111 of 05 December 2014 <http://www.scj.ro/1093/Detalii-jurisprudenta?customQuery%5B0%5D.Key=id&customQuery%5B0%5D.Value=121154> (visited on 01.03.2016).

Although there is scientific interest increased by theorists to investigate customs offenses, we believe that, taking into consideration the potential contribution which it can be scientific research, and that some aspects of it can be designed on new positions, there is room for a new approach, in our case, of customs offenses in general and of the phenomenon of smuggling, in particular, both according to the legislation of the Republic of Moldova and that of Romania.

This new approach requires new research directions, while developing scientifically grounded theoretical concepts connected to existing case law on customs offenses in the Republic of Moldova and Romania, and formulating *de lege ferenda* proposals aimed at improving the existing legal framework.

The work is structured well. In **Chapter I "Analysis of the situation in the science of criminal law in the field of customs crimes"** the analysis of the scientific materials regarding the theme of the paper, published in the Republic of Moldova since the declaration of independence, has been carried out in Romania as well as in other states. The analysis was performed in chronological order. Thus, the works of the following authors were investigated: S. Maimescu, S. Brînză, V. Stati, R. Sobietki, V. Berliba, V. Bujor, V. Spatari, M. Mutu, L. G. Gîrlă, Iu. M. Tabarcea, Gh. Nicolaev, N. Lacusta, C. Gurschi (*Republic of Moldova*); F. Sandu, C. Voicu, A. Boroi, I. Molnar, Gh. Diaconescu, G. I. Olteanu, M. Gorunescu, S. Corlăţeanu, O. Predescu, D. Ticău, O. Pop, D. Bujorean, F. Coman, I. Rusu (*Romania*); N. S. Ghilimutdinova, Iu. I. Sucicov, T. A. Dicanova, V. E. Osipov, V. D. Laricev, L. F. Rogatîh, M. A. Cociubei, O. Cruglova, A. Cotelnicov, Z. M. Abdurahmanov, A. Vaculenco, I. V. Rozumani, A. Focov, C. A. Pliasov, L. A. Prohorov, A. V. Scacico, M. S. Marcovski (*Russian Federation*), V. V. Hiliuta, A. Z. Ignatiuc (*Republic of Belarus*), A. B. Magzumov (*Republic of Kazakhstan*), A. A. Music, A. V. Savcenko, O. V. Protiuc (*Ukraine*).

Chapter II "Customs offenses: notion, normative framework, comparative law study" is dedicated to the analysis of customs crimes according to the legislation of the Republic of Moldova and Romania in terms of concept, evolution and normative framework of rigor. The concept of customs offense is defined, as well as the criteria according to which a socially dangerous act is included in the category of customs offenses. Another part of our investigation has been devoted to the research, from a comparative point of view, of the criminal law regulations of other states that deal with customs offenses.

Chapter III "Pre-existing elements of customs offenses in accordance with the legislation of the Republic of Moldova and with that of Romania" is devoted to the investigation of the object and subject of the customs offenses in accordance with the legislation of Romania and that of the Republic of Moldova. There are some theoretical aspects of particular importance, according to the judicial practice in the field of the Republic of Moldova and Romania. It has been demonstrated that the offenses referred to in articles 248 and 249 of the Criminal Code have the same legal subject of a subgroup - the social relations inherent in the activity in the customs sphere. In the context of the subject of the crime, it is

pointed out that, although the legislator does not expressly specify in the content of the norm in article 249 of the Criminal Code the special quality of the subject of the offense, it results from (implicitly) interpretation of the norm of incrimination. Concretely, the special quality of the offense derives from the content of the legal obligation of the person to pay the customs payments when passing goods across the customs border of the Republic of Moldova. As far as smuggling offenses are concerned, it is demonstrated that the subject of the offense is non-circumstantial (with the exception of smuggling referred to in point (c), paragraph 5, article 248 CP RM).

Chapter IV "Aggravating constitutive and circumstantial elements of customs offenses according to the legislation of the Republic of Moldova and of Romania" is intended to determine the traits of the objective and subjective aspect of the customs offenses. Similarly, the peculiarities of the aggravating circumstantial elements of customs offenses are identified. It is shown that the Romanian legislation lacks an article to criminalize the evasion offenses from the payment of customs payments, analogous to the legislation of the Republic of Moldova. It is argued that in comparison with the passing of goods over the customs border of the Republic of Moldova by non-declaration, in the case of non-authentic declaration, the perpetrator fulfills the legal obligation to declare the goods to be crossed over the customs border, but the data reflected in the customs declaration do not correspond to the reality. In the context of delimitation of smuggling offenses from evasion of payment of customs payments, it is stated that in the case of crossing the customs border of the Republic of Moldova by fraudulent use of documents or means of customs identification, by non-authentication or non-authentication, when the perpetrator they pay the appropriate customs payments, the ones committed should only be qualified as smuggling. It is further demonstrated that offenses of evasion from payment of customs payments can be committed only with direct intent because in the content of the offense the legislator included the purpose as a constitutive sign.

The methodological approaches, the theoretical prescriptions and the practical conclusions presented in the paper can be used both by doctrines in the future of theoretical researches, as well as by practitioners in the process of solving the problems related to customs crimes according to the legislation of the Republic of Moldova and of Romania. The practical importance of the present research is that it will serve as a benchmark for law enforcement, contributing to the correct judicial and criminal classification of customs offenses, given that the work contains valuable practical recommendations in this respect. Moreover, the elaborated paper carries important theoretical-practical valencies, since they are subject to various analysis of the practice of the courts.

The theoretical significance of the work lies in the fact that the judicial-criminal investigation of the customs offenses was carried out based on the generalization of the practical experience accumulated by the Republic of Moldova

and Romania under specific social and legal conditions. We are firmly convinced that this work can constitute a solid scientific and methodological support for the literature, especially for the further development of the science of criminal law. Based on their own approaches, obviously formed by the analysis of the theoretical conceptions of the scientists in the researched field, new research orientations are prefigured. Similarly, the importance of the work lies in the possibility of contributing to the improvement of the existing incriminating framework in the field of customs offenses.

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List of abbreviations

CP Ar – Penal Code of Armenia
CP Az – Penal Code of Azerbaijan
CP Ch – Penal Code of the People's Republic of China
CP FR – Penal Code of the Russian Federation
CP Kz – Penal Code of Kazakhstan
CP Ja – Penal Code of Japan
CP RM in the 1961 edition – Penal Code of the Republic of Moldova in the
24.03.1961 edition
CP RM – Penal Code of the Republic of Moldova in the 18.04.2002 edition
CF RM – Fiscal Code of the Republic of Moldova
C. contr. RM - Contravention Code of the Republic of Moldova
CP Rom in the 2009 edition – Romanian Penal Code in the 2009 edition
CP Uc – Penal Code of Ukraine
CP Uz – Penal Code of Uzbekistan
CV Fr – Customs Code of France
CV RM – Customs Code of the Republic of Moldova
CV Rom – Customs Code of Romania in the 2006 edition
CSJ – Supreme Court of Justice of the Republic of Moldova
RM – Republic of Moldova
VAT – value added tax

Introduction

The growth and the annual development of the volume of economic and trade relations between states can not affect the relations in the field of legal transportation of the value of the merchandise over the state border, their deterioration being evident. The extent to which the legislator has drawn attention to solving the issue of the legal legitimacy of transporting goods and other goods through the customs authorities where customs formalities can be fulfilled depends on the protection of the state's economic interests.

Recently, there has been an increase in customs offenses in the Republic of Moldova, probably facilitated by Romania's accession to the European Union, the abolition of restrictions on border crossings and the new opportunities for Moldovan-Romanians in rural areas of the country to pass illegal goods across the customs border of the Republic of Moldova.

For example, in the Republic of Moldova, in the last period (since 2004), of the total economic crimes recorded about 50% are the offenses under the name of smuggling². From this, a simple conclusion can be drawn: in Moldova the rate of customs offenses and in particular of smuggling offenses is very high, which demonstrates once more the extra effort that law enforcement bodies must manifest in countering offenses customs. From the statistical data of the economic crime for the years 2004-2012, we observe the following trend: in 2004-2007 smuggling offenses registered a negative dynamic, increasing the number of offenses committed. From 2007 to 2012, the number of smuggling offenses has decreased, as from 2013 onwards the number of smuggling offenses will increase again. This dynamic is derived from the following statistical data: out of the total economic crimes registered by the competent bodies of the Republic of Moldova, for 2004, about 74% were the offenses stipulated in article 248 CP of Moldova; for the year 2005 - 66%; for 2006 - 70%; for 2007 - 76%; for 2008 - 55%; for 2009 - 43%; for 2010 - 29%; for 2011 - 22%; for 2012 - about 11%; for 2013 - about 28%. The trend of increasing crime in the customs sphere in the Republic of Moldova is also the result of the following statistical data: out of the total number of offenses recorded in 2014 - 0.45% are customs offenses, and for the year 2015 - the number of customs offenses is 0, 54% of all recorded offenses.³

The high level of crime in the sphere of customs relations, its increased social danger, the latency and the lack of effective counteraction by the specialized state law bodies justifies the investigation of the juridical-criminal aspects

² Operative information on the state of crime (without classified causes) on the territory of the Republic of Moldova <http://www.mai.gov.md/ro/advanced-page-type/date-statistic> (visited on 13.02.2016).

³ *Idem*.

of the customs offenses and the establishment of a scientific strategy and tactics motivated by the fight of these offenses.

The purpose of this paper is to deepen the concept of criminal liability for customs offenses, to highlight and to solve the criminal law issues related to the customs offenses, regulated by the criminal law of the Republic of Moldova and of Romania, as well as in formulating some proposals *de lege ferenda* designed to optimize the current legal framework.

In order to achieve the stated goal, the following *objectives* were formulated:

- analysis of ideas, theoretical and scientific conceptions of scientists from the Republic of Moldova and Romania, as well as from other states, regarding customs offenses;
- defining the concept of customs offense, as well as revealing the composition of the offense attributed to this category;
- researching the main stages of development and amending legislation on customs criminalization in both the Republic of Moldova and Romania;
- the legal approach of the main concepts contained in the provisions of the normative acts determining the responsibility for the commission of the customs offenses;
- investigating the particularities of the objective and subjective constituent elements of customs offenses;
- investigating judicial practice centered on customs offenses;
- solving the problems of legal framing of customs offenses;
- specification of the demarcation lines between customs offenses and related facts;
- comparative analysis of the regulations in the criminal law of some foreign states on customs offenses;
- formulating the proposals *de lege ferenda* on the optimization of the existing legal framework in the field, both in the Republic of Moldova and in Romania.

The scientific novelty of the obtained results consists in the fact that a thorough criminal law investigation into customs crimes committed in the Republic of Moldova and in Romania, approached from the perspective of the environment, causes, logic and consecutivity. In addition, the scientific novelty of the research results consists in pointing out some polemic conceptions encountered in the doctrine, in their analysis and in the exposition of their own position. Last but not least, the novelty derives from the very theme of the paper, the study being focused on the comparative analysis of the customs regulations in Romania and Moldova.

The scientific novelty of the elaborated paper also consists in: a) definition of the concept of customs offense, as well as in determining the composition of the offense attributed to this category; b) identification of the generic legal

object of customs offenses in the Customs Code of Romania, taking into account the legislative technique of the Romanian legislator for criminalization of acts in the customs sphere under a special criminal law; c) the demonstration that the offenses provided in articles 248 and 249 of the Criminal Code have the same legal subgroup; d) the argument that goods other than those referred to in paragraphs (1) - (4) of article 248 of the Criminal Code may not constitute a material/immateral object of the smuggling offenses; e) revealing the aspect that, in the context of customs offenses, the victim of the offense does not appear as a compulsory sign in the content of the offense; f) identifying the particularities of the subject of the evasion offenses from the payment of the customs payments; g) determining the time of consumption of customs offenses; h) comparative analysis of the criminal regulations in the field of customs offenses.

In order to improve the legislation on customs criminalization, subject to comparative analysis, several *lender ferenda* proposals were formulated, including:

- *for the Republic of Moldova*: 1) adjusting the content of the norm in which the definition of smuggling in the Customs Code is included with that of the incrimination rule in the Criminal Code; 2) the exclusion of the expression "other kind of energy" from the content of point 1) article 1 of the Customs Code of the Republic of Moldova and from the letter f) article 2 of the Law of the Republic of Moldova on the way of introducing and removing goods from the territory of the Republic of Moldova by natural persons, no.1569 of 20.12.2002; 3) completing paragraph (4) article 248 CP RM with the other three methods of committing smuggling provided for in paragraphs (1) – (3) of article 248 CP RM, missing in paragraph (4) article 248 CP RM (if the detrimental act is expressed in the action of crossing cultural values across the customs border); 4) the introduction of precursors in the list of material entities likely to be crossed illegally across the customs border within the meaning of paragraph (2) of article 248 CP RM; 5) completing article 248 CP RM with a new paragraph containing the particularly aggravating circumstantial element "committing smuggling by an organized criminal group or a criminal organization".

- *for Romania*: 1) replacing the phrase "by evading customs control" with the phrase "by any means" similar to the norm in paragraph (1) article 270 CV Rom, so that under the rule of paragraph 2) article 270 CV Rom to cross any illegal border crossing at border crossing points, including by non-authentication or inappropriate declaration; 2) introducing in article 274 CV Rom the aggravating circumstance similar to that of letter c) paragraph (5) article 248 CP RM, namely: "by a civil servant, using the service situation".

Chapter I

Analysis of the situation in the science of criminal law in the matter of customs offenses

Section 1. Analysis of scientific materials related to customs offenses published in the Republic of Moldova

Because this segment is meant to be an analysis of the scientific contributions in the field, we have to say that although in the Republic of Moldova, even in Romania, the scientific researches carried out on such a topic have been published in a very small number, yet scientific polemics on some or other issues related to customs offenses continue to exist. Moreover, based on the potential contribution that scientific research can have on the one hand and on the importance of socially protected values by criminalizing the perpetrators of acts committed in the customs sphere, on the other, plus the conception of on new positions of some aspects, we believe that there is room for a new approach to customs crimes, perhaps even more complex. This, however, can not take place without a review of ideas, conceptions, opinions, visions from the main materials and scientific papers elaborated on the theme of the work, signed by authors from Moldova, Romania, as well as from other states.

That is why, in order to substantiate our investigation and to identify the main research directions, in the following we will focus on punctuation on the perceptions, visions of scientists from the Republic of Moldova, Romania and other states on the topic we approached.

First of all, some authors give more space to the analysis of customs offenses. Others, on the contrary, only tangentially highlight some aspects of customs offenses. In some papers, the judicial-criminal investigation of customs offenses takes the form of only a part of the entire work, focusing not only on the characterization of customs offenses but also on other crimes committed in other spheres of social life. Other doctrinal sources, however, are mainly oriented towards investigating the phenomenon of crime in the customs sphere.

Finally, we find that among the crimes committed in the customs sphere, subject to analysis by scientists, the greatest attention is focused on the investigation of smuggling offenses considered the most dangerous in the field of foreign economic activity of the state.

Thus, we can not neglect the special importance of first handbooks, monographs, scientific articles published by scientists from the Republic of Moldova, Romania (and not only) in the field of criminal law, but especially those devoted to the legal classification of crimes committed in the customs sphere.

Regarding the Republic of Moldova, a first material that we will discuss is the scientific article elaborated by *M. Mutu* that dates back to 2003⁴. It is a work dedicated exclusively to the delimitation of smuggling offenses from the evasion of payment of customs payments. Even though the research segment in that scientific article is narrow, the importance of the author's study is undoubtedly enormous. There have always been blurring about the delimitation of those criminal offenses; to the possibility of the ideal contest between these crimes. In large part, the distinction between the smuggling committed by the non-authentication or non-authentication in customs documents and the evasion of the payment of customs payments is highlighted. The delimitation is done by identifying the moment when the offenses are consumed. Therefore, it is believed that smuggling offenses are consumed from the moment when the customs border actually crosses (in the case of goods entering the territory of the Republic of Moldova) or when the customs declaration is lodged (in the case of removal of goods from the territory of the Republic of Moldova) evasion of payment of customs payments shall be deemed to have been exhausted from the time of expiry of the time limit for the payment of customs payments, that is, until the customs declaration is lodged. Therefore, the author comes to the conclusion, which we embrace, that the offenses provided by article 249 CP RM are consumed prior to smuggling (ie at the time of filing the customs declaration the customs payments must already be paid), thus possible real cumulation (*to read - the real contest - the author's note*) of the two offenses. In the opinion of the same author, to which we subscribe, in the case of natural persons who are not entrepreneurial (they pay import or export rights at the time of crossing the customs border), the ones committed should be qualified according to article 248 CP RM, the ideal contest between article 248 and article 249 CP RM.

We will continue to look at the work of *A. Barbăneagră, V. Berliba, M. Bargău* and others, which dates back to 2003⁵. In particular, it is interested in the segment for the analysis of contraband and evasion offenses payment of customs payments, the author of which is *C. Gurschi*. In the context of smuggling, it is mentioned that the fraudulent use of customs documents takes place when the customs or commercial documents used at the crossing of the customs frontier are falsified, in their content the truth is distorted or the content of the document is untrue. In the plan of the subjective side, *C. Gurschi* notes that smuggling can be committed both with direct intention and indirect intention, an opinion we can not embrace. Regarding the offenses under article 249 of the Criminal Code, the author defines the evasion as an act (inaction) of circumventing an obligation stipulated by the law. It turns out that they can only be committed with direct intent.

⁴ Mutu M., *Deosebirea contrabandei de eschivarea de la achitarea plăților vamale*, „Revista Națională de Drept”, no. 12, 2003.

⁵ Barbăneagră A., Berliba V., Bărgău M. et al., *Comentariu la Codul penal al Republicii Moldova*, Chișinău: ARC, 2003.

Another work on which we will stop is the one signed by the native author *S. Maimescu* that dates back to 2004⁶. The scientific article belonging to him contains ideas exposed by the author on a subject as narrowly, so subtly - the delimitation of crimes of smuggling of trafficking in human beings. Among the basic ideas derived from the analyzed scientific material we note the position of the author (which we support), according to which the smuggling of people over the state border can not be considered as smuggling with persons, although the passage of goods, goods across the state border, and people, is an illegal crossing (*emphasis belongs to us - the author's note*) across the state border.

The author attempts to distinguish between smuggling and trafficking in human beings in terms of the object of the offense (the generic legal object, the special object and the material object). It is stated that, as compared to human trafficking crimes, smuggling directly affects: the interests of the Republic of Moldova in the field of foreign economic relations; state authority on the "world arena", through the realization of uncompetitive goods, manufactured or produced on the territory of the Republic of Moldova; the interests of the state regarding the collection and accumulation of money resources to the state budget; owning new outlets to produce domestic produce; the monetary-financial system of the state; the inviolability of the state border; the normal legal working regime of local public institutions; the security of the state and the maintenance of public order, etc.

In the same way, we will submit to the research the segment from the scientific publication whose authors are *A. Barbăneagră, V. Berliba, C. Gurschi, V. Holban, T. Popovici, Gh. Ulianovschi, X. Ulianovschi* and *N. Ursu*,⁷ appeared in 2005, a segment for the analysis of the offenses stipulated in articles 248 and 249 CP RM. The position of the authors according to which the smuggling offenses do not concern the place where the customs control was circumvented, but the circumstance that the goods or other goods are not presented at the customs office (customs) point of view before the removal from country or, as the case may be, immediately after their introduction into their country. In the plan of the subjective side, it is shown that the purpose and the reason for smuggling are voluntary signs. As regards the evasion of payment of customs payments, it is considered that criminal liability under article 249 CP RM is established for the purpose of special protection of customs clearance operations, the protection of goods producers and the creation of favorable conditions for integration economic development of the Republic of Moldova in the world economy.

⁶ Maimescu S., *Traficul de ființe umane și contrabanda: aspecte comune și delimitări*, „Revista Națională de Drept”, no. 5, 2004.

⁷ Barbăneagră A., Berliba V., Gurschi C. et al., *Codul penal comentat și adnotat*. Chișinău: Cartier, 2005.

Further attention will be focused on the analysis of the scientific article elaborated by S. Maimescu in 2005⁸. It is a study in which the author takes into account the illegal material entities over the customs border of the Republic of Moldova and, in particular, the entities possessing certain qualities (weapons, munitions, narcotics, etc.). He highlights the cases of judicial practice in which the persons empowered to apply the criminal law emphasize more on other crimes committed with the use of weapons, munitions, narcotic substances, but disregards the fact that they are introduced into the territory of the Republic of Moldova by smuggling.

The author tries to establish the correlation between smuggling offenses and public security of the state as a social value susceptible to smuggling by smuggling. In this respect, the correlation is established when some goods possessing special qualities (weapons, ammunition, explosive devices) are passed (introduced and/or removed) over the customs border of the Republic of Moldova. In order to bring a note of clarity, we would like to point out that in the case of the offense provided for in paragraph (3), article 248 CP RM, included under the name of smuggling marginal, is only secondary to the public security of the state, on the legal circulation of arms, explosive devices and ammunition. In the forefront, however, the social relations regarding the customs security of the Republic of Moldova are damaged.

We will continue to focus on the scientific article signed by V. Stati in 2006⁹. It is a study focused mainly on the comparative analysis of the regulations in the criminal legislation of the Republic of Moldova and of Romania. Considering the subject of our research, the scientific contribution brought by this article is indisputable to the present study. We mention that the analysis carried out by the author concerns the regulations of article 248 CP RM and those of the old Romanian Customs Code (no. 141 of July 24, 1997). Even under these conditions, the importance of the author's analysis is clear; the legal provisions of the present Customs Code of Romania have largely taken over the provisions of the old regulations, without great differences. In general, a comparative analysis is performed in the light of the constituent elements of the offense.

The author tries to express his/her opinion on the generic legal object of smuggling offenses under Romanian criminal law. At first glance, its identification does not seem to be an easy task because the Romanian Criminal Code does not contain any incrimination regarding smuggling offenses, and these facts are incriminated by a special criminal law. However, only the Criminal Code is structured on sections and chapters, which facilitates the identification of the generic legal object. The same is not true of special criminal laws. Even so, the author reaches the conclusion, which we agree, that both in the context of the Moldovan

⁸ Maimescu S., *Obiectul material al contrabandei ca obiect de atentare asupra securității publice a statului*, „Revista Națională de Drept”, no. 1, 2005.

⁹ Stati V., *Infracțiunea de contrabandă în legislația penală a Republicii Moldova și a României: analiză juridică comparativă*, „Revista de Științe Penale”, Yearbook, year II, 2006.

criminal law and in the context of the Romanian criminal law it can be argued that the fundamental social value injured by smuggling is the national economy.

The following V. Stati's assertion is interesting in the context of the material object of smuggling: "a first observation is that the Romanian legislator does not set a limit of value delimitation on the material object of the deed. We can therefore find that in Romanian law, the commission of smuggling can only lead to criminal liability. In contrast, in Moldovan law, depending on the value limit of the material object of the deed, committing smuggling can result in criminal liability or administrative accountability". Please note that the above mentioned explanation does not fully correspond to the current customs legislation of Romania; According to the new Customs Code of Romania, the quantitative parameters of the material/immaterial object are relevant to framing when the prejudicial act is expressed by the evasion of the customs control at the crossing of the customs border. The value of goods is of no importance for qualification only when goods crossing the customs border are made through places other than those established for crossing the customs frontier.

Remarkable is the author's conclusion that, in the context of the Moldovan criminal law, compared to that of Romania, the circumvention of the customs control concerns not only the spatial aspect but also the temporal aspect of the circumvention.

Attention must be paid to the scientific material whose authors are V. Berliba and R. Sobiețki, dating from 2008¹⁰. It is interesting in the context of the approach to smuggling with cultural values. The authors point out that the problem of research and documentation of violations related to the historical-cultural heritage has its point not only in the difficulty of finding elements of the constitutive content, such as the objective and subjective sides, under certain pre-existing conditions, especially its object.

Since 2009, the work elaborated by A. Barbăneagră, Gh. Alecu, V. Berliba, V. Budeci, T. Carpov, V. Cusnir, R. Cojocar, A. Mariș, T. Popovici, Gh. Ulianovschi, X. Ulianovschi, N. Ursu, V. Volcinschi¹¹. For the present study, the commentary article 248 and article 249 CP RM, co-authored by V. Berliba and R. Cojocar, is presented. In the opinion of the named authors, the special legal object of the smuggling offenses is the total social relations that ensure the order of legal crossing of the goods across the customs border of the Republic of Moldova.

It is of interest to the authors' opinion that the large proportions of smuggled goods constitute the condition of incrimination. In our opinion, the large

¹⁰ Berliba V., Sobiețki R., *Aspecte de drept penal privind contrabanda cu valori istorico-culturale*, International Scientific and Practical Conference "Legal Protection of Cultural Values in the Republic of Moldova", Chișinău, 2008.

¹¹ Barbăneagră A., Alecu Gh., Berliba V. et al., *Codul penal al Republicii Moldova. Comentariu. (Adnotat cu jurisprudența CEDO și a instanțelor naționale)*, Chișinău: Sarmis, 2009.

proportions express the quantitative parameters of the material object of the smuggling offense referred to in paragraph (1) article 248 CP RM. It is right to say that the main notions that form the normative content of smuggling offenses are stipulated in the Customs Code of the Republic of Moldova. We can not overlook the perception of the authors that the methods of committing smuggling offenses have an alternative character, which denotes the necessity to establish in the process of framing the harmful act as a crime of at least one of them. With regard to the time when the offense is consumed, it is shown that the content of smuggling offenses is of a formal nature and is considered consumed since the *de facto* crossing of the customs border. In the context of the subjective side, it is stated that smuggling can be committed only with direct intent, and the purpose and reason of the offenses may be different, not relevant to the classification.

As for the evasion of payment of customs payments, the authors note that as a material object may appear: customs duty, value added tax, excise duties, duty for customs procedures, authorization fee and fee for updating the validity of the authorization, tax for participation in the customs auction, other amounts provided for by the legislation. We would point out that, until the changes in the Customs Code, the import and export duties to be paid were entered: the fee for issuing the authorization and the fee for updating the validity of the authorization, the fee for participation in the customs auction, other amounts provided by the legislation. At present, as a material object of the offenses provided in article 249 CP RM can be recorded only: customs duty, value added tax, excise duties and customs procedures.

The next work on which we will stop is the one signed by *L. G. Gîrla* and *Iu. M. Tabarcea*, published by the printing press in 2010¹². It is dedicated to the analysis of the offenses listed in the Special Part of the Criminal Code, among which the offenses provided by article 248 and article 249 CP RM. There are a number of arguments designed to justify the existence of such incriminating rules. It is stated that the material object of the offense referred to in paragraph (1) of article 248 of the Criminal Code may be any good (with the exception of those provided for in paragraphs (2) - (4) article 248 CP RM), provided that its value exceeds the large proportions, and if the property does not attain such value at the moment of the act, then those committed must be qualified in accordance with paragraph (10) article 287 of the Code of Contravention of the Republic of Moldova¹³. Significant is the definition given by the authors to all special categories of material entities that constitute the material object of the offenses referred to in paragraphs (2) - (4) article 248 CP RM. In particular, the authors point out the defining signs of cultural values as a material object of the offense recorded in paragraph (4) of article 248 CP RM. It is rightly stated that the provisions of the

¹² Gîrla L. G., Tabarcea Iu. M., *Уголовное право Республики Молдова. Часть Особенная. Том I.* (Criminal Law of the Republic of Moldova. The special part. Tom I.), Chişinău: Cartdidact, 2010.

¹³ *The Code of Contravention of the Republic of Moldova*, adopted by the Parliament of the Republic of Moldova on 24.10.2008, Official Gazette of the Republic of Moldova, 2009, no. 3-6.

norms of article 248 CP RM are descriptive because the legislator resorts to describing the criminal behavior of the guilty person.

In the conjuncture of the objective side, it is revealed that in the case of the offense provided in paragraph (4) of article 248 CP RM, the obligation of returning cultural values implies the presence of the return period as a compulsory sign. From the point of view of the subjective constitutive elements it is emphasized that smuggling can be committed only with direct intent, at the same time the motive of the offense is not a mandatory sign, and as a subject of the crime evolving both the natural person and the legal person.

In the following, the scientific article elaborated in 2010 by R. Sobiełki and V. Spatari¹⁴ will be discussed. In it, the fraudulent use of documents, as an alternative method of committing smuggling offenses, is subject to analysis. According to the authors, the crime-based form of the offense gives it a full comisic character, resulting both from the objective manifestation of the realization of the material element and the way of committing the offense. A special issue, to which the authors pay attention, is the identification of the correlation between the rules of article 361 CP RM and those of article 248 CP RM on the assumption that smuggling offenses are committed through the use of false official documents as a way of fraudulent use of documents. The authors conclude that between these norms there is competition between a part-norm and an entire norm, article 361 CP RM being the norm-part, and article 248 CP RM - norm-whole. At the same time, it is revealed that if not only the fraudulent use of false documents to pass over the customs frontier of goods, objects and other values in large proportions, but also their falsification, the facts are to be framed by contest of offenses: one of smuggling offenses (article 248 CP RM) and the offense of making, holding, selling or using official documents, stamps, stamps or false seals (article 361 CP RM) or false in public documents (article 332 CP RM), depending on whether the active subject of the latter offenses is a responsible person who has reached the age of 16 (general subject) or a person with responsibility (special subject). It is noteworthy the assertion of the authors, to which we subscribe without any reservations, according to which the legislator should intervene by amending the criminal law, in the sense of completing paragraph (4) of article 248 CP RM with the "fraudulent use of documents" as a method of committing the offense, as in the case of other offenses in the standard version, which is necessary to eliminate the possibility of avoiding criminal norms.

Within the framework of the same scientific approach, the authors dispute the criteria for delimitation of smuggling offenses from those of evasion from payment of customs payments.

¹⁴ Sobiełki R., Spatari V., *Folosirea frauduloasă a documentelor – modalitate normativă alternativă prin care se poate manifesta infracțiunea de contrabandă*. „Revista Națională de Drept”, no. 12, 2010.

The next paper that will be analyzed is the manual elaborated by *S. Brînza* and *V. Stati* in 2011¹⁵. In the context of our investigation, we are particularly interested in the theses from Section VI "Offenses committed in the sphere of foreign economic activity" in Chapter XI "Offenses economic section", in which the authors carry out a legal-criminal investigation of the offenses provided in articles 248 and 249 CP RM. The actual analysis is performed by the elements of the offense.

Inter alia, we can highlight the following basic ideas exposed in the scientific material analyzed: an indication that in the case of the offenses referred to in paragraphs (2) - (4) article 248 CP RM, in the secondary context, the social relations are affected by the legal circulation of narcotic substances, psychotropic substances with strong, toxic, poisonous, radioactive or explosive effects or harmful waste, dual-purpose products, weapons, explosives, munitions or cultural values; the statute on the fact that smuggling may, in some cases, have an immaterial object, attributing to it electricity and thermal energy, given their intrinsic nature; the complex definition of the entities forming the material/immaterial object of the offenses specified in article 248 CP RM; the multi-purpose approach to smuggling methods, including by systematically interpreting the provisions of article 248 CP RM in relation to other rules in the field of extrapolar, especially in the customs field.

The interest presents the opinion of the authors, according to which there are no other goods (other than those listed in paragraphs (1) - (4) article 248 CP RM) which could represent the material object of the smuggling offenses; for example, in the case of crossing the customs border of the Republic of Moldova of counterfeit money, article 248 CP RM will be inapplicable. Further, the same authors insist, rightly, that such an act does not entail liability, because the counterfeit money can not be equated with the money emitted by the National Bank of Moldova, and the notion "goods, objects and other values" used in paragraph (1) article 248 CP RM does not refer to false money. It is worth mentioning the position of the authors according to which the obligation of returning cultural values (in the sense of the offense stipulated by paragraph (4) article 248 CP RM, when the prejudicial act is expressed in the inaction of non-return to the customs territory of the Republic of Moldova of cultural values taken out of the country if their return is compulsory) refers only to a legal person, because in accordance with the legislation of the Republic of Moldova, individuals do not have the right to remove cultural values from the territory of the Republic of Moldova.

Notable interest is the work signed by *N. Lacusta* in 2012¹⁶. It is a scientific article in which new comparative analysis of the regulations in criminal law of other states in the field of smuggling offenses is carried out. Undoubtedly, the

¹⁵ Brînza S., Stati V., *Drept penal. Partea Specială*, vol. II, Chișinău: Tipografia Centrală, 2011.

¹⁶ Lacusta N., *Elemente de drept penal comparat în materia infracțiunii de contrabandă*, „Legea și Viața” no. 7, 2012.

ideas from this study constitute an important theoretical and scientific basis for the elaboration and cementing of our investigation from the point of view of the comparative law analysis, even if it mainly targets the comparative research of the regulations that incriminate the smuggling offenses, and not escape from payment of customs payments. Criminal laws on smuggling of such states, such as Ukraine, the Russian Federation, Kazakhstan, Estonia, France, Italy, Germany, the United Kingdom, Japan, Korea, the People's Republic of China, are being analyzed.

It is worth mentioning the work signed by *R. Sobiętki* out of print in 2013¹⁷. It is the only monographic study dedicated to the analysis of smuggling crimes in accordance with the criminal law of the Republic of Moldova, which is why undoubtedly the work in question is of undeniable importance for the present study. The main milestones of the author caught during the analysis of the paper are: investigation of the general situation regarding the criminal liability for smuggling offenses; the general feature of smuggling offenses; the quantitative analysis of the crime affecting the customs regime of the Republic of Moldova; highlighting the real situation in the domestic entrepreneurial field analyzed from the point of view of smuggling, tax evasion and delinquent relations with ghost companies; identifying the main factors of smuggling and prophylactic elements; analyzing the legal and criminal aspects of smuggling offenses; establishing the factual modalities of smuggling with drugs, weapons and cultural values; determination of fraudulent schemes for smuggling offenses in the Republic of Moldova; the delimitation of smuggling offenses from other homogeneous offenses and the comparative analysis of criminal regulations in the field of smuggling.

Also in 2013, another work, signed by a team of authors, including *V. Stati* and *Gh. Nicolaev* - the authors of the crime analysis section provided by article 248 and 249 CP RM¹⁸, is dated. Regarding the "customs border of the Republic of Moldova", the authors mention that this is defined as the state border of the Republic of Moldova as well as the perimeter of free zones and customs warehouses. It should be mentioned that following the modifications introduced by the Law of the Republic of Moldova for the amendment and completion of certain legislative acts, no. 307 of 26.12.2012¹⁹, the perimeter of the free zones was excluded from the definition of the customs border. It is rightly stated that the special legal object of the offenses specified in paragraphs (2) - (4) of article 248 CP RM is of a multiple character. For the notion of "armament" within the meaning of paragraph (3) of article 248 CP RM, the authors include all types of

¹⁷ Sobiętki R., *Contrabanda: aspecte juridico-penale: studiu monografic*, Chișinău: Totex-Lux, 2013.

¹⁸ Poalelungi M., Dolea I., Vîzdoagă T. et al., *Manualul judecătorului pentru cauze penale*, Chișinău: Tipografia Centrală, 2013.

¹⁹ Official Gazette of the Republic of Moldova, 2013, no. 26.

weapons, military equipment and military equipment, a position we support. Regarding the offenses provided by article 249 CP RM, the Republic of Moldova considers that, due to their specificity, they do not have a victim. At the time of consumption point, it is mentioned that the offenses stipulated in article 249 CP RM are considered consumed from the moment when the customs payments are not paid within the stipulated period.

We can not overlook the scientific article elaborated in 2014 by V. Stati²⁰. In this article the author tries to point out (more detailed) the legal and criminal particularities of smuggling and evasion of customs payments. As a novelty, we take the position of the author regarding the technical-legislative structure of the rules of criminality subject to analysis. Thus, in V. Stati optics, which we actually support, in article 248 CP RM, under the name of smuggling marginal, there are five types of offenses and a single variant aggravated by the offense. At the same time, in article 249 CP RM, two types of offenses and one variant aggravated by the offense are combined under the name of marginal evasion from payment of customs payments. In the context, regarding the offense referred to in letter d) paragraph (5) article 248 CP RM, the author states that the provision included in the norm in question is complementary only to the provision of paragraph (1) article 248 CP RM and not with the provisions of paragraphs (2) - (4) article 248 CP RM.

Regarding the offenses listed in article 249 CP RM, the author states that the objective aspect of the offense stipulated in paragraph (1) article 249 CP RM has the following structure: 1) the prejudicial act consisting in the inaction of evasion from paying the customs payments in large proportions; 2) damaging consequences in the form of non-payment of customs payments within the prescribed period; 3) the causal link between the detrimental act and the injurious consequences. By avoiding payment of the customs payments, the author understands the perpetrator's refusal to pay the respective payments within the deadlines established by the customs legislation.

The next work we will stop is also elaborated by V. Stati in the same year 2014²¹. It is a material destined to the analysis of all economic crimes, according to the criminal law of the Republic of Moldova. As with the other materials of didactic nature, our opinions are relevant to our investigation, the authors' theses, presented on the analysis of the crime components of articles 248 and 249 CP RM.

As for the offenses provided by article 248 CP RM, it is worth considering the arguments put forward by the author in favor of justifying the existence of such crimes in criminal law. In the context, V. Stati points out that the criminalization of smuggling acts is an "absolute imperative" for securing order in the

²⁰ Stati V., *Infrațiuni săvârșite în sfera activității economice externe (art.248 și 249 CP RM): studiu de drept penal*, „Studia Universitatis Moldaviae”, no. 8(78), 2014.

²¹ Stati V., *Infrațiuni economice: Note de curs*, Chișinău: CEP USM, 2014.

field of customs legal relations. Regarding the material/immaterial object of the offense, the author points out that analogs of narcotic or psychotropic substances, plants containing narcotic or psychotropic substances, precursors and doping substances can not be a material object of the offense referred to in paragraph (2) article 248 CP RM. It is noteworthy the author's opinion that criminal liability is applied on the basis of article 158 CP RM for the illegal import or export of human organs or parts thereof, tissues or human cells, in which case the provisions of article 248 CP RM.

The following is also an interesting opinion of the author: "The offenses specified in article 249 CP RM must be delimited by the offense assuming the imitation of the transfer of money for the goods or services delivered, as well as the corresponding value added tax, on the supplier's bank account. By such an imitation of the export the perpetrator creates artificial premises for the "refund" of the value added tax, although it has never been paid into the national public budget. In the given case, the liability must be applied for one of the offenses provided by article 190 CP RM, being deceived by means of money belonging to the public budget".

In the segment of the delimitation of the offenses stipulated in article 249 CP RM for smuggling offenses, the author points out that the offender's recourse to one of the methods of committing crimes specified in article 248 CP RM, even if the non-payment of the customs payments is excluded, any of the offenses provided for in article 249 CP RM, the liability being applied only in accordance with one of the provisions of article 248 CP RM.

In other news, the work signed by S. Brînză and V. Stati, outlined in print in 2015²², is of interest. In the present paper the authors point out very thoroughly on the constitutive signs of the crimes stipulated in articles 248 and 249 CP RM. It should be noted that the analysis carried out is in line with the judicial practice in the matter. In this respect, S. Brînză and V. Stati refer to the judicial practice in the field of smuggling and evasion of customs payments.

It is shown that when the cultural values crossing over the customs border of the Republic of Moldova, to the qualification, neither the value in money of the cultural values, nor the number of them, matter. Here also the authors point out that the obligation to return cultural values, recorded in paragraph (4) of article 248 CP RM, refers only to the legal person. The moment of consumption of the offenses referred to in article 248 CP RM is identified. As a reference, it was taken when the goods were placed on or removed from the customs territory of the Republic of Moldova.

We will conclude the investigation of the scientific materials on customs offenses published in the Republic of Moldova with the monograph signed by S.

²² Brînză S., Stati V., *Tratat de drept penal. Partea Specială*, vol. II, Chișinău: Tipografia Centrală, 2015.

Maimescu, published in print in 2015²³. It is a work in which the author analyzes the aggravating circumstances of smuggling offenses. *In concreto*, the legal and criminal particularities of smuggling offenses committed under specific conditions (under the circumstances of aggravating liability and criminal punishment) are outlined. In the context of the aggravating circumstance provided in letter b) paragraph 5 article 248 CP RM, it is quite right that the smuggling offenses committed by two or more persons, compared to the same acts committed by one person, is characterized by a higher degree of social danger, determined by the fact that those who commit their efforts to commit smuggling do not only make it easier for them to commit the crime but also help to clear the traces.

Section 2. Research of scientific papers published in Romania

In the following, we will first refer to the work signed by *F. Sandu*, printed out in print in 1997²⁴. It is one of the most prestigious works in the field of contraband crimes published in Romania. Even if the author's ideas and opinions refer to the old regulation on customs offenses, it is undeniable the material studied, at least in the sense that the new regulations aimed at criminalizing injurious customs are not radically different from the old ones. *Grosso modo*, the work is focused on: characterization of smuggling offenses; identifying the subject of legal protection by criminalizing customs offenses; revealing the subjects of smuggling and other customs offenses, including the determination of the problems of occasional plurality (participation) and that of criminals; analysis of the legal constitutive content of smuggling and other customs offenses; to illustrate the forms and modalities of smuggling; analysis of criminal regulations in the laws of some foreign states (France, Italy, UK); conducting a criminal investigation into customs offenses, etc.

We will continue our scientific approach with the analysis of another paper written by the same author *F. Sandu* that dates back to 1999²⁵. The paper aims to analyze Romania's criminal legislation regarding simple smuggling, qualified smuggling, the use of unrealistic acts and the use of falsified documents. Although in the paper the customs offenses are approached according to the old Customs Code of Romania (1997), we can not neglect the ideas, the author's views presented in the present document, considering that the current Customs Code of Romania largely took over the provisions of the old legislation. Regarding the mobile with which the smuggler acts, the author emphasizes that this is not a necessary subjective condition for the existence of smuggling offenses, being an

²³ Maimescu S., *Contrabanda comisă în circumstanțe agravante pe teritoriul vamal al Republicii Moldova*, Chișinău: Estetini, 2015.

²⁴ Sandu F., *Contrabanda – componentă a crimei organizate*, Bucharest: Național Imprim, 1997.

²⁵ Sandu F. *Contrabanda și albirea banilor*, Bucharest: Trei, 1999.

optional element in the subjective content. With regard to the offense of using unrealistic acts, it is indicated that the essential requirement that is specific and necessary for the existence of the objective side is that the act constituting the material element is accomplished by the use of customs, transport or trade documents that refer to other commodities or goods.

In the following we will point out the basic ideas set out in the scientific article signed in 2000 by D. Țicău²⁶. The author deals with the analysis of the offense of using unreal acts and the use of falsified acts in accordance with the judicial practice in the matter. Regarding the moment of consuming the act of using unreal acts, the author rightly claims that this, being a formal offense, is considered consumed since the action to use documents containing the unrealistic data, ie from the moment which documents are presented to the customs authorities. At the same time, the author contradicts himself when he says about the possibility of committing the offense of using unreal acts with both direct intention and indirect intention. In our view, formal offenses can only be committed with direct intent.

Also from the year 2000 date the scientific material elaborated by O. Predescu²⁷. It is a criminal business lawsuit. For this study, interest is presented in Chapter XVII of the paper "Crimes specific to customs law". Customs are identified as smuggling: smuggling, skilled smuggling, use of unrealistic acts and the use of counterfeit documents. According to O. Predescu, the common legal object of customs offenses is the social relations related to the passage over the state border of goods and other objects of natural or legal persons only through the customs control points and only based on authentic and conformable documents. In the case of skilled smuggling, the author points out, goods are considered to be of particular danger.

Since 2002, the work signed by the authors V. Bujor and O. Pop²⁸ also dates. Although the paper is aimed at revealing aspects of crime in the field of taxation, some features of smuggling offenses, which, in the opinion of the authors, are some of the forms of expression of the tax attack, are also highlighted. According to the authors, smuggling offenses are a threat of danger and the causality ratio is "ex re". It is shown that these are done exclusively with direct intent, not necessarily present purpose.

Another work under consideration in the present research is the one signed by the authors C. Voicu, A. Boroî, F. Sandu, I. Molnar dating back to 2002²⁹. It is shown that the generic legal object of the customs regime offenses constitutes those social relations relating to the customs regime whose birth and

²⁶ Țicău D., *Infracțiuni vamale. Controverse*. „Revista de Drept penal”, no. 2, 2000.

²⁷ Predescu O., *Drept penal al afacerilor*, Bucharest: Continent XXI, 2000.

²⁸ Bujor V., Pop O., *Criminalitatea în domeniul fiscal*, Timișoara: Mirton, 2002.

²⁹ Voicu C., Boroî A., Sandu F. et al., *Drept penal al afacerilor*, Bucharest: Rosetti, 2002.

normal deployment are conditioned by the special protection of customs clearance operations and of other customs operations which lawfully require special requirements for the crossing of goods. Rightly, the authors note that people, human beings, are not the material object of smuggling, although living people can be brought to the condition of commercial things by placing or holding in a state of complete dependence (economic, psychophysical and moral) or through the trafficking of human beings to the state of things (ie through an onerous exposure, sale, assignment, etc.). Regarding the smuggling of smuggling and the illegal crossing of the state border, the authors point out that for the existence of this crime it is irrelevant whether the perpetrators have legally crossed the border or fraudulently, because this criminality is exclusively aimed at breaking the rules customs on goods and other goods, but not the legal regime for the crossing of persons across the border. As far as the act of using unrealistic acts is concerned, it is true that the use of the word is the use of a customs, transport or commercial document referring to other commodities or goods, namely - serving by filing, by presentation of the customs document as a true means, respectively, as proof of certain goods or goods under the control of the competent public authorities in the customs units, either at the control points for crossing the state border of Romania or inside the country. At the same time, we can not support the position of the authors according to which the offense of using unreal acts can be committed with direct or indirect intent.

Also since 2002 dates the work whose author is *Gh. Diaconescu*³⁰. Although the scientific material contains theoretical explanations regarding the customs crimes in the old Law on the Customs Code, the ideas set forth by the author are to be taken into account in carrying out this research. It is worth mentioning that the author exposes very briefly some concepts and definitions with which he deals with the analysis of the pre-existing and constitutive elements of the customs offenses.

Particular attention should be paid to the analysis of the scientific paper published in 2004, whose author is *G. I. Olteanu*³¹. The main points of the work lie in the following segments: the socio-economic significance of the criminalization of the facts in the customs sphere; the incrimination of illicit conduct in the customs field in the legislation of other states; judicial-criminal investigation of customs offenses in accordance with the Customs Code of Romania of 1997; highlighting aspects of some offenses committed in connection with customs offenses - offenses committed to the state border regime and drug law offenses; identifying the main directions of the forensic investigation in the investigation of the crimes specific to the Romanian customs regime; international cooperation

³⁰ Diaconescu Gh., *Infrațiuni în legi speciale și în legi extrapenale: culegere de acte normative – comentate și adnotate. Doctrină și jurisprudență, referințe legislative la acte normative publicate până la 1 august 2002*. Bucharest, Foundation „România de Măine” Publishing House, 2002.

³¹ Olteanu G.I., *Cercetarea contrabandei și a altor infracțiuni ce implică trecerea frontierei de stat*, Bucharest: AIT Laboratories, 2004.

in the act of investigating customs offenses. Obviously, for our research, we are particularly interested in the authors' theses on the characterization of customs offenses. A special role is played by the comparative study of criminal laws in the legislation of some foreign states, including Albania, Bulgaria, Canada, China, France, Macedonia, USA.

Another work to be taken into account is the scientific material developed by C. Voicu, A. Boroi, I. Molnar, M. Gorunescu and S. Corlăteanu³², which dates back to 2008. It is a work dedicated to the analysis of crimes in the sphere business. Part of the study is oriented towards the theoretical approach to customs offenses under the new Customs Code of Romania (the 2006 edition). For the most part, the vision of the authors of this paper does not differ radically from those presented in the similar material signed by C. Voicu, A. Boroi, F. Sandu and I. Molnar which were analyzed above, only insofar as they are grounded on the provisions of the new criminal legislation in the field of customs offenses. For example, it is argued that if a customs officer, in exchange for money or other benefits, facilitates the crossing of the border through places other than the lawful ones, the official will commit complicity to smuggling and bribery. Similarly, it is proved that the persons, human beings do not constitute a material object of smuggling, and the deed committed in these circumstances actually realizes the conditions of the crime of trafficking in human beings in terms of Law no. 678/2001 on preventing and combating trafficking in human beings or trafficking in human beings.

Attention is also paid to the scientific article elaborated by S. Corlăteanu in 2009³³. For the most part, the author submits the smuggling analysis provided in paragraph (1) article 270 CV Rom. He is arguing about cigarette smuggling, with some statistical data being reflected. The author proposes tightening sanctions for smuggling. It also comes with the suggestion that tobacco be included in the category of material objects of skilled smuggling (article 271 CV Rom). It is demonstrated that for the existence of smuggling provided in paragraph (1) article 270 CV Rom it is irrelevant if the persons who have crossed the border have or not valid passports, because the criminality is exclusively based on the violation of the customs regulations regarding the goods and other goods, but not the legal regime of crossing the border, the essential being that goods or goods across the border line are to be moved through places other than those for customs control.

Notable is also the scientific article elaborated in 2011 by D. Bujorean³⁴. The author analyzes the constituent elements of smuggling and tax evasion, and

³² Voicu C., Boroi A., Molnar I. et al., *Dreptul penal al afacerilor*, 4th edition, revised, Bucharest: C.H. Beck, 2008.

³³ Corlăteanu S., *Reflecții în legătură cu infracțiunea de contrabandă*, „Dreptul”, no. 8, 2009.

³⁴ Bujorean D., *Infracțiunea de contrabandă și infracțiunea de evaziune fiscală*, „Revista de Drept penal”, no. 4, 2011.

ultimately points out the demarcation lines between them. It is revealed that the obligation to pay the customs debt arises when the smuggled goods are illegally introduced into the customs territory of Romania and is an autonomous obligation independent of the fate of the product that has been the object of the offense. As far as the material object of smuggling is concerned, according to the author, it is the goods stolen from customs control and its taxation, being in principle any commodity or object subject to customs control.

Another valuable scientific work in the field of customs offenses is the PhD. thesis in law, sustained in 2015 by *F. Coman*³⁵. Among the main ideas of the author we highlight: emphasizing the specifics of smuggling in Romania and the evolution of that phenomenon at the Romanian border; engaging in smuggling as part of organized crime; legal and criminal analysis of smuggling by the elements of the crime composition; establishing the criminal and customs regulations of the neighboring state - Ukraine - in the field of contraband crimes and emphasizing the specificity of the collaboration between the two states at the level of the border authorities in order to combat smuggling at the northern border of Romania; pointing to the methodology for investigating smuggling offenses, namely: the main issues to be clarified during the investigation of smuggling offenses, the activities to be undertaken for the administration of evidence, the joint investigation with the authorities of the Ukrainian state of the events at the border, the main tactical rules must be respected by border guards in the case of prosecution of persons suspected of committing border crimes, as well as mandatory tactical rules for the use of arms. For the present study, they are particularly interested in the ideas and theses of the author exposed on the criminal investigation of the offense.

Romania has been a member of the European Union since 1 January 2007. We mention that mechanisms have been developed at EU level to facilitate judicial cooperation in criminal matters between Member States, which have an important role in reducing organized crime through smuggling. In this regard, we mention the scientific articles elaborated by *I. Rusu* on the European Investigation Order in criminal matters, which is a new form of legal assistance in criminal matters between the Member States³⁶. The **European Investigation Order** is designed to simplify the work of the judicial authorities to investigate organized crime when they request evidence from other Member States. The European In-

³⁵ Coman F., *Contrabanda. Specificul contrabandei la frontiera de nord a României*: PhD thesis in law. Bucharest, 2015.

³⁶ Rusu I., *European investigation order in criminal matters in the European Union. General considerations. Some critical opinions*, „Juridical Tribune – Tribuna Juridica”, Volume 6, Issue 1, June 2016, p. 56-70; Rusu I., *The enforcement of investigative measures based on the European investigation order in criminal matters. Comparative examination relating to the Romanian law. Critical opinions and de lege ferenda proposals*, „Juridical Tribune – Tribuna Juridica”, Volume 7, Issue 1, June 2017, p. 179-197.

investigation Order is based on mutual recognition. This means that each EU country is obliged to recognize and execute requests from other countries, treating them as they did by their own authorities. Directive 2014/41/EU on the European Investigation Order in criminal matters entered into force on 22 May 2017. We also mention another European instrument useful in the investigation of organized crime, namely the **European Protection Order**, analyzed by the author I. Rusu in his articles³⁷. Romania has transposed into national law Directive 2011/99/EU on the European protection order by Law no. 151/2016. The European Protection Order is a decision taken by a judicial or equivalent authority of a Member State on a protection measure under which a judicial or equivalent authority of another Member State has the appropriate measure or measures under its own law with a view to further ensuring the protection of the protected person.

Also in the field of European judicial co-operation we mention the article by author B. Bîrzu³⁸ in which he analyzes the role of Europol in combating crime at European level, including in the field of smuggling.

The cooperation of the Romanian customs authorities with the customs authorities of other EU Member States has led to the development over time of a common set of practices and principles as a prerequisite for the creation of the European Administrative Space³⁹.

Section 3. Analysis of scientific papers on customs offenses published in other countries

We will initiate the investigation with the doctoral thesis, which was supported in 1998 by M. A. Cociubei⁴⁰. The paper focuses on the analysis of customs

³⁷ Rusu I., *Issuance and transmission of the European protection order by the Romanian judicial authorities. Some critical opinions. De lege ferenda proposals*, „Juridical Tribune – Tribuna Juridica”, Volume 6, Issue 2, December 2016, p. 282-296; Rusu I., *Recognition and enforcement of the European protection order in the Romanian law. Some critical opinions. De lege ferenda proposals*, „Juridical Tribune – Tribuna Juridica”, Volume 7, Special Issue, October 2017, p. 224-235.

³⁸ Bîrzu B., *Europol objectives and tasks in the construction of the European Union. Some critical opinions and proposals*, „Juridical Tribune – Tribuna Juridica”, Volume 7, Issue 1, June 2017, p. 157-166.

³⁹ Săraaru C.-S., *Premises for the establishing of the European Administrative Space*, „Juridical Tribune – Tribuna Juridica”, Volume 6, Issue 1, June 2016, p. 179; Săraaru C.-S., *European Administrative Space - recent challenges and evolution prospects*, Bucharest: ADJURIS, 2017, p. 18.

⁴⁰ Cociubei M. A., *Уголовная ответственность за преступления в сфере таможенной деятельности: Автореферат диссертации на соискание ученой степени кандидата юридических наук (Criminal liability for crimes in the sphere of customs activity: the dissertation author's abstract on competition of a scientific degree of the candidate of legal sciences)*, Rostov-on-Don, 1998.

offenses in accordance with the Russian Federation's criminal law. The author defines the customs offenses as socially dangerous deeds (actions or inactions) committed intentionally, provided for and prohibited by the criminal law, which affects the order and the conditions of crossing the customs border of goods, means of transport, collection of customs payments, customs clearance and control customs. *M. A. Cociubei* classifies the special subjects of smuggling in two categories: a) persons exercising control functions at the customs border (state); b) other responsible persons who use their service for the passage of goods across the customs border. The author points out that for the classification of those committed according to the norms sanctioning the evasion facts from the payment of the customs payments does not matter the type of customs payment from the payment of which the perpetrator has escaped. It is demonstrated that the constituents of the evasion offenses from the payment of customs payments are material, the injurious effect being expressed in the fact that the state does not receive the due payment.

Another important work is the PhD thesis, sustained in 1998 by *N. S. Ghilimutdinova*⁴¹. Among the basic elements of the paper are: research on the evolution of criminal liability for evasion of payment of customs payments; comparative analysis of criminal regulations in the laws of foreign states; the role of customs payments in the national economy; the criminological and legal-criminal investigation of the evasion offenses from the payment of the customs payments; the delimitation of offenses of evasion from the payment of customs payments of some related criminal and contraventional deeds. The author defines the evasion of payment of customs duties as a socially dangerous, deliberate act provided by the criminal law and punishable by punishment expressed in the total or partial non-payment within the prescribed period of the legal payments provided by the law, as well as the unlawful restitution of the previously paid customs payments.

Noteworthy is the work that belongs to *Iu. I. Sucicov*, which dates back to 2000⁴². The scientific material focuses on identifying the juridical-criminal particularities of customs offenses in accordance with the Russian legislation. A special role is played by the judicial-criminal investigation of smuggling and evasion of payment of customs payments. Remarkable is the author's assertion that customs offenses correspond to a legal subgroup object, which consists of the social relations related to the external economic activity. Based on the type of material / immaterial entity passed over the customs frontier, *Iu. I. Sucicov* classifies the material object of smuggling into two main groups: a) consumer goods

⁴¹ Ghilimutdinova N. S., *Уголовная ответственность за уклонение от уплаты таможенных платежей*: Автореферат диссертации на соискание ученой степени кандидата юридических наук (*The criminal liability for evasion from payment of customs payments: the dissertation. Author's abstract on competition of a scientific degree of the candidate of legal sciences*), Moscow, 1998.

⁴² Sucicov Iu. I., *Таможенные преступления: учебное пособие* (*Customs crimes: a study guide*), Kaliningrad: Kaliningrad State University, 2000.

and b) commodities with a specific specificity, which are limited or forbidden in the civil circuit. Regarding the subjective side of smuggling, the author points out that these crimes are attributed to the category of offenses, for which the motive and purpose of the act does not influence the qualification.

We can not overlook the work that belongs to *T. A. Dicanova* and *V. E. Osipov*, out of print in 2000⁴³. The paper addresses various aspects useful to our study, especially those related to the analysis of smuggling offenses, as well as to the correlation between customs offenses and other economic crimes, including money laundering. It is noteworthy the position of the authors, according to which the negligent passage of the goods over the customs border by eluding the customs control or by non-authentication or non-authentic declaration can not form the smuggling component.

The following paper, which is subject to the analysis, belongs to the Russian authors *O. Cruglova* and *A. Cotelnicov*, published in 2001⁴⁴. It is a work, which specifies the lines of demarcation between smuggling and evasion of payment of customs payments. The authors point out that smuggling offenses have many similarities to those of evasion from paying customs. They state that smuggling can be committed through the fraudulent use of customs documents, through non-authentication and non-authentication, just like the evasion of payment of customs payments. At the same time, they differ according to the specific legal object and the objective side of the offense. The authors state that the offenses of evasion from the payment of customs payments imply the refusal to pay, within the set time, the payments provided by the customs legislation. Customs payments must be paid until the customs declaration or concurrent submission, while smuggling can be committed only at the stage of filing the customs declaration, for which the actions for payment of customs payments and goods crossing the customs border do not coincide in time, which excludes the presence of the ideal competition between smuggling and evasion of payment of customs payments. In the opinion of these authors, which we support, there can only be real competition between the offenses under the name of smuggling marginal and the ones married under the name of marginal evasion from the payment of customs payments.

Remarkable is the work signed by *V. D. Laricev* and *N. S. Ghilimutdinova* in 2001⁴⁵. The study mostly covers the evasion of paying customs payments. The legal-criminal and criminological analysis of these crimes is carried out. Similarly, some *de lege ferenda* proposals are proposed to improve the legislative

⁴³ Dicanova T. A., Osipov V. E., *Борьба с таможенными преступлениями и отмыванием «грязных» денег: Методическое пособие (Combating customs crimes and money laundering: A methodical guide)*, Moscow: UNITY-DANA, 2000.

⁴⁴ Cruglova O., Cotelnicov A., *Контрабанда и уклонение от уплаты таможенных платежей (Smuggling and evasion of payment of customs payments)*, „Законность” („Legality”), no. 5, 2001.

⁴⁵ Laricev V. D., Ghilimutdinova N. S., *Таможенные преступления (Customs crimes)*. Moscow: Examination, 2001.

framework in the field. The authors note that the material object of the evasion from paying the customs payments is characterized by quantitative (qualitative) and qualitative indices (types of customs payments). It is stated that the provision of the criminality rule is a blanket, which is why, in order to find out its content, it is necessary to refer to other normative acts of reference, including the Customs Code.

Since 2001, the work signed by the biographer A. Z. Ignatiuc⁴⁶. It is a study aimed at: legal-criminal analysis of smuggling offenses; their delimitation of some related facts, both criminal and contraventional; revealing the tactical aspects of investigating smuggling offenses and other offenses in the sphere of external economic activity. Although the material contains doctrinal approaches in accordance with the Belarusian criminal legislation, it can undoubtedly serve as a theoretical support for the present scientific approach, having regard to the similarity between the criminal law of the Republic of Moldova and that of the Republic of Belarus in matter of customs offenses. In the author's view, the material/immaterial objects of smuggling can be divided into two categories: a) objects in the civil circuit; b) objects restricted or forbidden in the civil circuit. He states that in the absence of the direct intention of the person passing goods across the customs border it can not be held criminally liable for committing smuggling offenses.

The following paper to be referred to is the thesis of a doctor in law advocated in 2002 by Z. M. Abdurahmanov⁴⁷. It is a study aimed at criminal-law and criminological analysis of the evasion crimes from the payment of customs payments. The author points out that customs offenses have a high degree of latency. In the author's view, the application of the rule sanctioning the evasion of payment of customs payments is rather deficient because the rule of criminalization is a blanket and the content of the normative acts of reference is in permanent change. Like other authors, Z.M. Abdurahmanov is trying to identify clear criteria for delimiting smuggling offenses from evasion from paying customs.

Another work under investigation is the scientific material developed by A. A. Vitviťkii in 2003⁴⁸. The content of the paper is divided into legal-criminal

⁴⁶ Ignatiuc, A. Z., *Контрабанда и иные правонарушения во внешнеэкономической деятельности: Теория и практика расследования (Smuggling and other offenses in foreign economic activity: Theory and practice of investigation.)*. Moscow: Amalfia, 2001.

⁴⁷ Abdurahmanov, Z. M., *Уголовная ответственность за неуплату таможенных платежей, взимаемых с организации или с физического лица: Автореферат диссертации на соискание ученой степени кандидата юридических наук. (Criminal liability for non-payment of customs fees levied from the organization or from an individual: the thesis abstract for the degree of candidate of legal sciences)*, Moscow, 2002.

⁴⁸ Vitviťkii A. A., *Преступления в сфере внешнеэкономической деятельности (криминологические и уголовно-правовые аспекты): Учебное пособие [Crimes in the sphere of foreign economic activity (criminological and criminally-legal aspects): Textbook.]*, Moscow: ICC "Mart", 2003.

and criminological analysis of crimes committed in the sphere of foreign economic activity in accordance with the Russian legislation. For the present study, the legal and criminal characterization of these crimes is of interest. Of note is the depth of research into the material object of smuggling. The author rightly observes that the state border does not coincide with the customs border. He points out that the time consumed for smuggling is strictly dependent on whether the goods are introduced or removed from the customs territory. Regarding the offenses of evasion from paying the customs payments, it is suggested that these are materials considered consumed from the expiry of the time limit set for the payment of customs payments.

In the following, the analysis will be subjected to the scientific article elaborated in 2004 by A. Vaculenco⁴⁹. The study focuses on identifying the legal and criminal particularities of smuggling offenses at national and international level. However, the emphasis is mostly on the criminal law analysis of smuggling offenses at national level, by reference to the criminal law and the Customs Code. It is attempted to distinguish between criminal and contraband offenses. The author distinguishes three large groups of objects of smuggling: 1) the first group includes goods, goods that are free in the civil circuit; 2) the second group includes limited or forbidden objects in the civil circuit (eg weapons, munitions, narcotics, psychotropic substances, etc.); 3) third group includes people. We do not support the author's position on the part of attributing to the category of entities that may appear as an object of smuggling.

The monograph signed by L. F. Rogatîh, appeared in 2005⁵⁰. It is a work aimed at tackling the legal-criminal aspects of smuggling. The author concludes that the material object of simple smuggling is any mobile commodity, currency, electricity, heat or other means of transport. Regarding material entities possessing special qualities (narcotic substances, weapons, etc., except for cultural values), the author points out that their social role lies in the fact that they are sources of increased social danger. The use of their useful qualities in the interest of society is only under the thorough supervision of the state. Also in the context of entities liable to pass illegally over the customs border, the author questions the situation if objects of intellectual property can appear as a material object of smuggling. On the objective side, he notes that the passage over the customs border, as a sign of the objective side, includes two elements: the action directed towards the passage of goods across the customs border and the crossing *de facto* of the customs border. At the same time, a place of smuggling will be considered

⁴⁹ Vaculenco A., *О понятии „контрабанда” в законодательстве РФ и в между-народном праве (On the concept of "smuggling" in the legislation of the Russian Federation and in international law)*, „Закон и право” („Zakon i pravo”), no. 9, 2004.

⁵⁰ Rogatîh L. F., *Уголовно наказуемая контрабанда, (Criminally punishable contraband)*, St. Petersburg: St. Petersburg Law Institute of the General Prosecutor's Office of the Russian Federation), 2005.

the place of the last action. The methods of committing smuggling offenses as well as the types of customs documents used for the fraudulent passage of the customs border are analyzed in detail.

Another meritorious work to be subjected to the analysis is the doctoral thesis elaborated by I. V. Rozumani in 2005⁵¹. The paper investigates, *inter alia*, the constituent elements of smuggling offenses. According to the author, smuggling offenses are attributed to the multi-object crime category, because it simultaneously attacks several objects of criminal protection. In the context, in the author's opinion, with which we can not agree, the smuggling of weapons, ammunition and explosive substances must be re-classified in the chapter of the Special Part of the Criminal Code which contains the crimes against the public security and in the chapter on the offenses against health public and social cohabitation be smuggled with narcotic, psychotropic substances and their analogues. A large part of the study is aimed at the comparative analysis of criminal regulations in the legislation of some foreign states.

Following the doctrinal approach will be subjected to the scientific article published in 2008, whose author is A. Focov⁵². In the scientific material analyzed, the author points out that the passage over the customs border of goods and other goods implies the import or export of goods into the customs territory of the Russian Federation by any means, including the passage of goods by international postal items through pipelines and power lines. Thus, according to the author, the moment of consumption of smuggling offenses depends on the form and the concrete method of committing (export, import, transit through pipelines and electric lines, bypassing customs control, fraudulent use of documents and means of customs identification, by non-authentication or non-authentication). Very detailed are the methods of crossing the goods across the customs border. Explanations of rigor are made in light of the legislation in force and the exposures made by the Plenum of the Supreme Court of Justice of the Russian Federation regarding criminal cases concerning smuggling and evasion of customs payments.

To note is the scientific article developed by C. A. Pliasov in 2009⁵³. It is a material designed to investigate the subject of evasion crimes from paying customs payments. As an active subject of crimes, the author highlights: the declarant, the customs broker, the customs warehouse owner, the duty-free shop owner. C. A. Pliasov does not support the position of the doctrines who consider it nec-

⁵¹ Rozumani I.V., *Уголовная ответственность за контрабанду: по материалам Сибирского федерального округа (Criminal responsibility for smuggling: according to the materials of the Siberian Federal District)*, the dissertation author's abstract on competition of a scientific degree of the candidate of legal sciences. Omsk, 2005.

⁵² Focov A., *О судебной практике по делам о контрабанде (On judicial practice in cases of smuggling)*, „Российский судья” („Russian judge”), no. 7, 2008.

⁵³ Pliasov C. A., *О субъекте уклонения от уплаты таможенных платежей (On the subject of evasion from payment of customs payments)*, „Общество и право” („Society and Law”), no. 4(26), 2009.

essary to complete the article sanctioning the evasion of the payment of the customs payments with the following additional sign: "the act committed by a person with responsibility, using the service situation". According to him, the accountable person and, in particular, the customs officer, who does not carry the goods across the customs border, has no legal obligation to pay the customs payments.

It is worth paying attention to the scientific article elaborated in 2011 by the bielorus V. V. *Hiliuta* dedicated to one of the most controversial theoretical and practical problems in the field of customs offenses, namely: delimitation of smuggling offenses from the evasion of payment of customs payments⁵⁴. The author submits to the analysis the various points of view in the literature referring to the delimitation of the respective crimes, that eventually come with his / her own position. In the author's view, the difficulty of delimiting the offenses in question is dictated by the fact that they are part of the category of offenses in the sphere of external economic activity, both of which have insignificant differences with regard to the special legal object, the objective side and the subjective side, and last but not least, in the provision of incriminating rules, the legislator did not specify the particularities of the illegal actions. According to him, if the intention of the perpetrator is directed to the passage of goods across the customs frontier in large proportions by the methods indicated in the norms that incriminate the smuggling offenses, the committed ones must be classified as smuggling. If the intention of the perpetrator is to escape from paying the full amount of customs payments or in a substantially lower volume, those committed will attest the presence of evasion from paying the customs payments.

Another material under investigation is the scientific article signed by Kazakh author A. B. *Magzumov*, which dates back to 2011⁵⁵. The author's effort focuses on investigating the smuggling of goods that do not possess special qualities (an offense analogous to the one stipulated in paragraph (1) article 248 CP RM), which he calls economic contraband. The elements of this crime are analyzed in accordance with the content of the rules of the Kazakh Customs Code. It is shown that the special legal object of economic smuggling is the inviolability of the customs frontier. At the time of consumption, the author points out that smuggling is considered consumed since the crossing *de facto* of the customs border.

⁵⁴ Hiliuta V. V., *Проблемы отграничения контрабанды от уклонения от уплаты таможенных платежей в уголовном праве Беларуси (Problems of delimitation of smuggling from evasion from payment of customs payments in the criminal law of Belarus)*, http://edu.tltsu.ru/sites/sites_content/site1238/html/media71251/Khiljuta.pdf (visited 26.12.2015).

⁵⁵ Magzumov A. B., *Уголовно-правовые аспекты экономической контрабанды (Criminally-legal aspects of economic contraband)*, Materials of the inter-faculty student scientific-practical conference "Youth and Science", 2011.

The next work on which we will stop is the monograph signed in 2011 by the Ukrainian authors A. A. Muzica, A. V. Savcenko, O. V. Proțiuș, V. V. Silenco, O. P. Goroh⁵⁶. It is a scientific material in which the particularities of smuggling crimes are characterized as national and international crimes. The main segments of the paper were: the comparative study on smuggling; legal and criminal analysis of constitutive elements and aggravating circumstances of smuggling offenses; revealing some aspects regarding the application of the punishment for committing smuggling; identifying the specifics of criminal liability for smuggling narcotic drugs, psychotropic substances and their precursors. It is demonstrated that human beings can not be a material object of smuggling. It also shows that the illegal crossing over the customs border of human beings must be framed according to article 149 of the Criminal Code of Ukraine - Trafficking in Human Beings.

In the course of the investigation we must also take into account the scientific article elaborated by the Russian authors L. A. Prohorov and A. V. Scacico in 2013⁵⁷. It is a study focused on the comparative analysis of criminal regulations in the legislation of some foreign states, including Germany, the Netherlands, Switzerland, San Marino, Sweden, Poland, Turkey, the People's Republic of China, Japan, Ukraine, Belarus, Azerbaijan, etc. The authors point out that some legislation is sufficiently liberal in terms of sanctioning smuggling (the case law of the EU Member States), while others come to establish a more severe sanctioning regime (here can be attributed to the criminal laws of the Asian states China, Japan, Turkey, etc.) Part of the study is focused on demonstrating the technical-legislative models of smuggling offenses under the rules of incrimination.

Finally, we conclude this section with the analysis of the doctrinal opinions of the scientific article signed by M. S. Marcovski that dates back to 2015⁵⁸. It is one of the few articles devoted to money laundering and / or payment instruments. The author attempts an incursion into the problem of identifying smuggling with such material entities. He points out that the practical difficulty in establishing cash and money-laundering smuggling is dictated by the fact that customs officers do not possess special professional knowledge of their payment instruments, their types and external signs.

⁵⁶ Muzica A. A., Savcenko A. V., Proțiuș O. V. et al., *Кримінальна відповідальність за контрабанду: національний та міжнародний досвід (Criminal Liability for Smuggling: National and International Experience)*: Monograph. Kyiv: Palivoda, 2011.

⁵⁷ Prohorov L. A., Scacico, A. V., *Правовые модели противодействия контрабанде: опыт зарубежного законодательства (Legal models of countering smuggling: the experience of foreign lawmaking)*, „Общество и право” („Society and Law”), no. 2(44), 2013.

⁵⁸ Marcovski M. S., *Проблемы определения предмета контрабанды наличных денежных средств и (или) денежных инструментов (The problems of determining the subject of contraband of cash and (or) monetary instruments)*, „Вестник Томского государственного университета” („Bulletin of Tomsk State University”), no. 393, 2015.

Section 4. Conclusions to Chapter I

Synthesizing the ideas and conceptions of the scientists expressed in the investigation of customs crimes, both from the Republic of Moldova and Romania, and from other states in the field of criminalization of customs acts, we draw the following *conclusions*:

1) the works signed by the following authors have an important role in the criminal analysis of customs offenses: S. Maimescu, S. Brînza, V. Stati, R. Sobiețki, V. Berliba, V. Bujor, V. Spatari, M. Mutu, L. G. Gîrla, Iu. M. Tabarcea, Gh. Nicolaev, N. Lacusta, C. Gurschi (*Republic of Moldova*); F. Sandu, C. Voicu, A. Boroï, I. Molnar, Gh. Diaconescu, G. I. Olteanu, M. Gorunescu, S. Corlățeanu, O. Predescu, D. Țicău, O. Pop, D. Bujorean, F. Coman, I. Rusu (*Romania*); N. S. Ghilimutdinova, Iu. I. Sucicov, T. A. Dicanova, V. E. Osipov, V. D. Laricev, L. F. Rogatîh, M. A. Cociubei, O. Cruglova, A. Cotelnicov, Z. M. Abdurahmanov, A. Vaculenco, I. V. Rozumani, A. Focov, C. A. Pliasov, L. A. Prohorov, A. V. Scacico, M. S. Marcovski (*Russian Federation*), V. V. Hiliuta, A. Z. Ignatiuc (*Republic of Belarus*), A. B. Magzumov (*Republic of Kazakhstan*), A. A. Muzica, A. V. Savcenko, O. V. Protiuc (*Ukraine*);

2) in order to substantiate the investigation and identify the main research directions, the main concepts, visions of the scientists from the Republic of Moldova, Romania and other states on the subject were analyzed.

3) the research of doctrinal opinions on customs offenses, both by the Moldovan and Romanian scientists and other states, has served as a fundamental pillar in tackling criminal offenses from the customs sphere.

4) although the doctrinal patrimony of customs offenses in Romanian and Moldovan legislation is not poor in volume and content, however, some views, visions, and optics of scientists are controversial.

5) the degree of investigation of the topic approached allows us to conclude that the judicial-criminal investigation of the customs offenses under the criminal law of the Republic of Moldova and that of Romania, in some aspects, is insufficiently examined in the specialized doctrine. This is because: several aspects of customs crimes were not fully highlighted both in the Republic of Moldova and in Romania; the criteria according to which a socially dangerous act is included in the category of customs offenses have not been fully identified; insufficiently insisted on qualification solutions in the case of goods passing through border crossing points, but by methods other than stealing, in the context of smuggling provided in paragraph (2) article 270 CV Rom. As a consequence, the statute on these aspects allowed to achieve the goal aimed at the elaboration of the present paper, namely to deepen the concept of criminal liability for customs offenses, to highlight and to solve the problems of criminal law regarding the offenses in the

customs sphere, regulated by the penal legislation The Republic of Moldova and Romania, as well as in formulating some *de lege ferenda* proposals aimed at optimizing the current legal framework in the field.

6) the solved scientific problem consists in the elaboration of the tools for identifying the constitutive elements and the aggravating circumstantial customs offenses in the legislation of the Republic of Moldova and Romania, in accordance with the current theoretical and normative framework, which led to the submission of proposals for improvement of the law to prevent and combat crime more effectively in the customs sphere.

7) in order to solve the major scientific problem, the following priority research directions have been established: defining the concept of customs offense; identification of the place of customs offenses in the system of economic crimes; the doctrinal approach of the pre-existing, constitutive and aggravating circumstantial elements of the customs crimes in the criminal law of the Republic of Moldova and of Romania; comparative analysis of criminal regulations in the criminal law of some foreign states in the field of customs offenses; practical investigation of customs offenses, etc.

Chapter II

Customs offenses. Notion. Normative framework. Comparative law study

Section 1. The concept of customs offenses. Criteria for assigning of the socially dangerous facts to the category of customs offenses

In the social life, inappropriate facts, actions or inactions that harm or endanger the interests of members of society may be committed, whether these interests belong to all, that is, to the collective as a whole, or to belong to only some of its members. As it disturbs the social order, all these facts are antisocial, but they can be characterized as crimes only to the extent that they are incriminated by criminal law and sanctioned with a punishment⁵⁹. Such injurious acts include *customs offenses*. But what do we mean by customs offense? What are the criteria according to which a certain offense is included in the category of customs offenses? Which concrete criminal offenses are included in the category of customs offenses?

Ab initio, we specify that the concept of customs offenses, their scope, the limits of assigning socially dangerous facts to the category of customs offenses are strictly dependent on the normative framework of each state. It is the legislator who directly or indirectly, through the legislative technique used to adopt the law, determine the types of customs offenses and the criteria for assessing the harmful act committed as a customs offense.

In this context, the Romanian legislator differs from the Moldovan one, considering the technique of the first to insert the customs offenses into the normative act dedicated to regulating the relations in the customs sphere (Customs Code), as compared to the Moldovan one, which used the location all criminal offenses, including those in the customs sphere, in the single criminal law - the Criminal Code. Thus, in line with Romanian legislation, the identification of the concept of customs offense, the criteria for awarding socially dangerous acts to the category of customs offenses, as well as the concrete customs offenses, do not create any difficulty. *In concreto*, the Romanian legislator turned to the technical procedure for the placement of crimes of criminal offenses in the customs sphere in the Law on Customs Code of Romania, no. 86/2006⁶⁰, which must be considered a special law with criminal provisions contained in articles 270-278. Because

⁵⁹ Crânguş I., Niţu A., Dragomir I., *Drept penal. Partea Generală*, 2nd edition. Bucharest: Ministry of Administration and Interior, 2006, p. 34, <http://www.cultura.mai.gov.ro/biblioteca%20virtuala/editura%20mai/drept%20penal/curs%20drept%20penal.pdf> (visited on 15.07.2014).

⁶⁰ *Law on the Customs Code of Romania*, no. 86/2006, the Official Gazette of Romania, 2006, no. 350.

the crimes in question are covered by the Romanian Customs Code, the criminal offenses included in the law constitute the category of customs offenses. These are attributed to: smuggling (article 270 CV Rom), skilled smuggling (article 271 CV Rom), the use of unreal acts (article 272 CV Rom), the use of falsified documents (article 273 CV Rom).

Both simple and qualified smuggling, as well as the use of unrealistic acts, as well as the use of falsified acts are criminal offenses that damage the social relations inherent in the customs activity. In this respect, *D. Țicău*, rightly, attributes to the category of customs offenses the act of using unreal acts and the use of counterfeit documents⁶¹.

Lastly, we are in the position that, in accordance with Romanian law, the criminalized offenses constitute the group of customs offenses, even if in doctrine⁶² it is shown that smuggling is one of the many ways of fraud in the fiscal field. However, the attribution of these facts to the category of offenses in the customs sphere was made even by the legislator, when he inserted in the Customs Code, but not in other normative acts, the norms that incriminate those facts. In our opinion, the customs and tax areas intersect, but do not overlap. It is true that, in most cases, by committing smuggling offenses, the perpetrator escapes from the legal obligation to pay the customs payments, which for the most part form the state budget, just like the tax charges. Only the source of the obligations to pay customs and the tax charges, respectively, is different. Compared with tax payments, customs are the result of passing goods across the customs border. So, they appear in relation to the development of customs relations.

In the same vein, we mention that, based on the number and content of the socially dangerous facts incriminated by the Customs Code of Romania, in the Romanian specialty the customs offenses are defined as acts consisting in crossing the border of the goods through places other than those established for the control customs clearance of weapons, ammunition, explosive or radioactive materials, narcotic and psychotropic products and substances, precursors and essential chemicals, toxic products and substances or, in free zones, goods the import of which is prohibited on Romanian territory, with unreal or falsified transport or commercial documents⁶³. The content of customs offenses is equivalent to the fact of crossing the customs border of goods by removing them from the customs authorities' mood in the precise and limiting circumstances determined by the law⁶⁴.

⁶¹ Țicău D., *op. cit. (Infrațiuni vamale. Controverse)*, p. 113.

⁶² Bujor V., Pop O., *op. cit. (Criminalitatea în domeniul fiscal)*, p. 19.

⁶³ Voicu C., Boroș A., Sandu F. et al., *op. cit. (Drept penal al afacerilor)*, p. 257.

⁶⁴ Pasat O., *Analiza juridico-vamală a contravențiilor, infracțiunilor vamale prevăzute de Codul vamal al României aflat în vigoare*, „Revista Națională de Drept”, no. 2, 2014, p. 68.

F. Sandu called the criminal offense in the customs field as a customs offense⁶⁵. According to the author, the criminal offense in the customs field comprises all the committal acts (which may also be committed through an omission) that seriously or intentionally threaten or seriously injure the Romanian customs regime and which, constituting a manifest source of fraud or social indiscipline, are punishable by law⁶⁶. At the same position is *O. Predescu*, who uses the generic term "customs offense" to characterize the criminal offenses provided by the Customs Code.⁶⁷

Thus, according to **the Romanian legislation**, a customs offense must be understood as the totality of the criminal offenses provided for by the Customs Code committed intentionally, punishable by criminal punishment and damaging the social relations inherent in the activity in the customs sphere.

Much more difficult is the determination of the concept of customs offense in the light of the legislation of the Republic of Moldova. The criminal law of the Republic of Moldova does not contain special criminal laws. The criminal code is the only criminal law. At the same time, the Criminal Code of the Republic of Moldova does not contain a separate section covering the criminal charges. However, these can be deduced from the analysis of Chapter X of the Special Part of the Criminal Code entitled "Economic crimes".

Based on the classification of spheres of economic activity, *S. Brânza* and *V. Stati* identifies several types of economic crimes, including offenses committed in the sphere of external economic activity, attributed to the offenses provided by article 248 (smuggling) and 249 CP RM (escape from payment of customs payments)⁶⁸. *I. Macari* classifies the economic crimes (offenses) in: a) offenses in the sphere of credit; b) offenses in the sphere of entrepreneurial activity; c) offenses in the financial and fiscal sphere; d) offenses on the securities market; e) trade-related offenses; f) offenses in the sphere of service of the population; g) offenses in the field of foreign trade; h) offenses concerning the insolvency of enterprises; i) other economic offenses⁶⁹. In the opinion of the quoted author, smuggling and evasion of payment of customs payments form the group of offenses in the sphere of foreign trade. Similarly, *I. S. Vasilicov* groups the economic crimes in: a) offenses in the sphere of entrepreneurial activity and other economic activities; b) offenses in the sphere of credit relations; c) offenses in the sphere of social relations ensuring free and fair competition; d) offenses in the sphere of financial relations related to the circulation of metals and precious

⁶⁵ Sandu F., *op. cit.* (*Contrabanda – componentă a crimei organizate*), p. 6.

⁶⁶ *Ibidem*, p. 5-6.

⁶⁷ Predescu O., *op. cit.* (*Drept penal al afacerilor*), p. 259.

⁶⁸ Stati V., *op. cit.* (*Infrațiuni economice: Note de curs*), p. 21; Brânza S., Stati V., *op. cit.* (*Tratat de drept penal. Partea Specială.*), vol. II., p.17.

⁶⁹ Macari I., *Dreptul penal al Republicii Moldova. Partea Specială*, Chișinău: CE USM, 2003, p. 234.

stones; e) offenses in the sphere of external economic activity and customs control (in this category being attributed the offenses corresponding to those stipulated in articles 248 and 249 CP RM)⁷⁰.

In this context, we emphasize that, in theory, crimes committed in the sphere of external economic activity are called by some authors of customs offenses⁷¹. S. Maimescu also states that both offenses, although placed in economic crimes, are recognized as customs offenses committed in the area of customs activity of the Republic of Moldova⁷².

In our opinion, a distinction is to be made between offenses committed in the sphere of foreign economic activity and customs offenses. These two categories do not overlap completely. However, customs offenses only form part of the crimes committed in the sphere of foreign economic activity. We support the position of A. I. Tulenev: "Crimes committed in the sphere of external economic activity should not be limited to the circle of customs violations. These include other offenses provided by the Criminal Code"⁷³. So, the sphere of external economic activity, as a whole, encompasses the customs sphere as a party. According to article 2 of the Moldovan Law on state regulation of foreign trade activity, no. 1031 of 08.06.2000⁷⁴, external trade activity means the essential means of realizing the world circuit of material and intellectual values, which materializes in all operations and activities involving the exchange of goods, works and services on an international scale. According to article 3 of the Law, the external trade activity is regulated by the provisions of the Constitution of the Republic of Moldova, laws, normative acts of the Government, as well as the norms of international law and international treaties to which the Republic of Moldova is a party. It follows from the cited rules that offenses committed in the sphere of external economic activity violate not only the rules of customs legislation⁷⁵. In the context, A. I.

⁷⁰ Vasilicov I. S., *Преступления в сфере экономики (Crimes in the sphere of economy)*, Rostov-on-Don: Phoenix, 2007, p. 13-14.

⁷¹ Sucicov Iu. I., *op. cit.*, (*Customs crimes: a study guide*), Kaliningrad: Kaliningrad State University, 2000, p. 8; Volzhenkin B.V., *Преступления в сфере экономической деятельности (Crimes in the sphere of economic activity)*, St. Petersburg: Legal Center Press, 2002, p. 428; Zdravomyslova B. V. (ed.), *Уголовное право Российской Федерации. Особенная часть (Criminal Law of the Russian Federation. Special part)*, Moscow, 1999, p. 225; Abdurahmanov Z. M., *op. cit.* (*Criminal liability for non-payment of customs fees levied from the organization or from an individual*), p. 15.

⁷² Maimescu S., *Cumulul infracțiunilor de contrabandă și de eschivare de la achitarea plăților vamale, prevăzute de legislația penală a Republicii Moldova*, „Studia Universitatis” USM, no. 1(11), 2008, p. 28.

⁷³ Tulenev A.I., *Актуальные проблемы терминологии и понятия таможенных преступлений (Actual problems of terminology and the concept of customs crimes)*, „Вестник Костромского государственного университета им” („Bulletin of Kostroma State University”), no. 5, 2012, p. 212.

⁷⁴ Official Gazette of the Republic of Moldova, 2000, no. 119-120.

⁷⁵ Garmayev YU. P., *Преступления в сфере внешнеэкономической деятельности и криминалистическая методика расследования (Crimes in the sphere of foreign economic*

Tulenev notes that customs offenses can be grouped into a particular category characterized by certain features, including: committing to external economic activity; prosecution for breach of customs regulations, etc.⁷⁶

According to Russian authors V. N. Andrianov and Iu. P. Garmaev, compared to customs offenses, the offenses committed in the sphere of external economic activity, *inter alia*, involve the following particularities: a) involves the presence of two or more states; b) participants in social relations are natural or legal persons entitled to carry out foreign economic activity, as well as foreign persons; c) the respective form of economic activity is regulated by the norms of the law: customs, currency, banking, administrative, etc.; d) an important role in the regulation of relations in the sphere of foreign economic activity is formed by the specificity of the legislation of the foreign states, as well as of the international legislation⁷⁷.

Thus, customs offenses involve a breach of customs regulations. At the same time, offenses committed in the sphere of external economic activity may claim violations of regulations in other spheres than customs. It is precisely for these reasons that we are in the position that the offenses brought together under the marginal trade mark of imported diesel for own consumption or its use contrary to its purpose (article 240¹ CP RM), recently introduced in the Criminal Code, by the Law of the Republic of Moldova for the modification and the completion of some legislative acts, no. 223 of 03.12.2015⁷⁸, are to be included in the category of crimes committed in the sphere of external economic activity, but they are not classified as customs offenses. This is because it does not involve the violation of some customs restraints. In fact, as a normative act of reference (extrapenal) for the norms of article 240¹ CP RM, there is the Law of the Republic of Moldova on the petroleum products market, no. 461 of 30.07.2001⁷⁹. The fact that it does not constitute a customs offense results implicitly from the legislative technique of locating the related contravention [(domestic marketing of diesel imported for personal consumption or use them for purposes other than for personal use, if such action is not a crime) (paragraph (9) article 277 of the C. contr.

activity and forensic methods of investigation), <https://www.lawmix.ru/comm/5182/> (visited on 31.01.2016).

⁷⁶ Tulenev A. I., *Таможенные преступления и современное состояние использования специальных знаний при их расследовании (Customs crimes and the current state of the use of special knowledge in their investigation)*, „Современные научные исследования и инновации” („Modern scientific research and innovations”), no. 11, 2012, <http://web.snauka.ru/issues/2012/11/18472> (visited on 31.03.2016).

⁷⁷ Andrianov V. N., Garmaev YU. P., *Современный подход к разработке методики расследования преступлений в сфере внешнеэкономической деятельности (A modern approach to the development of methods for investigating crimes in the field of foreign economic activity)*, „Сибирский юридический вестник” („Siberian Legal Bulletin”), no. 1, 2003, p. 66.

⁷⁸ Official Gazette of the Republic of Moldova, 2015 no. 361-369.

⁷⁹ Official Gazette of the Republic of Moldova, 2003, No. 76.

RM)] along with other violations of the legislation on the petroleum products market, but not with the violation of the customs rules.

In conclusion, customs offenses are part of the offenses committed in the sphere of external economic activity. These, however, do not overlap. In accordance with the criminal law of the Republic of Moldova, only the offenses provided by articles 248 and 249 CP RM can be attributed to the category of customs offenses. At the same time, *lato sensu*, these are part of crimes committed in the sphere of foreign economic activity.

So, conventionally, offenses under the name marginal, smuggling and those under the marginal name of evasion from paying customs duties can be referred to as customs offenses. This is because both offenses of smuggling and evasion of payment of customs payments are acts committed in the customs sphere. By committing these crimes, the social values and social relations of those who appear and develop in the customs sphere are damaged. So, as a fundamental criterion for grouping economic crimes in certain categories, it serves the sphere of economic activity in which they are committed. Given this criterion, economic crimes are classified into several categories, such as: tax offenses, crimes committed on the capital market, offenses committed in the sphere of competition, etc. The category of economic crimes also forms the customs offenses. As the offenses provided in articles 244, 244¹ and 250 CP RM are considered to be tax offenses, the offenses provided in articles 248 and 249 CP RM must be classified as customs offenses. It is clear that the offenses of smuggling and the evasion of customs payments on the one hand, committed in the customs sphere, and on the other hand, threaten the social relations that emerge and develop in connection with work customs. Here is another criterion for grouping economic crimes, namely: the object of similar generic attack. Both offenses of smuggling and evasion of payment of customs payments harm values and social relations related to customs activity.

Also, as a basis for highlighting the sub-group of customs offenses is the branch of customs law formed by juridical norms regulating the social relations between the representatives of the customs bodies and the subjects involved in the activity of crossing the goods across the customs border.

In addition, the legislator himself indirectly urges us to conclude that the suspected criminal offenses are part of the customs offense. For example, the legal definition of smuggling (which mostly overlaps with the content of the criminalization rules under article 248 CP RM) is inserted, *inter alia*, in the regulations of the Customs Code of the Republic of Moldova, namely: article 224 CV RM. With regard to the offenses of evasion of customs payments, it is clear from the article title that these acts are committed in the sphere of customs activity. The criminalization of such acts is the result of the non-payment of the obligation to pay the mandatory customs duties established by law for the passage of certain goods over the customs border of the Republic of Moldova. Not the same opinion is V. Berliba, which includes the evasion of payment of customs payments in the

category of tax offenses⁸⁰. After S.E. Semionov, the evasion of the payment of customs payments is a matter of both social relations in the customs sphere and those in the fiscal sphere⁸¹. In our view, however, the offenses of evasion of payment of customs payments constitute customs offenses. *Primo* - at the risk of repeating itself, we note that in the classification of economic crimes, most theorists point out the group of offenses in the sphere of external economic activity (the category of customs offenses), which includes the evasion of the payment of customs payments. *Secundo* - it is clear from the title and from the provisions of the article 249 CP RM that the committed acts are customs offenses; the legislator sanctions the evasion of paying the customs payments, not the tax payments. *Tertio* - the provision of article 249 CP RM being a blank, refers to other normative acts of extrapenal character, among which the Customs Code, as the basic act of reference. *Quarto* - from the point of view of the legal technique, article 249 CP RM follows article 248 CP RM (which also includes several customs offenses). Thus, we consider that the Moldovan legislator deliberately did so, intending to establish the group of crimes that attack the social relations in the customs sphere. Hence, another argument - *quinto*: smuggling and evasion of payment of customs payments protects the same group of social relationships (legal object of common subgroup).

Moreover, in accordance with the provisions of article 268 of the Code of Criminal Procedure⁸², competent to prosecute offenses under articles 248 and 249 CP RM is the criminal prosecution body of the Customs Service.

It is precisely from the above-mentioned considerations that we consider that the offenses provided by articles 248 and 249 CP RM form the category of customs crimes according to the criminal law of the Republic of Moldova.

At the same time, they are part of the economic crimes, which is dictated by the technical-legislative placement of the norms that criminalize these crimes. We consider that the Moldovan lawmaker rightly decided to place articles 248 and 249 CP RM in Chapter X of the Special Part of the Criminal Code entitled "Economic crimes"; customs activity is one of the most important forms of the economic activity of the state. In this respect, it is clear from the Preamble of the Customs Code of the Republic of Moldova that it establishes the juridical, economic and organizational principles of the customs activity and is oriented towards defending the sovereignty and the economic security of the Republic of Moldova (emphasis belongs to us - *the author's note*). Similarly, *inter alia*, article

⁸⁰ Berliba V., *Delictul fiscal: concept și manifestări*, Chișinău: Totex-Lux, 2011, p. 134.

⁸¹ Semenov S. Ye., *Понятие таможенной преступности и ее показатели (The notion of customs crime and its indicators)*, „Криминология: вчера, сегодня, завтра” („Criminology: yesterday, today, tomorrow”), no. 1(16), 2009, p. 201.

⁸² Official Gazette of the Republic of Moldova, 2003, no. 104-110.

11 CV RM stipulates as basic duties of the customs body: defense of the economic interests of the state; participation in the elaboration of economic policy measures regarding the passage of goods across the customs border.

In conclusion, unhindered, we are in the position that in accordance with the criminal law of the Republic of Moldova, the prejudicial acts provided by articles 248 and 249 CP RM form the category of customs offenses, being correctly placed within the chapter of the Special Part of the Criminal Code intended for protection of the national economy as a fundamental social value.

But what do we mean by customs offense in accordance with the legislation of the Republic of Moldova?

Considering that in the specialized literature of the Republic of Moldova little attention is paid to revealing the concept of customs offense, we will reproduce some definitions in the Russian doctrine, which can easily be extrapolated to the legal framework of the Republic of Moldova.

Thus, B. V. Voljenkin defines customs offenses as those socially dangerous facts directed at foreign economic activity⁸³. Much more detailed is the definition given by M. A. Cociubei, according to which, through a customs offense, it is necessary to understand any socially dangerous act (action or inaction) committed deliberately, provided for and prohibited by the criminal law, which affects the order and conditions of crossing the customs border of goods, means of transport, collection of customs payments, customs clearance and customs control⁸⁴. A similar position is held by the Russian author G. P. Cacichina defines customs offenses as socially dangerous deeds (actions or inactions) committed with guilt, forbidden by criminal law, which affects the social relations in the sphere of regulating the passage of goods and other objects across the customs border⁸⁵.

Other authors point out that customs offenses are those socially dangerous, guilty, punishable offenses that affect the sphere of economic activity related to the order of removal and customs clearance of goods and valuables across the customs frontier, contrary to the prohibitions laid down by law⁸⁶.

According to V. M. Malinovskaya, the customs offenses are considered those socially dangerous facts, committed with guilt, prohibited by the criminal

⁸³ Volzhenkin B. V., *op. cit.* (*Crimes in the sphere of economic activity*), p. 179.

⁸⁴ Cociubei M. A., *op. cit.* (*Criminal liability for crimes in the sphere of customs activity*), p. 11.

⁸⁵ Kachkina G.P., *Контрабанда как таможенное преступление: Автореферат диссертации на соискание ученой степени кандидата юридических наук (Smuggling as a customs offense: the dissertation author's abstract on competition of a scientific degree of the candidate of legal sciences)*, Vladivostok, 2003, p. 9.

⁸⁶ Ivanova S. Yu., Chuchayev A. I., *Таможенные преступления в новом УК РФ (Customs crimes in the new Criminal Code)*, „Государство и право” („State and Law”), no. 11, 1998 p. 42; Fesenko N. P., *Таможенные преступления и возможности их предотвращения (Customs crimes and the possibility of their prevention)*, „Законодательство и экономика” („Legislation and Economics”), no. 12, 2006, p. 14.

law, which threatens the economic security of the state, to its financial interests, committed in violation of the rules established by the customs legislation⁸⁷.

S. Iu. Ivanova, through customs offenses, understands the socially dangerous attacks committed with guilt, which essentially violate the activity of the customs bodies to achieve the tasks and objectives set by the legislation⁸⁸.

In the vision of A. I. Tulenev customs offenses are those socially dangerous acts committed with guilt prohibited by the laws of the Member States of the Customs Union under the threat of punishment under the conditions of external economic activity related to the crossing of the customs border and which essentially violate the customs authorities' duties established by the legislation of the Member States of the Customs Union⁸⁹.

D. A. Postnova mentions that the customs offenses are those guilty offenses punishable by criminal penalties committed by persons who have reached the age of criminal liability, acts that are at the order established by national and international normative acts in the customs field, crossing the customs frontier of goods⁹⁰. We believe that the latter does not comply with the legal framework of the Republic of Moldova, because not only the individual but also the legal person are liable to criminal penalties for smuggling and evasion of customs payments.

As far as we are concerned, we believe that defining the concept of customs offense is indispensable for identifying the features of such a criminal category. As such particularities A. I. Tulenev highlights: the offense committed in the sphere of foreign economic activity; the passage of goods, valuables and means of transport across the customs border by importing, exporting and returning them; violation of customs and criminal law; the competence of the customs authorities to elucidate those violations⁹¹. After L. D. Laricev, the customs offenses are characteristic of being committed in connection with the crossing of

⁸⁷ Malinovskaya V.M., *Таможенное право России: Учебник по публичному и частному праву в 2-х томах. Публичное право (Customs Law of Russia: Textbook on public and private law in 2 volumes. Public law)*, Moscow: Statute, 2008, p. 82.

⁸⁸ Ivanova S. YU., *Уголовно-правовое обеспечение деятельности таможенных органов России: Автореферат диссертации на соискание ученой степени кандидата юридических наук (Criminally-legal maintenance of activity of customs bodies of Russia: the Author's abstract of a thesis for the degree of Candidate of Legal Sciences)*, Ulyanovsk, 1999, p. 21.

⁸⁹ Tulenev A. I., *op. cit. (Customs crimes and the current state of the use of special knowledge in their investigation)*, <http://web.snauka.ru/issues/2012/11/18472> (visited on 31.03.2016).

⁹⁰ Postnova D. A., *Развитие теоретико-правовых и организационных основ международного сотрудничества таможенных органов Российской Федерации при выявлении и расследовании таможенных преступлений: Автореферат диссертации на соискание ученой степени кандидата юридических наук. Москва (Development of the theoretical and legal and organizational bases of international cooperation of the customs bodies of the Russian Federation in the detection and investigation of customs crimes: the thesis abstract for the degree of candidate of legal sciences)*, Moscow, 2006, p. 14.

⁹¹ Tulenev A.I., *op. cit. (Actual problems of terminology and the concept of customs crimes)*, p. 213.

the customs border⁹². We also point out that customs offenses are deliberately committed and can take the form of action or inaction.

In addition, we consider that in order to define the customs offense, on the one hand, it is necessary to adhere to the norm of paragraph (1) article 14 CP RM, a norm containing the legal definition of the offense in general and, on the other hand, it is necessary to highlight the values and social relations injured or endangered by the committed crimes.

Primo - according to paragraph (1) article 14 CP RM, the offense is a detrimental act (action or inaction), provided by the criminal law, committed with guilt and punishable by criminal punishment.

Secundo - customs offenses are attentive to the values and social relations of the customs activity.

Considering the above criteria, in the end, *in accordance with the Moldovan criminal law, customs offenses must be understood as prejudicial acts that may take the form of action or inaction, intentionally committed, punishable by criminal penalties, committed in the sphere the foreign economic activity in connection with the passage of the goods across the customs border, by ignoring the customs regulations, facts that are attentive to the values and social relations related to the customs activity, stipulated in articles 248 and 249 CP RM.*

As customs offenses, the above-mentioned prejudicial acts in the criminal law of the Republic of Moldova and Romania demonstrate to us, including the title of the International Convention signed in Nairobi on 9 June 1977⁹³, ratified both by the Republic of Moldova and by Romania, namely: the International Convention on Mutual Administrative Assistance for the Prevention, Investigation and Suppression of Customs Offenses (emphasis belongs to us - *the author's note*). According to article 1 of the Convention, the term "customs offense" means any violation or attempted violation of customs legislation. It is common ground that by committing smuggling and evasion of the payment of customs duties, the use of unrealistic documents or the use of forged documents, the rules of the customs legislation are infringed, which once again indicates that those facts are considered to be customs offenses.

Section 2. Normative connotations on customs offenses

The social relations in the customs sphere are governed predominantly by the Customs Code, as well as by other normative acts, including the ones subordinated to the law, including the decisions of the Moldovan Government. A special place belongs to the criminal law, which comes to criminalize and sanction the socially dangerous deeds committed in the customs sphere.

⁹² Laricev V. D., Ghilimutdinova N. S., *op. cit.*, (*Customs crimes*), p. 95.

⁹³ Official Gazette of the Republic of Moldova, 2001, no. 078.

First of all, we mention that since the customs offenses prejudices the economic, social and fiscal interests, as well as the legitimate interests of trade, the Republic of Moldova has adhered by the Law no. 275-XV of 21.06.2001 to the International Convention on Mutual Administrative Assistance for Prevention, Investigation and the Suppression of Customs Offenses by means of which the customs administrations of the Member States provide mutual administrative assistance for the correct application of customs legislation by preventing, investigating and repressing customs offenses.

The history of customs activity in the Republic of Moldova starts after the proclamation of independence on August 27, 1991, with the entry into force of the Decree of the President of the Republic of Moldova on the subordination of the customs institutions located on the territory of the country⁹⁴, no. 189 of September 3, 1991, being the first state structures created after the declaration of independence⁹⁵.

Following the signing of the Decree, on September 6, 1991, the Government of the Republic of Moldova no. 496 on the establishment of the customs transit and control points (currently abrogated)⁹⁶ was adopted, according to which the passage of goods and any other goods across the State border of the Republic Moldova will only be done through border crossing points and customs control.

The first Customs Code of the Republic of Moldova, adopted on March 9, 1993⁹⁷ (currently abrogated by the Law No.1149-XIV of 20.07.2000), constituted the basic legislative act regulating the organizational and activity principles of the customs system, and in Chapter XIV [Violation of customs rules, article 72, letter j)], the legislator indirectly defined the smuggling offenses as the passage of goods, objects and other values across the customs border, bypassing the customs control, ie through places other than those approved by the customs authorities or outside the hours of customs control, or concealing them, that is, using hideouts or other methods that prevent the discovery of goods, objects and other values.

The Customs Code of the Republic of Moldova in the 1993 edition has undergone changes over time. As a result, the new Customs Code of the Republic of Moldova⁹⁸, which aims to regulate more thoroughly the multitude of social relations in the customs sphere, including the criminal offenses in this field, was adopted. In accordance with the provisions of the current Customs Code, customs policy is an integral part of the state's foreign and domestic policy and aims to ensure the efficiency of customs operations, regulate the exchange of goods in

⁹⁴ Official Gazette of the Republic of Moldova, 1991, no. 009.

⁹⁵ Maimescu S., Pasat O., *Contrabanda în legislația Republicii Moldova*, National Scientific Conference with International Participation "Integration through Research and Innovation" (10-11 November 2015), Chisinau: CEP USM, 2015, p. 156.

⁹⁶ Official Gazette of the Republic of Moldova, 1991, no. 000.

⁹⁷ Official Gazette of the Republic of Moldova, 1993, no. 010.

⁹⁸ Official Gazette of the Republic of Moldova, special edition, 2007.

the customs territory of the Republic of Moldova, contribute to solving political and trade problems concerning the protection of the internal market stimulating the development of the national economy, other objectives set by the legislation.

At the same time, this normative document comes to define some damaging facts committed in the customs sphere. For example, the following definition of the smuggling concept is given in article 224 CV RM: "Passing over the customs frontier of goods, bypassing the customs control or concealing them, committed in large or very large proportions, either repeatedly, either by a group of people who have been organized for smuggling or by a person with a liability function who makes use of the job or through the fraudulent use of customs documents and other documents or accompanied by non-declaration or their non-authentication in customs or other documents, such a narcotic, psychotropic, toxic, poisonous, radioactive and explosive, harmful, weapons, explosive, firearms and of ammunition, with the exception of flat-bladed shooting and cartoon guns, of cultural values, as well as the non-return to customs of values their cultural out of the country if their return is mandatory is considered as smuggling and is punished in accordance with the Criminal Code".

It should be noted that there is a mismatch between the definition of smuggling in the Customs Code and the Code of Criminal Code. In order to solve the divergences that have arisen both in the appreciation and the qualification of the smuggling, it would be appreciated that the norm of the customs law stipulated in article 224 CV RM, to be fully complied with article 248 CP RM, according to which the officers criminal prosecution performs the qualification and prosecution⁹⁹.

However, according to the criminal law of the Republic of Moldova, the normative act aimed at sanctioning the person for committing smuggling offenses, in general, and customs offenses, in particular, is the Criminal Code. Only the Criminal Code is the legislative act which contains rules of law establishing the general and special principles and provisions of criminal law, determines the offenses which constitute offenses and provides for penalties applicable to offenders. And in the Republic of Moldova, the only criminal law is the Criminal Code, compared to other laws (for example, with Romania), where there are a number of special criminal laws that incriminate and sanction the harmful deeds committed in certain areas of social life.

The Criminal Code of the Republic of Moldova of 24.03.1961 [(currently abrogated) further -- CP RM in the 1961 edition)]¹⁰⁰ contained regulations on smuggling. Therefore, according to paragraph (1) art.75 CP RM in the 1961 edition, it was a criminal offense to pass over the customs border of the Republic of Moldova of commodities, objects and other values in large proportions, with the

⁹⁹ Pasat O., *Analiza juridico-vamală a contravențiilor, infracțiunilor vamale comise pe teritoriul vamal al Republicii Moldova în conformitate cu Codul vamal din 2000*, „Revista Națională de Drept”, no. 1, 2014, p. 71.

¹⁰⁰ Published on 24.04.1961 in *Veștile* no. 010, 1961.

exception of those indicated in the second and third paragraphs of article by circumventing customs control or by concealing it, either by fraudulent use of documents or means of customs identification or by non-authentication or inappropriate declaration in customs or other border crossing documents.

According to paragraph (2) of article 75 of the same normative act, smuggling in another variant-type crossing over the customs border of the Republic of Moldova armament, explosion devices, firearms, ammunition, except weapons of hunting with jet pipes and cartridges to them, bypassing customs control or concealing them, either by fraudulent use of documents or means of customs identification or by non-authentication or inappropriate declaration in customs or other documents crossing the border. The counter-offer in another variant-type was incriminated in paragraph (3) article 75 CP RM in the 1961 edition, according to which it was an offense to cross the Moldovan customs border of cultural values, bypassing the customs control or concealing them by him, as well as the non-return to the customs territory of the Republic of Moldova of the cultural values removed from the country in case their return is obligatory.

In accordance with paragraph (5) of article 75 CP RM in the 1961 edition, criminal liability shall be aggravated if the actions referred to in paragraphs (1) to (4) were committed repeatedly or by a group of persons have been organized for smuggling, or by a person in charge of the job, as well as smuggling in a very large proportion. Finally, the notions of "cultural values", "smuggling committed in large proportions and in particularly great proportions" were defined in the note of article 75 CP RM in the 1961 edition. According to the same note, it is not considered as contraband the introduction into the customs territory of the Republic of Moldova, without a declaration, of funds, goods, objects and other values within the limits established by the legislation in force.

The crimes of evasion of payment of customs payments were incriminated in Article 164⁸ CP RM in the 1961 edition, according to which the evasion of the payment of customs payments, committed in large proportions, constituted crimes. Criminal liability is aggravated in the case of evasion of repeatedly paid customs payments, after prior arrangement by a group of persons, as well as in the case of escaping the payment of customs payments in particularly large proportions.

Exactly as in the case of smuggling offenses, and article 164⁸ CP RM in the 1961 edition contained a note which, on the one hand, explained the meaning of the evasion of the payment of customs payments in large proportions and in particularly large proportions, on the other hand, established a special ground for the release of criminal liability of guilty persons. Thus, in accordance with the note in the nominated article, the person who first committed the offense referred to in paragraph (1) of article 164⁸ could be held criminally responsible if he actively contributed to the discovery of the offense and fully repaired the damage caused.

We note that the subject of the release of criminal liability was applicable only on the assumption of the offense of evasion from the payment of the customs payments in the standard version [provided for in paragraph (1)], not in the case of the aggravated offense. For example, it was not applicable in the case of evasion of payment of customs duties when the harmful act was committed by a group of persons after a prior arrangement.

The current Criminal Code of the Republic of Moldova, adopted by the Parliament of the Republic of Moldova on April 18, 2002¹⁰¹, stipulates at article 248 the smuggling offenses and at article 249 on the evasion of payment of customs payments as criminal offenses committed in the customs sphere.

It should be noted that the norms of criminalization in the criminal legislation of the Republic of Moldova are rules of blancheta, which are norms that, in order to find out their content, it is necessary to resort to some normative acts from the field of extrapenal. And the eloquent example in this respect is the Customs Code of the Republic of Moldova. To this is added other normative acts with extrapenal character. It is precisely for these reasons that the constitutive content of the norms of criminalization in the Criminal Code is indispensable to refer to the normative acts of reference, in the "forefront" with the Customs Code.

From a technical and legislative point of view, article 248 CP RM consists of five types of offenses and an aggravated variant of the offense.

Thus, smuggling in the first type-variant [provided in paragraph (1) article 248 CP RM] presupposes the passing over the customs border of the Republic of Moldova of commodities, objects and other values in large proportions, eluding the customs control or concealing, by hiding it in places specially trained or adapted for that purpose or fraudulent use of documents or means of customs identification, or by non-authentication or non-authentication in customs documents or other documents of crossing the border.

The contraband in the second variant-type [provided in paragraph (2) article 248 CP RM] represents the passage over the customs border of the Republic of Moldova of narcotic, psychotropic substances with strong, toxic, poisonous, radioactive and explosive effects, as well as hazardous waste and dual-use products, bypassing or concealing customs control by hiding it in places specially trained or adapted for that purpose or fraudulent use of customs or customs-proofing means or by failing to declare or non-authentication in customs documents or other documents of crossing the border.

The smuggling in the third variant-type (provided in paragraph (3) article 248 CP RM) is the crossing over the customs border of the Republic of Moldova of weapons, explosive devices, ammunition, eluding the customs control or concealing them, by hiding in places specially trained or adapted for this purpose, or by fraudulent use of documents or means of customs identification, or by non-

¹⁰¹ Official Gazette of the Republic of Moldova, 2002, no. 128-129, republished in the Official Gazette of the Republic of Moldova, 2009, no. 72-74.

authentication or non-authentication in customs documents or other documents of crossing the border.

The smuggling of the fourth type-variant (provided in paragraph (4) article 248 CP RM) presupposes the passage over the customs border of the Republic of Moldova of cultural values, eluding the customs control or concealing it by hiding it in specially prepared places or adapted for this purpose, as well as the non-return to the customs territory of the Republic of Moldova of the cultural values removed from the country, if their return is mandatory.

The counter-offer in the fifth variant-type (referred to in letter d) paragraph (5) article 248 CP RM) consists in crossing over the customs border of the Republic of Moldova goods, objects and other values in particularly large proportions, controlling or concealing customs by hiding it in places specially trained or adapted for that purpose or fraudulent use of documents or means of customs identification or by non-authentication or non-authentication in customs documents or other documents of transit of the border.

Finally, smuggling in the aggravated version involves the committing of the criminal actions/ inactions provided in paragraphs (1), (2), (3) or (4): a) by two or more persons (letter b) paragraph (5) article 248 CP RM); b) by a responsible person, using the service situation (letter c) paragraph (5) article 248 CP RM).

As regards the offenses brought under article 249 CP RM (avoidance of payment of customs payments), we specify that, from the point of view of the legal technique, the Moldovan legislator recourse to the establishment of two types of variants and an aggravated variant.

The first type-variant (referred to in paragraph (1) of article 249 CP RM) consists in the escape from the payment of the customs payments in large proportions. The second type-variant (referred to in paragraph (3) of article 249 CP RM) presupposes the evasion of payment of customs payments in particularly large proportions. The aggravated variant (recorded at letter b) paragraph (2) article 249 CP RM) consists in the evasion of payment of customs payments when the criminal act is committed by two or more persons.

In a careful analysis of the legal provisions on customs crimes in the former Criminal Code of the Republic of Moldova (in the 1961 edition) and the current Criminal Code, we find the following findings:

- as a method of illegal crossing over the customs border of the Republic of Moldova of certain categories of material/immaterial entities that constitute the material/immaterial object of the crime, the lawmaker comes to specify in the new Criminal Code the concrete modalities of concealment, namely: by hiding in places specially prepared or adapted for this purpose;

- the circle of entities that can form a material object in the case of the passing over the customs border of the Republic of Moldova of limited goods in the civil circuit has been broadened: a) in the category of material entities with

special status were included smooth-bore hunting weapons and cartridges to them, (b) a new type of smuggling was introduced (paragraph (2) of article 248 CP RM) - a norm that came to sanction the act of illegal crossing over the state border of the Republic of Moldova of goods with a special status, namely: narcotic drugs, psychotropic substances, substances with strong effects, toxic substances etc.;

- the main difference between these regulations lies, however, in the fact that the position of legislative power over the subject of criminal protection has changed. If, according to the CP RM in the 1961 edition, smuggling offenses were placed within Chapter I of the Special Part of the Penal Code entitled "Offenses against the State", then, in accordance with the legal provisions of the current Criminal Code, these facts are located in Chapter X of the Special Part of the Criminal Code - "Economic Offenses". Thus, in the opinion of today's lawmaker, smuggling offenses attract the national economy as a fundamental social value protected by the criminal law. At the same time, the lawmaker's position remained unchanged as regards the evasion of payment. Thus, both in the old criminal law and the new law, they were placed in a chapter in the Special Part of the Criminal Code dedicated to the protection of the national economy, but not the state;

- regarding the evasion of payment of customs payments, compared to the old regulation, in the new one there is no special ground for the release of criminal liability.

In *Romania*, over the years, legislation has criminalized customs offenses starting with the Law on the Amendment of the General Customs Code of June 15, 1873, the General Customs Act of June 1, 1905, the Law of the General Customs Administration of April 13, 1933, Law on Customs no. 9 of January 1, 1949, Law no. 6 of 28 December 1961 on the regulation of the customs regime of the Romanian People's Republic.

During the communist era, the Great National Assembly of the Socialist Republic of Romania adopted the first Customs Code - Law no. 30 of 22 December 1978¹⁰², containing 10 chapters and 75 articles. Chapter IX, entitled "Liability and Sanctions", included texts on the criminalization of customs offenses. The notion of a customs offense has been established in this Customs Code under article 71, according to which the non-observance of the rules on the customs regime attracts, according to the law, as appropriate, disciplinary, contraventional or criminal liability, as well as material or civil liability¹⁰³. So, those who committed customs offenses were, as the case may be, responding to the Criminal, Civil or Administrative Code.

From the provisions of article 72, we discover that the customs offenses took the following forms: the crossing of the goods through borders other than

¹⁰² Official Bulletin of Romania, 1978, no. 115.

¹⁰³ Regarding forms of legal liability and their evolution, see Badescu M., *Legal liability through the prism of the new conceptual mutations*, „Juridical Tribune – Tribuna Juridica”, Volume 7, Issue 2, December 2017, p. 118-121.

those established for customs control; the use of false customs documents; the use of customs documents on goods other than those presented to customs; border crossing, without authorization, of weapons, ammunition, narcotics and psychotropic substances etc.; the removal from customs clearance operations of one or more persons armed or banded.

There are no provisions in the Romanian Penal Code in the 2009¹⁰⁴ edition that would criminalize socially dangerous deeds in the customs sphere. Neither in the Romanian Penal Code (in the 1968 edition)¹⁰⁵ there was a legal norm to incriminate customs offenses. In fact, the Law no. 86/2006 on Romanian Customs Code should be considered a special law with criminal provisions aimed at sanctioning customs offenses. Prior to this, the special law with criminal provisions criminalizing the acts committed in the sphere of customs activity was the Law on the Customs Code of Romania, no. 141 of July 24, 1997¹⁰⁶.

Therefore, compared to the legislation of the Republic of Moldova, in Romania customs offenses are located under a special law, but not within the Criminal Code. In the Republic of Moldova, however, customs offenses are included in the Criminal Code; in accordance with paragraph (1) of article 1 CP RM, the Criminal Code is the only criminal law of the Republic of Moldova. In Romania, the situation is different. In addition to the Criminal Code, other criminal normative acts, which, like the Criminal Code, come to criminalize and sanction various socially dangerous facts, but committed in certain spheres of social life. Thus, we conclude that in Romania's legislation the socially dangerous deeds committed in the sphere of customs activity are contained in a special law - the Law on the Customs Code.

It should be mentioned that the Customs Code of the Republic of Moldova contains the definition of smuggling. However, the normative act does not criminalize the smuggling facts, as it does not even criminalize the evasion of paying the customs payments. However, this Code does not contain criminal penalties for doing so. The Customs Code is a reference act for the Criminal Code.

After this digression we will try to review the legal provisions on customs offenses in the old and new Customs Codes of Romania. The knowledge of previously existing legal provisions, in combination with historical interpretation, allows the practitioner to better apply the criminal law to concrete situations in real life.

Thus, the provisions of the Customs Code of Romania in the 1997 edition (currently abrogated) reveal that smuggling in simple form is expressed through the passage of goods and goods across the customs border through places other than those established for customs control (article 175). Qualified smuggling was

¹⁰⁴ Official Gazette of Romania, 2009, no. 510.

¹⁰⁵ Official Gazette of Romania, 1997, no. 65.

¹⁰⁶ Official Gazette of Romania, 1997, no. 180.

regulated by article 176, in accordance with which the crossing of arms, ammunition, explosive or radioactive materials, products and narcotic and psychotropic substances, precursors and essential chemicals was a crime products and toxic substances. Here the material object of smuggling possesses special qualities. The Romanian customs code in the 1997 edition further criminalizes two customs offenses, but under other names than smuggling¹⁰⁷. Thus, article 177 of the same law regulated the act of customs, transport or commercial documents dealing with goods or goods other than customs (offenses of use of unrealistic acts). And according to article 178, it was a criminal offense to use customs, transport or falsified documents (the offense of using falsified documents) at the customs authority.

The aggravating form of smuggling (article 179) consists of the deeds defined in articles 175-178, committed by one or more persons armed or banded. The same aggravating form, incriminated in article 180, consists in the fact that the deeds stipulated in articles 175-179 were committed by employees or representatives of legal entities whose activities were import-export operations or for the benefit of these persons legal.

In 2006, the latest regulations in the field of customs law appeared. Thus, through Law no. 86/2006 was adopted the new Customs Code of Romania, in force today. The Romanian Government Decision no. 707/2006 approved the Regulation for the application of the new Customs Code of Romania¹⁰⁸. The new CV Rom is in fact a revision of the Law no. 141/1997 (law which enacted the old Customs Code of Romania). The new CV Rom emerges as a result of the need to harmonize the legislation of Romania with the requirements of the European Union. Several articles have been amended to meet the current requirements. Law no. 86/2006 ensures the application of Council Regulation (EEC) No. 2913/92 establishing the Community Customs Code, as subsequently amended, published in the Official Journal of the European Communities no. 302/1992¹⁰⁹.

The current Customs Code of Romania details the offenses committed in the customs sphere of Romania, as regulated in Title XII, Section 1. The offenses are established in two forms: consumed and not consumed in the form of the attempt and in two ways: simple and aggravated.

Therefore, the new CV Rom stipulates in paragraph (1) article 270 the act of introducing into or removing from the country by any means the goods or goods through places other than those established for customs control. According to paragraph (2) article 270 CV Rom, it also constitutes a smuggling offense and is punished according to paragraph (1): a) introduction into or removal from the country through the places established for customs control, by evading the control

¹⁰⁷ Pasat O., *Apariția și evoluția infracțiunilor vamale pe teritoriul României*, International Symposium "The Universe of Sciences" – 4th edition, September 8, 2013, Iasi, p. 307.

¹⁰⁸ Official Gazette of Romania, 2006, no. 520.

¹⁰⁹ Council Regulation (EEC) establishing the Community Customs Code, no. 2913 of 12.10.1992, <http://eurex.europa.eu/LexUriServ.do?uri=CONSLEG:1992R29> (visited on 07.11.2015).

goods or goods to be placed under a customs procedure if the customs value of the goods or stolen goods is higher than 20,000 RON for excisable products and more than 40,000 RON for other goods or commodities; b) the introduction into or removal from the country, twice within a year, through the places established for customs control, by removal from customs control of the goods or goods to be placed under a customs regime, if the customs value of the goods or stolen goods is less than 20,000 RON for products subject to excise duties and less than 40,000 RON for other goods or commodities; (c) the alienation of goods in customs transit in any form.

According to paragraph (3) of the same article, they are assimilated to the smuggling offense and are punished according to paragraph (1) the collection, possession, production, transport, taking over, storage, handing over, selling and selling of the goods or goods to be placed under a customs procedure knowing that they come from smuggling or are intended to commit it.

Qualified smuggling is criminalized in article 271 CV Rom, in accordance with which it is a criminal offense to introduce or remove lawless arms, munitions, explosives, drugs, precursors, nuclear materials or other radioactive substances, toxic substances, waste, residues or hazardous chemical materials.

The act of using unreal acts is incriminated in article 272 CV Rom, according to which it is a criminal offense to use, at the customs authority, the customs, transport or commercial documents referring to other goods or goods or other quantities of goods or goods than those presented to customs. Article 273 CV Rom provides the offense of using falsified acts, constituting an offense the act of using customs documents, customs documents, transport or falsified commercial documents.

Finally, the aggravated variant of the offense is stipulated in article 274 CV Rom, according to which the criminal liability for the criminal offenses stipulated in articles 270-273 CV Rom worsens if the deeds are committed by one or more persons armed or two or more people together.

Section 3. Comparative law study on customs offenses

In the theory of criminal law, it is noted: "In several countries of the world, smuggling offenses are recognized as some of the most dangerous types of criminal activity. Like crime in general, smuggling offenses will obviously exist as long as there are state borders. Even in developed countries like the United States of America, Germany, Great Britain, France there is smuggling. In these countries, there is no question of the total eradication of these types of

crimes. The efforts of the criminal prosecution bodies are focused only on reducing the level of smuggling to the controlled limits"¹¹⁰. We do not question the existence of such a phenomenon even in advanced economies. In the context of comparative law, the phenomenology of crime in the customs sphere is of particular concern, but the existing regulations in this field. The knowledge of the legal experience of some foreign states could determine their appropriation by the Moldovan and Romanian legislators in order to streamline the process of preventing and combating crimes in general and customs offenses in particular. It is precisely from these reasoning that a comparative analysis of criminal regulations is required in the area of customs criminalization.

Since the Republic of Moldova has detached itself from the communist "block", customs and criminal law have preserved some influences from the former Soviet Union. In fact, crimes in the customs sphere of the Moldovan Criminal Code have entered the domestic legal framework through the Russian branch. And this is due to the historian of the Republic of Moldova. The socialist fingerprint was also laid on Romanian legislation, even if to a lesser extent on the legislation. For these reasons, our focus will be on the analysis of the Russian Federation's regulatory framework in the field of customs crimes, as well as those in other former Soviet Union member states. Last but not least, comparative analysis will be subject to criminal regulations in the legislation of other states, especially European ones.

The Criminal Code of the Russian Federation (hereinafter referred to as the CP FR)¹¹¹ includes in the category of customs offenses: illegal export of technologies, scientific and technical information, services, products, materials and equipment used in the production of weapons of mass destruction, military equipment (article 189 CP FR); the return of cultural values on the territory of the Russian Federation (article 190 CP FR); eschewing from the execution of the obligation to repatriate money in foreign currency or in the national currency of the Russian Federation (article 193 CP FR); evasion of payment of customs payments (article 194 CP FR); smuggling of cash and/or financial instruments (article 200.1 CP FR); smuggling of alcoholic products and/or tobacco products (art.200.2 CP FR).

It is worth mentioning that the offense against customs security was also the act of economic smuggling. This was incriminated in article 188 CP FR. By Russian Federation Act of December 7, 2011, no. 420, article 188 CP FR has

¹¹⁰ Lacusta N., *op. cit.* (*Elemente de drept penal comparat în materia infracțiunii de contrabandă*), p. 26.

¹¹¹ *Уголовный кодекс Российской Федерации*: Закон Российской Федерации №63-ФЗ от 13 июня 1996 г., принят Государственной Думой 24 мая 1996 г., одобрен Советом Федерации 5 июня 1996 г., введен в силу с 1 января 1997 г. (*The Criminal Code of the Russian Federation*: Law of the Russian Federation No. 63-F3 of June 13, 1996, adopted by the State Duma on May 24, 1996, approved by the Federation Council on June 5, 1996, entered into force on January 1, 1997), „Собрание Законодательства Российской Федерации” (Collection of Legislation of the Russian Federation), no. 25, 1996.

been repealed so that the act of economic smuggling (with goods not possessing special qualities) no longer constitutes a crime, according to the legislation of the Russian Federation. At the same time, smuggling of substances with a strong effect with poisonous, toxic, explosive, radioactive, radiation, nuclear, firearms or their main parts, explosives, ammunition, weapons of mass destruction, means other weapons, other military equipment, as well as materials and equipment that can be used to create weapons of mass destruction, means of delivering them, as well as strategic goods and resources or cultural values, or with the most valuable wildlife and aquatic biological resources, has been re-classified in Chapter XXIV "Crimes against public security" of Section IX "Crime against security and public order" in the Special Part of the Criminal Code (article 226.1 CP FR). At the same time, the smuggling of narcotic, psychotropic substances and their precursors or analogues, plants containing narcotic, psychotropic substances or their precursors, or parts thereof, containing narcotic, psychotropic substances and their precursors, with instruments or equipment under special control and used for the manufacture of narcotic drugs or psychotropic substances, has been redeployed within Chapter XXV for the protection of public health and social coexistence (article 229.1 CP FR).

In the context, we underline the following fact: the content of article 248 CP RM largely took over the content of the former article 188 CP FR. This take-over is due to the pronounced influence of the legislation of the Russian Federation on that of the Republic of Moldova, considering that the latter is a former member of the Soviet Union.

Under the current criminal law of the Russian Federation, we point out the following defining issues regarding customs offenses according to CP FR:

- the existence of incriminating norms in the criminal legislation of the Russian Federation which are missing from the criminal law of the Republic of Moldova and that of Romania (it is the case of the escape from the execution of the obligation to repatriate the money means in foreign currency or in the national currency of the Russian Federation);

- incrimination in a distinct article of the act of non-return to cultural values in the territory of the Russian Federation, compared to the criminal law of the Republic of Moldova, where, from a technical and legislative point of view, such a criminal offense is criminalized under article 248 CP RM, together with the other offenses under the generic name of smuggling;

- the express specification in the framework of the norm of article 194 CP FR of the natural and legal person as a subject of the evasion crimes from the payment of the customs payments;

- aggravation of the liability and of the penal punishment for the evasion of the paid customs payments: a) by a person in charge of the use of the service situation [letter a), paragraph (3), article 194 CP FR] and b) with the application

of violence against a person carrying out the customs or border control [letter b), paragraph (3) article 194 CP FR];

- the existence of distinct rules aimed at criminalizing the smuggling of certain goods (which contain special qualities).

In the field of customs offenses, a special place is dealt with by the criminal law of the neighboring state - Ukraine. In article 201 of *the Criminal Code of Ukraine* (hereinafter referred to as the CP Uc) ¹¹², the offense of smuggling, defined as passing over the customs border of Ukraine, by circumventing or concealing from the customs control of cultural values, poisonous substances with a strong effect, explosive, radioactive materials, weapons and ammunition (except for the straight-line hunting gun), as well as special technical means for hiding information. Criminal liability worsens if the offense is committed by an organized criminal group, by a person previously convicted of an offense under the same article or by a person in charge of using the job.

We note that the Ukrainian legislator included in the list of material entities susceptible of illegal crossing over the customs border only those entities that possess certain special qualities. Passing over the customs border of Ukraine goods or goods without special qualities does not fall under the criminal law. Like the Russian lawmaker, the Ukrainian considered such a behavior to be without social danger. Similarly, to the legislation of the Republic of Moldova and that of Romania, in the list of material objects of the smuggling offense, according to article 201 CP Uc, does not enter the hunting gun with a straight pipe. At the same time, special technical means for the hidden information are included in the category of material objects.

Please note that, according to Ukraine's criminal law, the list of methods of committing the border crossing act is more restrictive. As methods of committing the act, the legislator establishes only the concealment and circumvention of customs control. Earlier, smuggling, according to the criminal law of Ukraine, was placed in the category of crimes against the state; but now the smuggling is located within Chapter VII "Crime in the Economic Activity" of the Special Part of the Criminal Code.

The smuggling of narcotic drugs, psychotropic substances, precursors and their analogues with counterfeit drugs is criminalized in article 305 CP Uc, in Section XIII "Offenses in the sphere of narcotic, psychotropic and health circulation".

In *the Criminal Code of Azerbaijan* (hereinafter referred to as - CP Az) ¹¹³ customs offenses are located within Chapter XXIV - Offenses in the sphere of economic activity. Here we highlight the following customs offenses: a) smug-

¹¹² The Criminal Code of Ukraine as amended on 18.09.2012 <http://meget.kiev.ua/kodeks/ugolovnyy-kodeks> (visited on 20.11.2015).

¹¹³ Ragimova, I. M. (ed.), *Уголовный кодекс Азербайджанской Республики (The Criminal Code of the Republic of Azerbaijan)*, St. Petersburg: Legal Center Press, 2001.

gling (article 206 CP Az); b) the return of objects of artistic, historical and archaeological heritage to the territory of the Republic of Azerbaijan (article 207 CP Az); c) non-return of the foreign currency abroad (article 208 CP Az); d) evasion of payment of customs payments (article 209 CP Az).

The main defining aspects of customs offenses under Azerbaijan's legislation are:

- incrimination in a separate article of the act of non-return to the customs territory of Azerbaijan of the cultural values that make up the artistic, historical and archaeological heritage;

- the criminalization of the foreign exchange non-return. It should be noted that, according to the legislation of the Republic of Moldova, such an act constitutes a fiscal violation, punishable by a fine. Thus, according to the Law of the Republic of Moldova on the regulation of the repatriation of money means, goods and services resulting from foreign economic transactions, no. 1466 of 29.01.1998¹¹⁴, control over the repatriation of money, goods and services from external economic transactions is carried out by the bodies of the State Tax Service during the inspections carried out at the economic agents, in the manner established by the legislation. The finding of the violations and the application of the pecuniary sanctions are carried out by the State Tax Service bodies based on the results of the verification of the data regarding the failure of the economic agents to meet the cash and material funds collection time (repatriation). Failure to observe the terms for repatriation of funds, materials and services shall be sanctioned with a fine, applied to economic agents, in the amount of 0.1% of the amount (value) of non-repatriated funds for each calendar day of delay;

- the presence of the aggravating circumstance "with the application of violence against the person performing the customs control" in the article that criminalizes contraband;

- the exclusion of the smooth-hunting gun and the appropriate ammunition for it from the list of material entities susceptible to crossing the customs border in the context of the offense provided for in article 206.2 CP Az;

- include weapons of mass destruction in the list of material entities with special status which may constitute a material object of the smuggling offense. According to the criminal law of the Republic of Moldova, such an act falls within the scope of article 140¹ CP RM (use, development, production, otherwise acquisition, processing, possession, storage or preservation, direct or indirect transfer, storage, transport of destruction weapons in the mass);

- the presence of the special ground of criminal liability of the perpetrator for the evasion of the payment of customs payments. In order to operate the said ground of criminal liability, it is necessary to meet cumulatively the following conditions: a) the perpetrator has committed for the first time such an act; b) the perpetrator has repaired the damage caused by the offense.

¹¹⁴ Official Gazette of the Republic of Moldova, 1998, no. 28-29.

In *the Criminal Code of Armenia* (hereinafter referred to as CP Ar)¹¹⁵, as well as in the criminal law of most of the former Soviet Union states, customs offenses are located within the Chapter of the Special Part of the Criminal Code for the Protection of Economic Activity. It is also worth noting that the Armenian lawmaker only criminalized the smuggling.

In the standard version of paragraph (1) article 215 CP Ar, as a material object, alongside the goods lacking in special qualities, the cultural values appear. At the same time, the methods of committing the offense are as follows: a) circumvention of the customs control; b) concealment of customs control; c) fraudulent use of customs documents or other types of documents. At the same time, the legislator did not provide as methods: non-authentication or non-authentication.

Compared to the norm in paragraph (1) of article 215 CP Ar, in the paragraph (2) the legislator omitted to specify in general the method of committing the offense, therefore, it is not a constitutive sign.

Criminal liability aggravates in the case of committing the offense: a) by a person released from certain forms of customs control or by a person authorized to cross the customs border of certain goods or special means of transport released from the customs control (point 2, paragraph (3), article 215 CP Ar); b) by an organized criminal group (paragraph (4) article 215 CP Ar).

As for the aggravating circumstance recorded in point 2, paragraph (3) of article 215 CP Ar, we find that this presupposes the presence of a special quality of the subject of the offense or the goods passed over the customs border.

Under *the Criminal Code of Kazakhstan* (hereinafter referred to as CP Kz)¹¹⁶, customs offenses are provided in Chapter VII of the Special Part of the Criminal Code entitled "Offenses in the Field of Economic Activity". The following are considered customs offenses: a) economic contraband (article 209 CP Kz); the return of the foreign currency and the national currency abroad (article 213 CP Kz) abroad; evasion of payment and customs duties (article 214 CP Kz).

Just like the Russian legislature, the Kazakh decided to separate the smuggling of certain goods with special qualities. It is smuggling with forbidden or limited goods in the civil circuit (article 250 CP Kz). According to the Kazakh legislator, smuggling with such entities, in the main plan, harms public security, but not the economy of the country. As shown in the doctrine, the social danger of smuggling with narcotics is equivalent to that of smuggling with weapons, and the social relations with regard to public security are being harmed¹¹⁷.

¹¹⁵ The Criminal Code of the Republic of Armenia, <http://www.parliament.am/legislation.php?sel=show&ID=1349&lang=rus> (visited on 26.12.2015).

¹¹⁶ The Criminal Code of the Republic of Kazakhstan, http://online.zakon.kz/Document/?doc_id=1008032 (visited on 26.12.2015).

¹¹⁷ Savchishkina G. I., Stepanova O. G., *Зарубежное уголовное законодательство об ответственности за контрабанду наркотических средств, психотропных веществ или их аналогов* (Foreign criminal legislation on liability for the smuggling of narcotic drugs,

Customs offenses in *the Criminal Code of Uzbekistan* (hereinafter referred to as CP Uz)¹¹⁸ are located in Chapter XII of the Special Part - "Crimes Against the Basis of the Economy". In the category of customs offenses is included the act of violation of the customs legislation (article 182 CP Uz). In general, the offense provided for in article 182 CP Uz is the same as in paragraph (1) of article 248 CP RM. The smuggling of goods forbidden or limited in the civil circuit is incriminated in article 246 CP Uz, being placed within the chapter for the protection of public security. It should be noted that according to the Uzbek legislation, only passage of goods over the customs border of goods forbidden or limited in the civil circuit is considered as smuggling. The illegal crossing over the customs border of goods other than forbidden or restricted in the civil circuit is described as a violation of customs legislation, but not as smuggling. In other words, in the sense of the Uzbek legislature, the country's economy is criminalizing the act of breaking the customs legislation (article 182 CP Uz). *Per a contrario*, smuggling attacks on public security.

As regards the act of violation of the customs legislation, in comparison with the criminal law of the Republic of Moldova, for the criminal liability for the illegal crossing of certain goods in large proportions through the express methods provided by the law (which are similar to those of article 248 CP RM), it is mandatory that the perpetrator previously had been subjected to contravention for committing a similar act. We consider the insertion in the text of the law by the Uzbek legislature of the qualifying sign that the passage of the goods across the customs border will be considered a crime only after the application of the contravention sanctions. Such a situation, when repeating offenses constitutes an offense, inevitably leads to a violation of the principle of non-admission to criminal liability twice for one and the same act. That is why we can not disagree with the position of the local authors S. Brînză and V. Stati, who state: "The act of contravention in the past, for which the perpetrator has already borne the appropriate sanction, can not serve in the future as a probation, pretext or ground for the application of criminal liability"¹¹⁹.

Attention is also drawn to the analysis of the criminal law of the People's Republic of China in the field under investigation. The Chinese legislator has devoted more rules to criminalizing economic smuggling, smuggling with various prohibited or limited goods in the civil circuit, and some smuggling-related

psychotropic substances or their analogues), „Вестник Челябинского государственного университета” („Bulletin of the Chelyabinsk State University”), no. 17 (308), 2013, p. 74.

¹¹⁸ The Criminal Code of Uzbekistan, http://lex.uz/pages/getact.aspx?lact_id=111457 (visited on 26.12.2015).

¹¹⁹ Brînză S., Stati V., *Despre oportunitatea modificării art.320 „Neexecutarea hotărârii instanței de judecată” din Codul penal. Partea I*, „Revista Națională de Drept”, 2013, no. 5, p. 5.

facts. According to paragraph (1) of article 151 of the *Criminal Code of the People's Republic of China* (hereinafter referred to as CP Ch)¹²⁰, the first type-variant is the smuggling of arms, ammunition, radioactive material and false money. Paragraph (2) of article 151 CP Ch establishes criminal liability for smuggling of cultural values, gold, silver and other precious metals, as well as precious animals. In paragraph (3) of article 151 CP Ch, smuggling of rare plants and products thereof is found.

The smuggling of pornographic films, video cassettes, audio tapes, images, printed materials and other pornographic materials is criminalized in article 152 CP Ch. The Moldovan lawmaker, however, to a certain extent establishes criminal responsibility for committing such acts article 208¹ CP RM (child pornography), a rule sanctioning, *inter alia*, the import and export of images or other representations of one or more children involved in explicit, real or simulated sexual activities, or images or other representations of the sexual organs of a child, represented in a lascivious or obscene manner, including in electronic form. So the Moldovan lawmaker does not sanction the import and export of images or other representations with adult persons involved in sexual activities, or pictures or other representations of sexual organs of adults.

After this digression, we further mention that in article 153 CP Ch is smuggled with other goods and objects committed with the evasion of the payment of customs payments. Article 155 CP Ch establishes criminal liability for the illegal acquisition of smuggled goods. One of the forms of complicity qualified to commit smuggling is criminalized in article 156 CP Ch, according to which the prior understanding of the smuggler, the granting of a credit to him or his financial means, the check, the provision of transport services, the retention services and of postal delivery. The second form of smuggling complicity is provided by article 157 CP Ch, according to which the armed concealment of smuggling is punishable.

In view of the fierce struggle of the Asian states in general and the People's Republic of China in particular with the illicit drug trafficking phenomenon, the Chinese legislature decided to incriminate a smuggling of narcotic substances in a separate chapter. Thus, article 347 CP Ch establishes the criminal liability for smuggling with narcotic substances, irrespective of their quantitative parameters. Here, too, criminal liability is provided for instigating minors to smuggle with narcotic substances.

In another register, as regards the criminal laws of the Western European states, we observe the tendency to criminalize customs offenses in special laws, similar to the Romanian legislature. Thus, in *Italian criminal law*, smuggling is

¹²⁰ Korobeyeva A. I., Vichikova D. V. (ed.), *Уголовный кодекс Китайской Народной Республики (Criminal Code of the People's Republic of China)*, St. Petersburg: Legal Center Press, 2001.

incriminated by the Unified Text of Customs Laws¹²¹. This normative act is a correlation of the 1940 Customs Law, adapted to the new economic conditions. According to article 282 of this normative act, smuggling is an offense consisting in the circumvention of goods brought into or out of the country from the payment of customs duties and customs control. In addition to punishment, the law provides for the obligation of perpetrators to pay customs duties and the measure of confiscation in full of the goods. In the criminal doctrine it is stated that customs smuggling, according to the Italian legislation, does not imply any deception (specific fraud), the desire to place the goods on the territory of the state beyond the customs control, whatever the intention of the customs destination, is sufficient¹²². Concerning participation, the jurisprudence has held that the liability of those involved in one way or another must be the same, that is to say, the authors, accomplices and instigators are subject to the same sanctioning treatment¹²³.

Article 295 of the respective normative act provides for the following forms of aggravated smuggling: a) the use of means of transport belonging to persons other than the perpetrators. The purpose of this regulation was to discourage offenders from using other people's means of transport in order to avoid confiscation, and it is irrelevant if the perpetrator knows the owner of the means of transport or if he has given his consent to the use of the vehicle; b) the commission of an offense by an armed person. In the Italian criminal doctrine, in comparison with the Romanian one, the term "armed person" means that criminals must wear their weapons visibly to intimidate; c) the commission of the crime by three or more persons between whom there was a tacit or express agreement; d) committing smuggling in competition with another offense (such as forgery or corruption).

In **France**, customs offenses are criminalized by the Customs Code (henceforth CV Fr)¹²⁴. These are located under Chapter VI of Title XII, entitled "Repressive provisions". From article 408 CV Fr, there are five classes of customs contraventions and three classes of customs offenses.

The French Customs Code distinguishes between import and export smuggling. Thus, any introduction into the customs territory in an illegal way constitutes smuggling. There is a smuggling offense when import is done through a closed legal, but temporary, international traffic¹²⁵.

¹²¹ *Codice doganale*, www.agenziadoganemonopoli.gov.it/wps/wcm/connect/internet/ee (visited on 06.12.2015).

¹²² Cudrișescu P. G., *Infracțiunea de contrabandă*, „Revista de Drept penal”, no. 3, 2000, p. 95.

¹²³ Streteanu Fl., Chiriță R., *Răspunderea penală a persoanei juridice*, Bucharest: Rosetti, 2002, p. 141.

¹²⁴ *Code des douanes*, version consolidée au 19 août 2015 <http://www.legifrance.gouv.fr/affichCode.do?cidTexte=LEGITEXT000006071570> (visited on 06.12.2015).

¹²⁵ Lacusta N., *op. cit.* (*Elemente de drept penal comparat în materia infracțiunii de contrabandă*), p. 27.

The definition of smuggling is provided in paragraph (1) article 417 CV Fr: the import or export performed outside the customs offices, as well as any violation of the legal or regulated provisions regarding the holding and the transport of the goods within the customs space.

They may, *inter alia*, constitute smuggling of a class I offense, as is apparent from the provision of paragraph (2) of article 417 CV Fr: fraudulent landing or embarkation within or outside ports; the removal or substitution during shipment of goods dispatched under suspension; non-observance of fixed routes and schedules without legitimate reason; imports or exports without a declaration when the goods are passed through a customs office and removed from control by hiding in specially arranged hideouts or in empty spaces which are not normally intended for the storage of the goods.

According to article 415 CV Fr, class II offenses punished more harshly than class I offenses are: attempting or recourse to export, import, transfer or compensation to a financial operation between France and other countries related to funds known to derive, directly or indirectly, from an offense under the Customs Code or from an offense against the substance of poisonous substances or plants considered as narcotic.

The class III offense refers to qualified smuggling and consists in committing a customs offense by more than six persons or by three or more persons if they have used a vehicle, a ship or any marine or fluvial craft.

As far as the customs offenses in CV Fr are concerned, they are divided into five classes, covered by articles 410-413 *bis*. They are sanctioned by gravity only by fine or by fine and by imprisonment from 10 days to one month, with the confiscation of the goods. Thus, as is apparent from article 410 CV Fr of the first class, for example: any omission or inaccuracy relating to one of the indications which the customs declarations must contain if the irregularity has no influence on the application of the duties; or prohibitions; any infringement of the quality or packaging rules imposed on importation or exportation where this does not have the purpose or effect of obtaining a refund, an exemption, a reduced charge or a financial advantage. Class II contraventions contained in article 411 CV Fr are, *inter alia*: deficits on the number of parcels declared or carried with a free pass or proof document; presenting at destination with the broken or falsified seal of the goods shipped with lead seals or other customs seals. Class III contraventions (article 412 CV Fr) form: any false declaration about the type, value or origin of goods imported, exported or under a suspensive regime where a customs debt or any charge is eluded or diminished; any false statement about the designation of the actual recipient or the actual sender; any diversion of unprotected goods from their privileged destination; absence of the customs list or failure to present the original of the list; any difference in the nature of the goods entered on the lists or declared summary. Class V contraventions, referred to in article 413 *bis* CV Fr, are: the non-declaration of the money or the performed operations; the act of the person to whom the clearance or clearance has been withdrawn and

who continues either to carry out directly or indirectly the customs formalities for the detailed declaration of the goods or to benefit directly or indirectly from all or part of the remuneration provided for by law.

Goods may be considered to be smuggled in the country where there is a lack of documents justifying the origin or false, inaccurate, incomplete or inapplicable documents presented to the customs authority. It is also considered to be smuggled and any goods that exceed the quantity entered in the documents or is not written in the documents¹²⁶.

The analysis of the legislation of some countries shows that smuggling is not always considered a special crime. Thus, *the United Kingdom Customs Act* of 1979 does not use the notion of smuggling for any of the customs offenses referred to in articles 123-135¹²⁷. However, considering the content of the criminalizing texts, it can be appreciated that there is a similarity between what the neolithic legislation considers and the customs offenses under British law are.

Thus, article 123 of the United Kingdom Law provides for an offense of illegal import consisting of: a) bringing goods from abroad or from a free zone without the announcement of the customs authorities under the conditions stipulated by law; (b) the use or transfer of goods from warehouses without the permission of the customs authorities; (c) the unloading of uncleared goods, those originally loaded for export or those admitted for export by offsetting or exemption from ships, without the permission of the customs authorities or by any means of circumvention, (d) ship loading of goods without being mentioned in the manifest (*cargo manifest*) and without being declared to the customs authority; if the goods were discovered before the ship leaves the port, the deed is considered an attempt to make an illegal (tentative) import; if the owner of the goods is not found, the responsibility for these goods lies with the master of the ship¹²⁸.

In another context, with regard to the comparative study carried out, we mention that some forms of smuggling, as the most widespread customs offense, are placed in sections, different chapters than those in which economic smuggling is incriminated, which is the position of the legislative authority in these states - to defend other social values than those derived from the national economy as social value, by criminalizing such behaviors. It is worth mentioning the *Japanese Penal Code* (hereafter CP Ja)¹²⁹, where some forms of smuggling are provided in separate chapters. For example, Chapter XIV "Opium-related offenses" contains the article 138 that criminalizes the import of opium and other actions

¹²⁶ Pasat O., *Stabilirea și analiza juridico-vamală și penală a infracțiunilor comise pe teritoriul statelor limitrofe*, „Revista Națională de Drept”, no. 5, 2014, p. 70.

¹²⁷ *Customs and Excise Management Act 1979*, <http://www.legislation.gov.uk/ukpga/1979/2> (visited on 06.12.2015).

¹²⁸ Lacusta N., *op. cit.* (*Elemente de drept penal comparat în materia infracțiunii de contra-bandă*), p. 28.

¹²⁹ Korobeyeva A. I. (ed.), *Уголовный кодекс Японии (The Criminal Code of Japan)*, St. Petersburg: Juridical Center Press, 2002.

on opium or the means used to consume opium by customs administrators. The smuggling of opium committed by persons other than those authorized to administer the customs domain is sanctioned by article 136 CP Ja. In the *Criminal Code of Denmark*, the import and export of narcotic drugs, psychotropic substances, weapons and explosive devices are located within Chapter XX - "Offenses posing a threat to society"¹³⁰.

*The Austrian Criminal Code*¹³¹ in Section VII "Offenses against the environment" contains article 177a which establishes, *inter alia*, criminal liability for the import, export and transit of weapons of mass destruction. An analogous rule is laid down in *the Polish Penal Code*¹³², placed under the environmental chapter. Thus, in accordance with § 2 article 183 of this Criminal Code, the act of illegal importation of substances harmful to the environment is subject to criminal liability.

Section 4. Conclusions to Chapter II

As a result of the research, we advance the following general **conclusions**¹³³ :

1) the concept of customs offenses, the sphere of their extent, the limits of assigning socially dangerous facts to the category of customs offenses are strictly dependent on the normative framework of each state;

2) according to the criminal law of the Republic of Moldova, customs offenses must be understood as prejudicial acts that may take the form of action or inaction, intentionally committed, punishable by criminal penalties, committed in the sphere of foreign economic activity in connection with goods crossing the customs border, by ignoring the customs regulations, facts that are attentive to the values and social relations related to the customs activity, stipulated in articles 248 and 249 CP RM;

3) conventionally, the offenses committed under the name of smuggling marginal and those under the name of marginal evasion of payment of customs payments can be referred to as customs offenses, since both smuggling and evasion of the payment of customs payments are committed in the customs sphere, thus having the same legal subgroup object;

¹³⁰ Belyayeva S. S. (ed.), *Уголовный кодекс Дании (The Criminal Code of Denmark)*, Moscow: Publishing House of the Moscow University, 2001.

¹³¹ *Criminal Code of the Republic of Austria*, <http://www.legislationline.org/documents/section/criminal-codes> (visited on 03.03.2016).

¹³² *Criminal Code of the Republic Poland*, <http://www.legislationline.org/documents/section/criminal-codes> (visited on 03.03.2016).

¹³³ See also Pasat A. O., *Comparative analysis in the field of customs offenses and criminal regulations in certain states in relation to the legislation of the Republic of Moldova*, „Juridical Tribune – Tribuna Juridica”, Volume 7, Issue 1, June 2017, p. 115, 116.

4) compared with CP RM in the 1961 edition, according to which smuggling offenses were placed under Chapter I of the Special Part of the Penal Code entitled "Offenses against the State", according to the legal provisions of the current Criminal Code, the offenses under the marginal name of smuggling are located under Chapter X of the Special Part of the Criminal Code - "Economic crimes";

5) the legislators of foreign states have different positions in relation to the number and content of customs offenses, as well as to the technical-legislative placement within the criminal law of the norms that criminalize them, positions which are conditioned, in particular, by the level of economic development, the established foreign relations, including the commercial ones, etc.;

6) criminal laws of foreign states lack the rules corresponding to article 249 CP RM (for example, Ukraine, Armenia, Uzbekistan, etc.). On the same position is the Romanian legislator, who does not consider the evasion of the payment of customs payments as a crime;

7) in most of the ex-Soviet states, in the legislation on customs criminality, the act of non-return to the customs territory of the cultural values that make up the artistic, historical and archaeological heritage is incriminated in a separate article;

8) as far as the criminal laws of the Western European states are concerned, we tend to criminalize customs offenses in special laws, similar to the Romanian legislature.

Chapter III

Pre-existing elements of customs offenses in the legislation of the Republic of Moldova and Romania

Section 1. The object of the offense

§1. The legal object of the offense

We reiterate that there is no article in Romania's legislation that criminalizes the evasion of paying the customs payments. In the customs sphere, the Romanian legislator has incriminated: simple smuggling, skilled smuggling, the use of unrealistic acts and the use of falsified documents. The analysis of smuggling (simple and qualified) will make an incursion both in the legislation of the Republic of Moldova and in Romania; the analysis of the use of unrealistic documents and the use of falsified documents will be made to the rules of the Romanian Customs Code, while the analysis of the evasion from the payment of the customs payments will be made use of the rules of the Criminal Code of the Republic of Moldova. However, our scientific approach will, to a considerable extent, include the analysis of smuggling offenses; these are some of the most serious facts likely to be committed in the sphere of customs legal relations, because by committing them, the national economy and, implicitly, the state budget are threatened or are actually being harmed, as well as values of maximum importance in a particular country, a real democracy: public order, legitimate interests of citizens¹³⁴. For this reason, criminalization of these facts is imperative, since order and discipline in the sphere of customs legal relations can not be ensured without encroachment on smuggling¹³⁵. Being some of the basic crimes that seriously damage the state's economic potential, smuggling destroys the principles of statehood, fueling sources that threaten national security, fostering unemployment, developing anti-social and anti-human morals, committing other cross-border crimes, generating anxiety and insecurity among the population¹³⁶.

We will further analyze the pre-existing elements of customs offenses in accordance with the legislation of the Republic of Moldova and that of Romania.

In the following, our focus will be on investigating the subject of customs offenses. First, let us mention that the offense can not be conceived without the existence of a certain reality against which the act of conduct is directed and

¹³⁴ Bujor V., Pop O., *op. cit.*, (*Criminalitatea în domeniul fiscal*), p. 25.

¹³⁵ Pasat O., *Efectuarea analizei juridico-vamale a infracțiunilor, contravențiilor vamale prevăzute de Codul vamal al României din 1997*, „Revista Națională de Drept”, no. 4, 2014, p. 65.

¹³⁶ Maimescu S., *Contrabanda și modalitățile ei în reglementarea legislației penale a Republicii Moldova*: PhD thesis in law, Chișinău, 2000, p. 8.

which is the object of this act¹³⁷. Taking into account the existence of such a reality, we conclude that the object of the offense is the values and social relations against which the act of criminal conduct is directed and which either jeopardizes the values and social relations protected by the criminal law or injures them.

Taking into account the degree of hierarchy of the social values that form the object of the offense, I highlight the general legal object, the generic legal object and the special legal object. It is precisely in relation to these categories of legal object that the criminal offenses of the criminal law of the Republic of Moldova and of Romania will be investigated.

The general legal object of the offense, including the customs offenses, according to the criminal law of the Republic of Moldova and of Romania, is the set of social relations regarding the rule of law, i.e. regarding the totality of social values defended by criminal law against crimes¹³⁸. According to the criminal law of the Republic of Moldova, the general legal object is identified with the content of the norm in paragraph (1) of article 2 CP RM, which states: "The criminal law protects against the offenses the person, his rights and freedoms, the environment, the constitutional settlement, the sovereignty, independence and territorial integrity of the Republic of Moldova, the peace and security of mankind, as well as the entire order of law".

As far as **the generic legal object** is concerned, it is stated in the doctrine that it represents the beam determined by social and social values - identical or homogeneous, which, due to this entity or homogeneity, are protected by a group of criminal norms that are in close relations reciprocity and complement each other¹³⁹. Some authors state: "... the generic legal object is the systematization criterion of the Special Part of the Criminal Law. In addition to this technical and legislative significance of the generic legal object, this category also has a substantial contribution to the criminal law enforcement activity, namely: it allows to correctly determine the essence of one or another crime, facilitating the identification of other signs of the composition of the offense, which reduces the scope of search for the rule of criminality, thus facilitating the process of legal framing of the crime; helps select the most effective combat and prophylaxis procedures with the range of offenses that make up; facilitates the perception of the degree of social danger, the nature and particularities of the damage caused by that group of offenses, etc."¹⁴⁰

¹³⁷ Bulai C., *Manual de drept penal. Partea Generală*, Bucharest: All, 1997, p. 195.

¹³⁸ Grama M., Botnaru S., Șavga A. et al., *Drept penal. Partea Generală*, Chișinău: Tipografia Centrală, 2012, p.180.

¹³⁹ Brînza S., *Obiectul infracțiunilor contra patrimoniului*, Chișinău: Tipografia Centrală, 2005, p. 119.

¹⁴⁰ Cojanu G., *Răspunderea penală pentru actele de diversiune potrivit legislației Republicii Moldova și a României. Studiu de drept comparat*, PhD thesis in law, Chișinău, 2014, p. 39.

The generic or grouped legal object is individualized by subdivisions of offenses, depending on the genuinely prejudiced social importance. The legal object of the group was used by the legislator to classify offenses under the Special Part of the Criminal Code. Professor S. Brânza mentions that the harmful nature of the offenses, which share the same generic legal object, generally determines the consecutive distribution of the relevant chapters in the Special Part of Criminal Law, depending on the comparative meaning of some or other groups of social values and related social relationships¹⁴¹. Indeed, depending on the generic legal object, the Special Part of the Criminal Code of the Republic of Moldova was divided into 18 chapters, including Chapter X - "Economic crimes". According to N. Sîrbu, such an approach allows to notice that the criminal defense field of all the crimes in Chapter X of the Special Part of the Criminal Code of the Republic of Moldova is the national economy, regarded as fundamental social value¹⁴². The same opinion is S. Timofei¹⁴³.

V. Stati mentions that the generic legal object of all economic crimes is social relations with regard to the national economy (*alias* social economic relations), based on the following principles of economic activity: freedom of economic activity; the exercise of economic activity on legal grounds; fair competition of the subjects of economic activity; good faith of the subjects of economic activity; the prohibition of manifestly criminal forms of conduct of economic activity¹⁴⁴. Thus, the national economy is the fundamental social value defended by juridical-criminal means against economic crimes¹⁴⁵.

Referring to the generic legal object of smuggling, G. S. Ghireaev shows that it represents the social relations, the content of which is formed by the free external economic activity and the economic security of the state, which is the main guarantor in securing the economic sovereignty of the state¹⁴⁶. After A. I. Boico and L. Iu. Rodina, the generic legal object of smuggling offenses, is the total economic relations that underlie economic activities¹⁴⁷. According to R. Sobietki, the generic legal object of smuggling is formed by social relations that

¹⁴¹ Brânza S., *op. cit.* (*Obiectul infracțiunilor contra patrimoniului*), p. 145.

¹⁴² Sîrbu N., *Răspunderea penală pentru pseudoactivitatea de întreprinzător*, Chișinău: CEP USM, 2013, p. 68.

¹⁴³ Timofei S., *Răspunderea penală pentru infracțiunile în domeniul concurenței*, Chișinău: CEP USM, 2011, p. 142.

¹⁴⁴ Stati V., *op. cit.* (*Infracțiuni economice: Note de curs*), p. 13.

¹⁴⁵ Prodan S., *Răspunderea penală pentru infracțiunile legate de creditare*, Chișinău: CEP USM, 2011, p. 120.

¹⁴⁶ Giryayev G. S., *Криминологическая характеристика и уголовно-правовые меры противодействия контрабанде*: Автореферат диссертации на соискание ученой степени кандидата юридических наук (*Criminological characteristic and criminal law measures to counter smuggling*: The author's abstract of a thesis for the degree of Candidate of Juridical Sciences), St. Petersburg, 2005, p. 8.

¹⁴⁷ Boyko A. I., Rodina L. Yu., *Контрабанда. История, социально-экономическое содержание и ответственность* (*Smuggling. History, socio-economic content and responsibility*), St. Petersburg: Legal Center Press, 2002, p. 121.

are based on the principles of economic activity¹⁴⁸. The Russian author G. P. Cacichina reveals that the generic legal object of customs offenses, including smuggling offenses, is the social relations defended by criminal law in the sphere of economic activity¹⁴⁹.

Finally, with reference to the legislation of the Republic of Moldova, we conclude that from the title of Chapter X of the Special Part of the Criminal Code of the Republic of Moldova "Economic crimes", chapter in which the offenses under articles 248 and 249 CP RM that the generic legal object of the offenses committed under the generic name of smuggling and those under the generic name of evasion from the payment of customs payments is the national economy as a fundamental social value, as well as the social relations afferent to this value.

Compared to the legislation of the Republic of Moldova, in Romania the customs offenses are incriminated in a special criminal law, which is why we can no longer say that even in the case of the Romanian legislation in the field of customs offenses the thesis is valid, according to which the generic legal object of the offense be separated from the title of the chapter and the section where the incriminating rule is placed. However, the Romanian Customs Code only covers the crimes of criminal offenses committed in the customs sphere, and not other illegal acts. Even so, customs offenses, according to the Romanian legislation, have a generic legal object. But what is it? According to the Romanian authors C. Voicu, A. Boroi, F. Sandu and I. Molnar, the generic legal object of the offenses related to the customs regime [*to be read* - customs offenses – *the author's note*] is those social relations related to the customs regime whose birth and normal deployment are conditioned by the special protection of customs clearance operations, as well as of other customs operations requiring special legal requirements for the crossing of goods¹⁵⁰. Other authors are of the opinion that the generic legal object of customs offenses is the social relations that take into account the normal conduct of business activity by observing the customs regime¹⁵¹. According to O. Predescu, the common legal object of the customs offenses is the social relations related to the crossing of the state border only through the customs control points of the goods and other objects of the physical or juridical persons and only on the basis of authentic documents and according to reality¹⁵².

As far as we are concerned, we consider that, along with other similar criminal acts, by committing simple smuggling, skilled smuggling, the use of unrealistic acts or forged acts is directed at the state economy and the social relations deriving from that fundamental social value in a state with market economy. In this context, I subscribe to the position of the author N. Giurgiu, who claims that

¹⁴⁸ Sobiełki R., *op. cit.* (*Contrabanda: aspecte juridico-penale: studiu monografic*), p. 77.

¹⁴⁹ Kachkina G. P., *op. cit.*, (*Smuggling as a customs offense*), p. 19.

¹⁵⁰ Voicu C., Boroi A., Sandu F. et al., *op. cit.* (*Drept penal al afacerilor*), p. 261.

¹⁵¹ Voicu C., Boroi A., Molnar I. et al., *op. cit.* (*Dreptul penal al afacerilor*), p. 303.

¹⁵² Predescu O., *op. cit.* (*Drept penal al afacerilor*), p. 259.

extrapenal laws containing criminal provisions refer to special relations groups, which are organized into special criminal subsystems, taking into account the same ordinating distinction¹⁵³. By the same orderly distinction, the author considers the grouping of the legal object by category, similar to the group existing in the Criminal Code. That is why we can not disagree with the position in the doctrine, according to which the generic legal object of these crimes is the social relations that ensure the observance of the regime established for certain economic activities [the emphasis belongs to us - *the author's note*]¹⁵⁴. In a similar position is V. Bujor and O. Pop, which states that the generic legal object is the entirety of socially protected relations with regard to economic, commercial and financial activities, and whose existence can not be conceived without the criminalization of facts the national economy [the emphasis belongs to us - *the author's note*], prevents the activity of the economic agents and damages the economic interests of the population.¹⁵⁵

Finally, we conclude that ***the generic legal object*** of the customs offenses stipulated by articles 248 and 249 CP RM, based on the technical-legislative location of the norms of incrimination, as well as of the customs crimes in the criminal legislation of Romania, is formed by *the national economy, as well as the social relations related to that social value*.

At the same time, as a result of the doctrinal classification of economic crimes in several subgroups, including the group of offenses in the sphere of foreign economic activity (as part of which are customs offenses), we consider that the offenses under the name of smuggling and escape from the marginal the payment of customs payments, forming the group of customs offenses, challenges a *common group* of social relations inherent in the activity in the customs sphere. Consequently, we conclude that the offenses provided by articles 248 and 249 CP RM have the same ***legal subgroup object***. It is true that S. Prodan argues that although Chapter X of the Special Part of the Criminal Code of the Republic of Moldova is not structured on divisional sections corresponding to legal objects of a subgroup of economic crimes, it is still possible to identify such objects for the subgroups classification of economic offenses¹⁵⁶. Next, S. Prodan argues that the identification of the legal object of a subgroup of economic crimes according to the domains of the national economy allows the subgroup of offenses to be broken, which affects the social relations that are developing and developing, for example, in the customs field [emphasis belongs to us - *the author's note*], fiscal, commercial and other areas of the national economy¹⁵⁷. So, the content of the

¹⁵³ Giurgiu N., *Legea penală și infracțiunea (doctrină, legislație, practică judiciară)*, Iași: Gama, 1996, p. 164.

¹⁵⁴ Ungureanu A., Ciopraga A., *Dispoziții penale din legi speciale române*, Bucharest: Lumina Lex, 1996, p. 187.

¹⁵⁵ Bujor V., Pop O., *op. cit. (Criminalitatea în domeniul fiscal)*, p. 31.

¹⁵⁶ Prodan S., *op. cit. (Răspunderea penală pentru infracțiunile legate de creditare)*, p. 121.

¹⁵⁷ *Ibidem*, p. 121.

legal subgroup is strictly dependent on the classification of economic offenses in certain categories. Tax offenses have the same legal subgroup object. The same can be said about the crimes related to the entrepreneurial activity. Similarly, the customs offenses challenge the same legal object of the subgroup - *the social relations inherent in the activity in the customs sphere*. The existence of such an object is recognized in the native doctrine. For example, R. SobieŃki argues that the typical or subgroup object of smuggling offenses [emphasis belongs to us - *the author's note*] consists of the totality of social relations, the content of which is formed by the free external economic activity, the foreign economic policy and the economic security of the state¹⁵⁸. In the same context, Iu. I. Sucicov points out that the legal subject of all customs offenses is the social relations related to external economic activity¹⁵⁹. Here too, Iu. I. Sucicov argues, rightly, that the legal subject of the subgroup is the criterion for the delimitation of customs offenses from other economic crimes, such as: offenses in the sphere of entrepreneurship, tax offenses, crimes in the financial and credit sphere, etc.¹⁶⁰. At the same time, we specify that customs offenses differ from each other in terms of the distinct legal object.

After the outline of the generic legal object, we will, in the following, subject the investigation to ***the special legal object*** of customs offenses.

Ab initio, we assert that the particular legal object is the concrete individual social value that is harmed or threatened directly by committing a concrete criminal offense. At the same time, the special legal object is in strict dependence on the generic legal object of the offense. Therefore, in order to identify the specific legal object of customs offenses, the generic legal object of these crimes must be considered.

As regards smuggling offenses in the Moldovan criminal law, doctrinal opinions are different from the content of the special legal object. In R. SobieŃki's view, smuggling offenses particularly militate against the principle of banning criminal behavior in economic activity¹⁶¹. A similar position is N. A. Lopasenco, who considers that the special legal object of smuggling offenses forms social relations that are assimilated to the principle of banning forms of criminal behavior in economic activity¹⁶². I. Macari is of the opinion that the object of smuggling offenses is the social relations regulating the movement of goods across the customs border of the Republic of Moldova and ensures the payment of customs payments in the budget¹⁶³. According to other authors, the special legal object of

¹⁵⁸ SobieŃki R., *op. cit.* (*Contrabanda: aspecte juridico-penale: studiu monografic*), p. 77.

¹⁵⁹ Sucicov Iu. I., *op. cit.* (*Customs crimes: a study guide*), p. 12.

¹⁶⁰ *Ibidem*, p. 12.

¹⁶¹ SobieŃki R., *op. cit.* (*Contrabanda: aspecte juridico-penale: studiu monografic*), p. 78.

¹⁶² Lopashenko N. A., *Преступления в сфере экономики: Авторский комментарий к уголовному закону (раздел VIII УК)* [*Crimes in the sphere of economy: Author's comment on the criminal law (section VIII of the Criminal Code)*]. Moscow: Wolters Kluwer, 2006, p. 508.

¹⁶³ Macari I., *op. cit.* (*Dreptul penal al Republicii Moldova. Partea Specială*), p. 258.

smuggling offenses is the total social relations that ensure the order of legal crossing of goods across the customs border of the Republic of Moldova¹⁶⁴. Other theorists are of the opinion that the special legal object of smuggling is formed by the social relations related to the customs regime, relations whose normal development and development is conditioned by compliance with the rules imposed by the law on customs control of merchandise or other goods¹⁶⁵. In the sense of Iu. I. Sucicov, the special legal object of the smuggling offenses is the order of goods crossing, as well as the means of transport across the customs border, established for the purpose of ensuring a normal external economic activity, ie the social relations that occur between the bodies of the state and the leadership, on the one hand, and entrepreneurs, organizations, cooperatives, and individuals, on the other hand, in the process of passing goods across the customs border¹⁶⁶. According to other authors, the special legal object of smuggling offenses is the social relations regarding the establishment through the customs regulation of the order of passing of different goods or objects across the customs border¹⁶⁷. P. A. Modestov considers that the special legal object of smuggling offenses is the social relations that form the order and conditions of goods crossing the customs border¹⁶⁸. Other authors, however, argue that as a special legal object of smuggling, the order of crossing goods and means of transport across the customs border arises because export and import are regulated, including through the establishment of prohibitions and limitations in accordance with legislation¹⁶⁹.

In the view of L. Gîrla and Iu. Tabarcea, the special legal object of smuggling offenses is the social relations that ensure the customs security of the Republic of Moldova and the establishment of the order of transit of goods and means of transport across the customs border of the Republic of Moldova¹⁷⁰. According to S. Brînză, V. Stati and Gh. Nicolaev, the special legal object of the crimes stipulated in article 248 CP RM is to form the social relations regarding

¹⁶⁴ Barbăneagră A., Alecu Gh., Berliba V. et al., *op. cit. (Codul penal al Republicii Moldova. Comentariu. Adnotat cu jurisprudența CEDO și a instanțelor naționale)*, p. 537.

¹⁶⁵ Barbăneagră A., Berliba V., Gurschi C. et al., *op. cit. (Codul penal comentat și adnotat)*, p. 395.

¹⁶⁶ Sucicov Iu. I., *op. cit. (Customs crimes: a study guide)*, p. 14-15.

¹⁶⁷ Zhalinskovo, A. E. (ed.), *Учебно-практический комментарий к Уголовному кодексу Российской Федерации (Educational-practical commentary to the Criminal Code of the Russian Federation)*, Moscow: EKSMO, 2005, p. 565.

¹⁶⁸ Modestov P.A., *Контрабанда: общественная опасность, квалификация, вопросы ответственности: Автореферат диссертации на соискание ученой степени кандидата юридических наук (Smuggling: public danger, qualification, questions of responsibility: the dissertation Author's abstract on competition of a scientific degree of the candidate of legal sciences)*, Nizhny Novgorod, 2002, p. 16.

¹⁶⁹ Rogatîh L. F., *op. cit. (Criminally punishable contraband)*, p. 25.

¹⁷⁰ Gîrla L. G., Tabarcea Iu. M., *op. cit. (Criminal Law of the Republic of Moldova. The special part. Tom I.)*, p. 670.

the customs security of the Republic of Moldova¹⁷¹. We subscribe to the latter positions; precisely customs security as a component part of the economic security of the state is the basic social value against which the criminal offenses recorded in article 248 CP RM. In this respect, the Customs Code of the Republic of Moldova establishes the legal, economic and organizational principles of the customs activity and is oriented towards defending the sovereignty and economic security of the Republic of Moldova [emphasis belongs to us - the author's note]. As tasks of the customs body, the CV RM provides, *inter alia*, for ensuring the economic security of the state [letter c) article 11]. We can not share the views of A. B. Magzumov who argues that the special legal object of smuggling is the inviolability of the customs frontier as a social value¹⁷². Nor can we agree with the theoretical stance that smuggling offenses resemble the illegal crossing of the state border by protecting one and the same object - the inviolability of the state border¹⁷³. By criminalizing smuggling, the legislator wants to protect customs security, not the inviolability of the state border. The last social value is protected by the norms of article 362 CP RM (the illegal crossing of the state border).

In another register, it is considered in the literature that smuggling offenses are included in the category of multi-object crimes, because it simultaneously attacks several objects of criminal protection: the main special legal object is the order of passage of goods and other objects over the customs border, while the secondary legal object, depending on the type of goods or the illegal object past the customs border, is the health of the population, the public security, the financial interests of the state, the interests of the consumer, etc.¹⁷⁴ I. Macari reveals that smuggling offenses have an additional object - public order (in the case of smuggling with arms) or the health of the population (in case of smuggling with narcotic, radioactive, toxic substances, etc.)¹⁷⁵. In the context of smuggling with cultural values, the authors V. Berliba and R. Sobiețki note the necessity of legal protection of social relations regarding the historical and cultural values and goods, or, in other words, of the entire national cultural patrimony¹⁷⁶.

Indeed, in the case of the offenses referred to in paragraphs (2), (3), (4), article 248 CP RM, the secondary level affects additional values and social relations. On this occasion we support the view expressed by S. Brînză and V. Stati

¹⁷¹ Brînză S., Stati V., *op. cit. (Tratat de drept penal. Partea Specială)*, vol. II., p. 281; Poalelungi M., Dolea I., Vizdoagă T. et al., *op. cit. (Manualul judecătorului pentru cauze penale)*, p. 480; Stati V., *op. cit. (Infrațiuni economice: Note de curs)*, p. 429.

¹⁷² Magzumov A. B., *op. cit. (Criminally-legal aspects of economic contraband)*, p. 66.

¹⁷³ Sobiețki R., *op. cit. (Contrabanda: aspecte juridico-penale: studiu monografic)*, p. 178.

¹⁷⁴ Rozumani I. V., *op. cit. (Criminal responsibility for smuggling: according to the materials of the Siberian Federal District)*, p. 11-12.

¹⁷⁵ Macari I., *op. cit. (Dreptul penal al Republicii Moldova. Partea Specială)*, p. 258.

¹⁷⁶ Berliba V., Sobiețki R., *op. cit. (Aspecte de drept penal privind contrabanda cu valori istorico-culturale)*, p. 82.

that in the case of the respective offenses, the special legal object becomes multiple¹⁷⁷. This is because, through one action/inaction, several values and social relationships are affected. Here we talk about the existence of a special *primary* legal object and a special *secondary* legal object. According to the opinion of the same authors, which we embrace, we realize that as a special secondary legal issue there are: a) the social relations regarding the legal circulation of narcotic, psychotropic substances with strong, toxic, poisonous, radioactive and explosive effects; of harmful waste and of products with dual destination [in the case of the deed referred to in paragraph (2) article 248 CP RM]; b) the social relations related to the legal circulation of weapons, explosive devices, ammunition [in the case of the deed referred to in paragraph (3) article 248 CP RM]; c) the social relations regarding the legal circulation of cultural values [in the case of the deed stipulated in paragraph (4) article 248 CP RM]¹⁷⁸.

In other respects, with regard to material entities possessing special qualities (narcotic substances, weapons, etc., except cultural values), the theory of criminal law is emphasized: "The social role of such entities resides in the fact that they are sources of social danger increased. The use of their useful qualities in the interest of society is only under the thorough supervision of the state. This makes it possible to say that committing the offense with the use of such objects, including their illegal crossing over the customs border, constitutes an attempt at public security, public order, public health, but not external economic activity."¹⁷⁹ I.V. Rozumani believes that the smuggling of arms, ammunition and explosive substances is the Chapter of the Special Part of the Criminal Code which contains the crimes against public security and smuggling of narcotic drugs, psychotropic substances and their analogues - Chapter XXV "Offenses against public health and social cohabitation"¹⁸⁰. We do not support such a position. We believe that the act of illegal crossing over the customs frontier of the above-mentioned entities is at the core of the social relations regarding the customs security of the Republic of Moldova and only in the secondary level - the social relations regarding the public health or, as the case may be, to public security. This is because the entities mentioned are illegally crossed over the customs border. Customs security, as a social value, is harmed in all cases of illegal crossing of goods across the customs border, irrespective of their quality. At the same time, the customs sphere is one of the main components of the economic sphere. It is precisely for

¹⁷⁷ Brînză S., Stati V., *op. cit. (Tratat de drept penal. Partea Specială)*, vol. II., p. 281; Stati V., *op. cit. (Infrațiuni economice: Note de curs)*, p. 429.

¹⁷⁸ Brînză S., Stati V., *op. cit. (Tratat de drept penal. Partea Specială)*, vol. II., p. 281; Stati V., *op. cit. (Infrațiuni economice: Note de curs)*, p. 429; Stati V., *op. cit. (Infrațiuni săvârșite în sfera activității economice externe (art. 248 și 249 CP RM): studiu de drept penal)*, p. 126.

¹⁷⁹ Rogățil L. F., *op. cit. (Criminally punishable contraband)*, p. 27.

¹⁸⁰ Rozumani I. V., *op. cit. (Criminal responsibility for smuggling: according to the materials of the Siberian Federal District)*, p. 5.

these reasons that smuggling offenses (irrespective of the type of material/immaterial entities crossed over the customs border) are correctly placed within the group of offenses designed to protect the national economy as a fundamental social value. The same opinion is shared by other authors¹⁸¹.

In the case of smuggling in the aggravated version provided by letter c) paragraph (5) article 248 CP RM (smuggling committed by a person with responsibility, using the service situation), the special legal object of smuggling is *complex*, because through multiple actions/inactions, several social values and related social relationships are harmed. And in this hypothesis, we have two categories of special legal objects: one main and one secondary. R. Sobiętki denotes the object to which he is charged by committing smuggling by a person in charge of using the service situation as a special voluntary legal object, this being made up of the social relations that ensure the normal activity of the customs control bodies¹⁸². In our opinion, in the case of the offense referred to in letter c) paragraph (5) article 248 CP RM, the main legal object remains the same (considering the social relations regarding the customs security), while the secondary legal object it forms the social relations regarding the normal fulfillment of the duties in the public sphere.

In another context, the doctrine states that, in the secondary context, smuggling violates the legal regime of the state border¹⁸³. We can not support such a point of view because the nominated social value is not harmed by committing smuggling offenses, but by committing the offense provided under article 362 CP RM (illegal crossing of the state border).

Regarding the special legal object of the offenses stipulated in article 249 CP RM, it is stated in the doctrine that it represents: "the social relations related to the payment of the customs payments"¹⁸⁴; "the social relations in the sphere of the external economic activity that determine the order of the state budget formation from the financial means deriving from the customs payments received when the goods cross the customs border"¹⁸⁵; "social relations in the sphere of tariff-customs regulation"¹⁸⁶; "the customs clearance of goods and the order for payment of the customs payments"¹⁸⁷. V. P. Verin mentions that the evasion of payment of customs payments is a matter of the financial system of the country, because in the budget there are no financial means expressed in the due customs

¹⁸¹ Sobiętki R., *op. cit.* (*Contrabanda: aspecte juridico-penale: studiu monografic*), p. 181-182.

¹⁸² *Ibidem*, p. 82.

¹⁸³ Voicu C., Sandu F., Dascălu I., *Frauda în domeniul financiar bancar și al pieței de capital*. Bucharest: Trei, 1998, p. 261.

¹⁸⁴ Vasilicov I. S., *op. cit.* (*Crimes in the sphere of economy*), p. 181.

¹⁸⁵ Sucicov Iu. I., *op. cit.* (*Customs crimes: a study guide*), p. 71.

¹⁸⁶ Magzumov A. B., *op. cit.* (*Criminally-legal aspects of economic contraband*), p. 66.

¹⁸⁷ Sobiętki R., *op. cit.* (*Contrabanda: aspecte juridico-penale: studiu monografic*), p. 179.

payments¹⁸⁸. Z. M. Abdurahmanov argues that the special legal object of these crimes is formed by the social relations that occur in the process of calculating and paying the customs payments, as well as in the process of control over the full payment in due time of the due customs payments¹⁸⁹.

According to I. Macari, the special legal object of the crimes examined is the social relations established in the field of customs activity and the norms governing the accumulation of money in the state budget¹⁹⁰. We can not hold such a position since the practically unanimous literature is supported by an axiomatic thesis, according to which the rule of law can not in any case evolve as an object of the offense. The thesis was also demonstrated by the Moldavian author S. Brînza, in whose view the offense is a concern not on the law, but on the conditions that generated it, on the social relations protected and fixed by the law¹⁹¹.

We are partakers of the doctrinal opinion according to which the special legal object of the offenses provided in article 249 CP RM is the social relations regarding the formation of the national public budget on the way of paying the customs payments¹⁹². Our arguments are as follows: By avoiding payment of customs payments, an onerous rule is violated in the Customs Code which obliges the person passing goods across the customs border to pay the corresponding import/export rights; by refraining from fulfilling this obligation, the perpetrator challenges the social relations regarding the formation of the state budget from the due customs payments. That is why we are in the position that the special legal object of the evasion of payment of the customs payments is the social relations related to the formation of the national public budget by paying the customs payments by the persons who pass over the customs border and who have such an obligation established by law.

In the context of the analysis of the object of criminal protection by criminalizing the facts provided by article 249 CP RM, attention is paid to the assertion of the Russian author M. A. Cociubei who mentions the following: "The mechanism of causing damage to the object of criminal protection by evading payment of customs payments is reduced to the fact that one of the subjects of social relations - the person obliged to pay the customs payments through his illegal actions (inactions) is self-excluded from the relations financial services in the customs sphere protected by criminal law. It does not execute or inappropriately execute its obligation to the state to pay the customs payments: it hides the

¹⁸⁸ Verin V. P., *Преступления в сфере экономики. Серия „Российское право: теория и практика”. Учебно-практическое пособие (Crimes in the sphere of economy. Series "Russian Law: Theory and Practice". Educational and practical guide)*, Moscow: Delo, 1999, p. 93.

¹⁸⁹ Abdurahmanov, Z. M., *op. cit. (Criminal liability for non-payment of customs fees levied from the organization or from an individual)*, p. 15.

¹⁹⁰ Macari I., *op. cit. (Dreptul penal al Republicii Moldova. Partea Specială)*, p. 262.

¹⁹¹ Brînza S., *op. cit. (Obiectul infracțiunilor contra patrimoniului)*, p. 40.

¹⁹² Stati V., *op. cit. (Infracțiuni economice: Note de curs)*, p. 462; Brînza S., Stati V., *op. cit. (Tratat de drept penal. Partea Specială)*, vol. II., p. 294; Stati V., *op. cit. (Infracțiuni săvârșite în sfera activității economice externe (art.248 și 249 CP RM): studiu de drept penal)*, p. 136.

goods passed over the customs border, reduces its cost, presents incorrect information about the nature or destination of the goods or uses other methods leading to the escape from total or partial payment of customs payments, which ultimately leads to an attenuation of the social relations in the sphere of customs activity"¹⁹³.

Regarding the special legal object of the customs offenses according to the legislation of Romania, in the literature it is shown that in the case of smuggling offenses this is formed by the social relations whose normal birth and deployment are conditioned by the protection of the customs control operations, goods, the application of the customs tariff, as well as other customs operations caused by the crossing of the goods¹⁹⁴. According to other authors, the special legal object of smuggling is the social relations related to the customs regime, relations whose normal development and development is conditioned by compliance with the rules imposed by the law on the customs control of merchandise or other goods¹⁹⁵. In the view of F. Sandu, the object of legal protection in the case of smuggling offenses is the customs regime of Romania, as a major social interest or as an essential social value within the legal order of society, as well as the social relations whose birth and development normal conditions depend on the protection of the customs regime¹⁹⁶. According to D. Bujorean, the special legal object of simple smuggling forms the customs regime as a major social value and the social relations that arise and take place in relation to it¹⁹⁷.

We do not support the view that the special legal object of smuggling provided in article 270 CV Rom forms the social relations related to the customs regime. Not the customs regime but customs security is social value. The customs regime forms the totality of customs regulations that determine the status of goods and means of transport according to the purpose of the operation and the destination of the goods, and as the object of criminal protection, legal regulations, but values and social relations, can not arise.

Similarly, we can not agree with the point of view of P. G. Cudrițescu, according to which the smuggling of the goods from the customs control by passing over the state border through places other than those established for customs control, in the secondary plane, affects the social relations regarding the juridical regime of the state border of Romania¹⁹⁸. However, we reach C. Duvac's view that, if the goods or goods are to be transported by a person in places other than those established, the constitutive elements of two offenses committed in a real contest - the smuggling offense and crime of fraudulent crossing of the border¹⁹⁹.

¹⁹³ Cociubei M. A., *op. cit. (Criminal liability for crimes in the sphere of customs activity)*, p. 14.

¹⁹⁴ Cudrițescu P. G., *op. cit. (Infrațiunea de contrabandă)*, p. 96.

¹⁹⁵ Tudor G., *op. cit. (Infrațiunea de contrabandă. Practică judiciară)*, p. 26.

¹⁹⁶ Sandu F., *op. cit. (Contrabanda – componentă a crimei organizate)*, p. 11.

¹⁹⁷ Bujorean D., *op. cit. (Infrațiunea de contrabandă și infrațiunea de evaziune fiscală)*, p. 87.

¹⁹⁸ Cudrițescu P. G., *op. cit. (Infrațiunea de contrabandă)*, p. 96.

¹⁹⁹ Duvac C. *Infrațiunea de contrabandă*, „Revista de Drept penal”, no. 1, 1998, p. 41.

In our opinion, similar smuggling offenses in the Moldovan criminal law, the special legal object of smuggling provided in article 270 CV Rom is the social relations regarding the Romanian customs security. In the case of the offense provided by article 271 CV Rom (qualified smuggling), the social relations related to the legal circulation of weapons, munitions, explosives, drugs, precursors, nuclear materials or other radioactive substances, of toxic substances, waste, residues or hazardous chemical materials.

Regarding the offenses stipulated in articles 272 and 273 CV Rom, in doctrine it is considered that the special legal object consists of the social relations related to the customs regime, relations whose normal development and development is conditioned by observance of the rules imposed by the law for the control goods or other goods, as well as social relations whose normal birth and development are conditioned by the protection of confidence in customs documents, whether official or private²⁰⁰. F. Sandu believes that the use of unrealistic acts and the use of falsified acts has a major and a secondary legal object. According to the author, the main legal object is similar to that of smuggling, and the secondary legal entity forms the social relations whose normal birth and development is conditioned by the confidentiality of the customs documents, either official or private²⁰¹. In our opinion, the offenses stipulated in articles 272 and 273 CV Rom and the smuggling offenses have a special distinct legal object. However, there are not two offenses with a specially identical legal object. We are in the position that in the case of the offense provided by article 272 CV Rom (the use of unrealistic acts) the social relations regarding the trust of the public in the official or private documents, defended by the criminalization of the act of using the unreal acts, are undermined. In the case of the offense provided by article 273 CV Rom (the use of falsified documents), the social relations regarding the trust of the public in the official or private documents, protected by the criminalization of the act of using falsified acts, are undermined.

§2. The material/immaterial object of the offense

In the following, our attention will be focused on highlighting the **material/immaterial object** of customs offenses according to the legislation of the Republic of Moldova and that of Romania. The rule is that all customs offenses include in the content of the offense the presence of a certain corporeal or incorporeal entity that is criminally influenced by the commission of the detrimental act. These entities form the material/non-material object of the offense, which, in the crimes under investigation, constitutes a mandatory constitutive sign of the

²⁰⁰ Voicu C., Boroi A., Sandu F. et al., *op. cit. (Drept penal al afacerilor)*, p. 271.

²⁰¹ Sandu F., *op. cit. (Contrabanda și albirea banilor)*, p. 27.

offense. The lack of the material/ immaterial object leads to the non-existence of the composition of the offense and the offense, respectively.

So the material object is not found in all crimes. The Romanian author C. Bulai considers that the material object only exists if the protected social value, upon which the perpetrator is challenged, is projected into a material entity, so that the social relations are injured or threatened through this entity²⁰².

Regarding the smuggling offenses, according to the criminal law of the Republic of Moldova, we note that the legislator, as a legislative technique, has recourse to the method of expressing the material/non-material object in the text of the norm of incrimination.

The material object of the offenses under the name of smuggling may consist of any goods or other material values that are transported across the customs border. It should be noted that goods are merchandise of legal and natural persons crossing the customs border for sale, purchase, exchange, lease or other transactions²⁰³. Moldovan author R. Sobiețki includes in the category of goods moved over the customs border, including: gold, silver, platinum, platinum metals, diamonds, pearls, emeralds, sapphire²⁰⁴. Diamonds, pearls, emeralds and sapphires are also included in the category of precious objects.

In general, the material/non-material object of smuggling is different from the paragraph in paragraph. For example, the material object of smuggling provided in paragraph (1) of article 248 CP RM differs from the material object of the offense referred to in paragraph (2) of article 248 CP RM. Incriminating smuggling, the legislator could not distinguish the facts of passing specific objects such as drugs, weapons and munitions, cultural values, etc. depending on their different degree of social danger²⁰⁵.

Based on the type of material/immaterial entity illegally crossed over the customs border, some authors highlight the following forms of smuggling: a) economic contraband - the material object is goods, means of transport and other goods which are not of a special quality; b) smuggling of goods excluded from the civil circuit - radioactive, poisonous, nuclear materials, weapons of mass destruction; c) smuggling of cultural values; d) smuggling of narcotic, psychotropic substances and their analogues; d) smuggling weapons, ammunition and explosive devices²⁰⁶. P. A. Modestov highlights only two forms of smuggling: (a) smuggling of goods and other objects; and (b) smuggling of goods in respect of

²⁰² Bulai C., *op. cit. (Manual de drept penal. Partea Generală)*, p. 196.

²⁰³ Pasat O., *Analiza juridico-penală a infracțiunilor vamale și penale comise pe teritoriul vamal al Republicii Moldova în conformitate cu Codul penal din 2002*, „Revista Națională de Drept”, no. 12, 2013, p. 81.

²⁰⁴ Sobiețki R., *op. cit. (Contrabanda: aspecte juridico-penale: studiu monografic)*, p. 84-85.

²⁰⁵ Pasat O., *op. cit. (Analiza juridico-penală a infracțiunilor vamale și penale comise pe teritoriul vamal al Republicii Moldova în conformitate cu Codul penal din 2002)*, p. 82.

²⁰⁶ Rozumani I. V., *op. cit. (Criminal responsibility for smuggling: according to the materials of the Siberian Federal District)*, p. 13.

which special rules are laid down for their crossing over the customs frontier²⁰⁷. A similar classification is made by Iu. I. Sucicov grouping the material object of smuggling into two main groups: a) consumer merchandise and b) merchandise of a specific nature, which are limited or forbidden in the civil circuit²⁰⁸. In the vision of A. Z. Ignatiuc, the material/ immaterial objects of smuggling can be divided into two categories: a) objects in the civil circuit; b) objects restricted or forbidden in the civil circuit²⁰⁹. In the opinion of V. D. Laricev and N. S. Ghilimutdinova, smuggling can be divided into the following four categories: a) economic contraband; b) military smuggling; c) environmental smuggling; d) smuggling with objects forbidden for import or export²¹⁰.

Indeed, we note the position of the legislator to establish differentiated criminal liability for committing smuggling with certain entities. According to the provision of the incriminating norm, we realize that as a material/immaterial object of smuggling provided in paragraph (1) article 248 CP RM can appear: *merchandise, objects and other values in large proportions*.

Two conditions are deduced from this: a) the material/non-material object must be expressed in commodities, objects and other values; b) the value of those entities to reach large proportions.

Regarding *the first condition*, please note that in accordance with point 1, article 1 CV RM, by merchandise, objects and other values is meant any movable good, including foreign exchange values (foreign currency and national currency in cash, payment instruments and values movable assets denominated in foreign currency and in national currency), natural gas, electricity, heat, other energy, and means of transport (which are the subject of an external economic transaction).

It follows from this definition that also electric or thermal energy may appear as an entity susceptible to criminal influence by the illegal crossing of the customs border of the Republic of Moldova. At the same time, as the author of V. Stati notes, because of the intrinsic nature of the electric energy, the thermal energy and the other kind of energy, it is appropriate to state in relation to them the quality of immaterial object²¹¹. According to A. Reșetnicov²¹², neither the information, nor the intellectual values, nor the energy, nor any other such immaterial entities, without corporeality, can, by excellence, form the material object of the offense. So, the damage to social values and their social relationships is

²⁰⁷ Modestov P.A., *op. cit. (Smuggling: public danger, qualification, questions of responsibility)*, p. 10.

²⁰⁸ Sucicov Iu. I., *op. cit. (Customs crimes: a study guide)*, p. 16.

²⁰⁹ Ignatiuc, A. Z., *op. cit. (Smuggling and other offenses in foreign economic activity: Theory and practice of investigation.)*, p. 44-45.

²¹⁰ Laricev V. D., Ghilimutdinova N. S., *op. cit. (Customs crimes)*, p. 190.

²¹¹ Stati V., *op. cit. (Infrațiuni economice: Note de curs)*, p. 431.

²¹² Reșetnicov A., *Documentul fals ca obiect material, produs și mijloc de săvârșire a infracțiunii*: self-referral of the PhD. thesis in law. Chisinau, 2008, p. 11.

possible not only through material entities, but also by some immaterial entities²¹³.

At the same time, it raises the question of the expression "other kind of energy" from the content of point 1) article 1 CV RM used to enumerate goods susceptible of crossing the customs border. What kind of energy other than electric or thermal can be passed over the customs border? Can energy be included in this category from renewable sources? We think not. In response to this question, we note that according to article 3 of the Law of the Republic of Moldova on promotion of the use of renewable energy, no. 10 of February 26, 2016²¹⁴, through renewable energy, we understand the energy obtained through the capitalization of the renewable sources, solar, aerothermal, geothermal, hydropower, biomass, biogas, waste gas (storage gas), and gas from sewage treatment plants. All these forms of energy, however, are used to produce electrical or thermal energy. To this conclusion we urge the legislator himself, who, in the text of the aforementioned law, establishes that from renewable sources are produced electric and thermal energy. Thus, it is impossible to cross the customs border, for example, of solar energy. With photovoltaic cells, for example, solar energy can be transformed into electricity. And the latter is liable to cross the customs frontier. Also, not wind energy, but wind energy produced from wind energy can be crossed over the customs border. In other words, the energy from renewable sources, which is not a form of consumable energy, can not be crossed over the customs border. Only consumable energy is fit to be imported or exported. This includes electric and thermal energy. Finally, we are in the position that other types of energy than thermal and electric can not be crossed over the customs border. As a consequence, we consider the content of the expression "other kind of energy" to be used in the text of point 1) of article 1 CV RM, which is why we suggest to the legislator the exclusion of that phrase. The same legislative amendment will be made in the Law of the Republic of Moldova on the manner of introduction and removal of goods on the territory of the Republic of Moldova by natural persons, no. 1569 of 20.12.2002²¹⁵, which contains a similar definition of the goods.

The legislator establishes that, as a material object of smuggling provided in paragraph (1) article 248 CP RM, the payment instruments and the materialized securities may also appear. According to the provisions of the Law of the Republic of Moldova on foreign exchange regulation, no. 62 of March 21, 2008²¹⁶, *payment instruments* are considered cards, bills, checks and other similar instruments representing pecuniary claims against their issuers. As other payment instruments we can highlight: the payment order, the documentary credit, the documentary bills, the credit or payment cards, the travel checks, etc. Through *materialized*

²¹³ Copețchi St., Hadîrca I., *Calificarea infracțiunilor*, Chișinău: Tipografia Centrală, 2015, p.117.

²¹⁴ Official Gazette of the Republic of Moldova, 2016, no. 69-77.

²¹⁵ Official Gazette of the Republic of Moldova, 2002, no. 185-189.

²¹⁶ Official Gazette of the Republic of Moldova, 2008, no. 127-130.

securities, the financial titles that exist in the form of securities certificates must be understood.

The material object of smuggling is also the money. For example, in the following case of court practice a money sum was retained as a material object of smuggling: *P.S., on 01.11.2010, hour 17.11, having over it 60,000 euros, contrary to the legal obligation to declare in writing the currency at the border checkpoint and crossing of the State border Leuşeni - Albița (auto) and, without declaring the respective financial means to the customs authorities, passed them illegally over the customs border of the Republic of Moldova*²¹⁷.

No material object of the smuggling offense referred to in paragraph (1) of article 248 CP RM is the means of transport (not subject to an external transaction) used for the international transport of passengers and goods, including containers and other transport facilities. It is not excluded that such a means of transport appears to be a means of committing a smuggling offense.

In another context, G.P. Cacichina claims that intellectual property is the object of smuggling²¹⁸. In reply to the named author, we specify that intellectual and industrial property can be an immaterial object of the offenses provided by articles 185¹ and 185² CP RM (infringement of copyright and neighboring rights and, respectively, infringement of industrial property rights). These are special rules in relation to the norm of paragraph (1) of article 248 CP RM.

Regarding *the second condition*, we emphasize that in order to be in the presence of the smuggling provided for in paragraph (1) of article 248 CP RM, it is imperative that the value of the goods, objects or other values passed over the customs border of the Republic of Moldova to amount to large proportions. According to paragraph (1) of article 126 CP RM, the value of goods passed over the customs frontier is considered to be large proportions, which at the time of the offense exceeds 2,500 conventional units of fine. Considering that a conventional unit of fine constitutes 20 RON [paragraph (2) article 64 CP RM], in order to be in the presence of the offense stipulated in paragraph (1) article 248 CP RM, the value of the goods passed over the customs border must exceed 50,000 RON.

It is precisely on the basis of the given condition that the offense referred to in paragraph (1) of article 248 CP RM of the offense stipulated at letter d), paragraph (5) of article 248 CP RM (smuggling committed in particularly large proportions) on the one hand, and the contraventional act specified in paragraph (10), article 287 C.contr. RM, in accordance with which it is forbidden to pass goods, objects and other values over the customs border of the Republic of Moldova, by eluding customs control or by keeping them in places specially prepared or adapted for this purpose, or fraudulent use of documents or means of customs

²¹⁷ Chisinau Court of Appeal's Decision of 28 September 2015. File no. 1a-1077/15, <http://instante.justice.md/cms/cac-menu> (visited on 07.12.2015).

²¹⁸ Kachkina G. P., *op. cit. (Smuggling as a customs offense)*, p. 21.

identification, or by non-authentication or non-authentication in the customs documents or in other documents of crossing the border, if these actions do not constitute a crime of smuggling or another offense. Although the contravention rule does not expressly provide for the value of goods, objects or other values illegally crossed over the customs border of the Republic of Moldova, from the systematic and logical interpretation of the content of this legal provision we conclude that the value of the material/immaterial entities in the context of the contraventional deed referred to in paragraph (10) article 287 C. contr. RM, are numbered to small proportions. Also, according to article 18 C. contr. RM, the value of the goods passed over the customs border, which, at the time of the contravention, does not exceed 25 conventional units, is considered to be small. Finally, we support the position Iu. I. Sucicov, according to which the large proportions represent the circumstance on the basis of which the basis of initiation of the criminal prosecution and the taking of the guilty to criminal liability is determined²¹⁹.

In conclusion, we affirm that the large proportions characterize the quantitative parameters of the material/immaterial object of the smuggling offense stipulated in paragraph (1) article 248 CP RM. At the same time, when dealing with the issue of the proportion of smuggling, the cost of goods, objects or other values shall be calculated in accordance with the customs prices set out in the Annex to the Law of the Republic of Moldova approving the Combined Nomenclature of Goods, no.172 of 25.07.2014²²⁰. In this context, O. G. Stepanova points out that another method of assessing the cost of smuggling (e.g. by reference to market price) is incorrect and unfair²²¹.

With regard to money-laundering smuggling, it is necessary to answer the following question: what must be the solution for the case, in case the perpetrator removes from the customs territory of the Republic of Moldova money in proportions exceeding the maximum admissible limit established by law for removal without declaration and payment of export rights, but to the extent that the amount of money crossed over the customs border does not exceed the large proportions stipulated in the provision of the provision of paragraph (1) article 248 CP RM? The answer to this question is detached from point 9 of the Decision of the Plenum of the Supreme Court of Justice of the Republic of Moldova "On Judicial Practices in Cases of Contraband, Evasion of Payment of Customs Payments and Customs Contraventions", no. 5 of December 24, 2010 (hereinafter - CSJ Plenum Decision no. 5/2010)²²², according to which if the person, when

²¹⁹ Sucicov Iu. I., *op. cit.* (*Customs crimes: a study guide*), p. 17.

²²⁰ Official Gazette of the Republic of Moldova, 2014, no. 231-237.

²²¹ Stepanova O. G., *Проблемы определения стоимости предмета контрабанды: вопросы теории и практики* (*Problems of determining the value of the subject of contraband: theory and practice*), „Вестник Челябинского государственного университета” („Bulletin of Chelyabinsk State University”), no. 19 (234), 2011, p. 84-85.

²²² *Judgment of the Plenum of the Supreme Court of Justice of the Republic of Moldova "On Judicial Practices in Cases Related to Smuggling, Evasion of Payment of Customs Payments and Customs*

crossing the customs border, has a currency exceeding EUR 10,000, he is obliged to declare it to the customs authority, and upon the detection of the currency undeclared over EUR 10,000, the amount exceeding the amount allowed by law shall be deemed to be smuggled. By extrapolation we consider the explanation in question also valid for other cases provided by the law when it is permissible not to declare certain goods when they pass over the customs border in certain quantities (e.g. jewelry, etc.).

As regards the offense recorded in paragraph (2) of article 248 CP RM, the following entities may appear as material/immaterial object: a) narcotic substances; b) psychotropic substances; c) substances with strong effects; d) toxic substances; e) poisonous substances; f) radioactive substances; g) explosive substances; h) harmful waste; (i) products with a double destination.

In order to define the entities that form the material object of smuggling with goods possessing special qualities it is necessary to refer to some normative acts with a reference character. In this respect, it correctly supports P. A. Modestov of the terms used by the legislator to characterize the material object of skilled smuggling have in themselves independent legal concepts that are defined and concretized by a number of other normative acts²²³.

Thus, *narcotic and psychotropic substance* means a substance of natural or synthetic origin and a preparation containing such a substance which causes psychological disturbances and physical dependence on their abusive consumption. The list of narcotic and psychotropic substances can be found in Government Decision no. 79 of 23 January 2006²²⁴, approving the list of narcotic, psychotropic substances and plants containing such substances found in illicit traffic and their quantities. The following substances can be used as examples of narcotic substances: acetofine, marijuana, heroin, LSD, poppy extract, acetylated opium, benzylmorphine, cocaine, codeine, fentanyl, methadone etc. In the category of psychotropic substances, we include: amphetamine, amineptine, barbiturate, cyclodol, clofeline, lefetamine, tramadol, ibogaine, ketamine, mitraginine etc. We specify that the plants containing narcotic or psychotropic substances (poppy plant, hemp plant, horn plant, etc.), precursors, analogs of narcotic or psychotropic substances can not form the material object of the offense provided in paragraph (2) article 248 CP RM. It is not excluded, however, that they constitute a material object of the offense referred to in paragraph (1) of article 248 CP RM.

In the most frequent cases, when an entity crossing the customs border of the Republic of Moldova presents the narcotic or psychotropic substance, the committed ones are qualified according to the norm of paragraph (2) article 248 CP RM, and according to one of the norms of the Special Part of the Criminal

Contraventions", No. 5 of December 24, 2010, http://jurisprudenta.csj.md/search_hot_expl.php?id=26 (visited on 27.11.2015).

²²³ Modestov P.A., *op. cit.* (*Smuggling: public danger, qualification, questions of responsibility*), p. 17.

²²⁴ Official Gazette of the Republic of Moldova, 2006, no. 16-19.

Code, which criminalize the facts that mainly affect the social relations regarding the legal circulation of narcotic, psychotropic substances (for example, articles 217, 217¹ CP RM). In this case it is necessary to have at least one of the prejudicial acts referred to in articles 217 or 217¹ CP RM in addition to the crossing of the named entities over the customs border. Here is an example of the judicial practice when the offenses were qualified according to the rules of the crime contest: *by the judgment of the Ungheni Court on 25 July 2014, G.M. was sentenced on the basis of paragraph (2) of article 217 CP RM and on the basis of article 27, paragraph (2) article 248 CP RM. The court found that on March 15, 2014, at about 4:30 pm, G. M., following the purpose of the illegal circulation of narcotic drugs without a purpose of alienation, being in the Balti municipality, in circumstances unstable by the criminal investigating body, entered in possession of two packages of green vegetal mass, which he kept on himself and which, on March 16, 2014, at about 21.35 hours at the Sculeni customs check-out terminal, following the physical check of the luggage G. M.'s staff were found in his bag*²²⁵. Similar solutions have been taken in other criminal cases²²⁶.

Such a solution is framed from point 13 of the Plenary Session of the Supreme Court of Justice of the Republic of Moldova "On Judicial Practice for the Application of Criminal Legislation regulating the Movement of narcotic, psychotropic substances or their analogues and precursors", no. 2 of 26.12.2011 (hereinafter - CSJ Plenum Decision no. 2/2011)²²⁷, according to which "if, together with the smuggling, the person commits other offenses, for example offenses related to the illegal circulation of narcotic substances, psychotropic, actions of the culprit must be qualified in the competition".

A similar solution is suggested by R. Sobiełki. Thus, according to him, the qualification will be made by competition, in accordance with articles 217, 217¹ CP RM, if, in addition to the signs provided by article 248 CP RM, i.e. crossing the customs border by circumventing the customs control or concealing

²²⁵ Decision of the Supreme Court of Justice of 27 May 2015, File no. 1ra-625/15, www.csj.md (visited on 02.11.2015).

²²⁶ Decision of the Supreme Court of Justice of 27 May 2015, File no. 1ra-627/15, www.csj.md (visited on 07.11.2015); Decision of the Supreme Court of Justice of 12 March 2014, File no. 1ra-510/14, www.csj.md (visited on 07.12.2015); Decision of the Supreme Court of Justice of February 13, 2014, File no. 4-1re-97/14, www.csj.md (visited on 07.12.2015); Sentence of the Hâncești Court of May 22, 2013. File no. 1-102/2013, http://instante.justice.md/apps/hotariri_judecata/inst/jhn/jhn.php (visited on 07.12.2015); Judgment of the Ungheni Court of 25 July 2014, File no. 1-207/2014, http://www.jun.instante.justice.md/ro/hot?data_deciziei=&nr_dosar=&denumire_dosar=&tip_dosar=penal&page=28 (visited on 31.03.2016); Judgment of Ungheni Court of March 16, 2015, File no. 1-159/2015, http://www.jun.instante.justice.md/ro/hot?data_deciziei=&nr_dosar=&denumire_dosar=&tip_dosar=penal&page=17 (visited on 31.03.2016).

²²⁷ Judgment of the Plenum of the Supreme Court of Justice "On Judicial Practice for the Application of Criminal Legislation regulating the Movement of narcotic, psychotropic substances or their analogs and precursors", no. 2 of 26.12.2011. „Buletinul CSJ al Republicii Moldova”, no. 1/4, 2012.

it, hiding in places specially prepared or adapted for this purpose, or fraudulent use of documents or means of customs identification, by non-authentication or non-authentic declaration, the signs stipulated in articles 217, 217¹ CP RM shall also be included²²⁸.

However, in the judicial-criminal classification of those committed, questions of the perpetrator's actions related to the transportation of narcotic and/or psychotropic substances over the customs border of the Republic of Moldova arise, considering, on the one hand, according to DEX²²⁹, one of the meanings of the word "passage" from the provision of the rule of article 248 CP RM is "transport" and, on the other hand, the transportation of narcotic and/or psychotropic substances is one of the harmful injurious alternatives within the norms at paragraph (2), article 217 and paragraph (2) article 217¹ CP RM.

In order to identify the classification solution, we will appeal to the official judicial interpretation in the matter. Thus, according to point 4.13. of the CSJ Plenum Decision no. 2/2011, "actions related to the illegal transportation of narcotic, psychotropic substances or their analogues over the customs border of the Republic of Moldova shall be qualified based on an ideal contest of crimes stipulated by paragraph (2) article 248 CP RM, irrespective of the proportions in which it was committed and, as the case may be, by article 217 or article 217¹ CP RM. "In our opinion, the transportation of narcotic and psychotropic substances over the customs border of the Republic of Moldova should be qualified only according to paragraph (2) of article 248 CP RM, and no further framing is required according to articles 217 or 217¹ CP RM. However, according to the same Plenary Session of the Supreme Court of Justice, "the transportation of narcotic, psychotropic or analogous substances involves their movement from one place to another, including within one and the same locality, using any type of transport or of an object used as a means of transport, regardless of the place of storage of displaced substances, within the customs territory of the Republic of Moldova [emphasis belongs to us - *the author's note*]". Thus, transporting narcotic or psychotropic substances over the customs border is nothing more than passing over their customs frontier within the meaning of paragraph (2) of article 248 CP RM.

At the same time, if the perpetrator carries the respective substances within the customs territory of the Republic of Moldova, then passes illegally over the customs border of the Republic of Moldova, the perpetrated must be classified according to the norm of paragraph (2) article 248 CP RM and according to article 217 or, as the case may be, article 217¹ CP RM. However, in this hypothesis we will not be in the presence of the ideal contest of crimes, but of the real one. However, according to paragraph (3) of article 33 CP RM, the ideal

²²⁸ Sobiełki R., *op. cit.*, (*Contrabanda: aspecte juridico-penale: studiu monografic*), p. 177.

²²⁹ Coteanu I., Seche L., Seche M. et al, *Dicționar Explicativ al Limbii Române*, Bucharest: Univers enciclopedic, 1998, p. 1109.

contest exists when the person commits an action (inaction) that meets the elements of several crimes. In the present case, not in one action, but in several actions, the criminal offenses referred to in paragraph (2) of article 248 CP RM and article 217 or, as the case may be, article 217¹ CP RM (transportation inside the customs territory of the Republic of Moldova and the crossing over the customs border of the Republic of Moldova).

In the same way, we note that according to point 4.13. of the CSJ Plenum Decision no. 2/2011, "in the case of the transport of precursors over the customs border of the Republic of Moldova, the deed shall be subject to the provisions of paragraph (1) or paragraph (5) article 248 CP RM, provided that the value of those transported to be large or particularly large proportions; otherwise, the deed is to be classified in the provisions of article 217² CP RM". We support the recommended recommendation in the part concerning the qualification of the ones committed in accordance with the norm of paragraph (1) or paragraph (5) of article 248 CP RM in the case of the crossing of the precursors over the customs border of the Republic of Moldova. This is because the precursors do not fit into any of the categories of material entities with special qualities provided in paragraph (2) article 248 CP RM. Therefore, it remains to be considered a material object of the offense referred to in paragraph (1) of article 248 CP RM - if the value of the precursors exceeds 2,500 conventional units, or at letter d) paragraph (5) article 248 CP RM - if the value of precursors exceeds 5,000 conventional units.

After this digression, we still note that *substances with strong effects* are medicines or other means whose use without prescription by physicians or in breach of the dosage rules can cause serious damage to the human body²³⁰. Substances with strong effects are listed in List 2 of Table 5 of the Decision of the Standing Committee on Drugs Control "Narcotic drugs, psychotropic substances, which are under international control in accordance with the UN Conventions of 1961, 1971 and 1988 on the territory of the Republic of Moldova ", no. 7 of 01.12.1998²³¹.

Toxic substances are considered substances whose use by a person can cause death. Toxic substances are listed in List 1 of Table 5 of the Decision of the Standing Committee on Drugs Control "Narcotic substances, psychotropic substances, which are under international control, in accordance with the UN Conventions of 1961, 1971 and 1988 on the territory Republic of Moldova", no. 7 of 01.12.1998. The smuggling of toxic substances was retained in the following case: *M. N., on 29 October 2014, presenting itself at the entrance to the Criva-Mamaliga (auto) customs station, did not declare 45 packets of poisoned bait for*

²³⁰ Brînză S., Stati V., *op. cit. (Tratat de drept penal. Partea Specială)*, vol. II, p. 283; Stati V., *op. cit. (Infrațiuni economice: Note de curs)*, p. 432.

²³¹ Official Gazette of the Republic of Moldova, 1999, no. 16-18.

rodents, which according to the report of expertise is a preparation with a toxic effect²³².

Poisonous substances should be understood as high-toxicity chemical combinations intended for vulnerability of live force during military operations²³³.

Radioactive substances are substances containing bodies with radioactivity properties that are subject to state control within the meaning of the Law of the Republic of Moldova on the safe conduct of nuclear and radiological activities, no.132 of 08.06.2012²³⁴. The category of radioactive substances includes substances that are not nuclear materials but which eliminate ionized luminescence²³⁵. In this context, we mention that the smuggling of radioactive substances was also retained in the judicial practice of the Republic of Moldova²³⁶.

Explosive substances include substances used for explosions in industry or in the military. Explosives are combinations of chemical and mechanical substances liable to cause an explosion (trotyl, rocket fuel, etc.). Explosive substances are metastable substances (or mixtures of substances) that are susceptible to undergoing heat or mechanical damage by explosive transformations which rapidly react, break down suddenly and violently with strong heat, light and gas development, causing a large increase in pressure in their environment.

According to the Explanatory Dictionary of Romanian Language²³⁷, waste represents a rest of a material resulting from a technological process of making a particular product, which can no longer be used directly for the realization of the product. Harmful waste is the consequence of the processing of explosive and radioactive substances, which are dangerous to human life and health. By *waste*, within the meaning of the Law of the Republic of Moldova on production and household waste, no. 1347 of 09.10.1997²³⁸, are meant the substances, materials, objects, scraps of raw materials from economic, domestic and consumer activities, which have lost, in whole or in part, the initial use value, some of which are reusable after processing. *Harmful waste* means substances, materials, objects, scraps of raw materials from economic, domestic and consumer activities that have lost all or part of their initial use value and can cause harm to

²³² Briceni Court Sentence of May 13, 2015, File no. 1-44/2015, http://www.jbr.instante.justice.md/ro/hot?data_deciziei=&nr_dosar=&denumire_dosar=&tip_dosar=penal&page=7 (visited on 31.03.2016).

²³³ Brînză S., Stati V., *op. cit. (Tratat de drept penal. Partea Specială)*, vol.II, p. 283; Stati V., *op. cit. (Infrațiuni economice: Note de curs)*, p. 433; Stati V., *op. cit. (Infrațiuni săvârșite în sfera activității economice externe (art.248 și 249 CP RM): studiu de drept penal)*, p.127; Brînză S., Stati V., *op. cit. (Drept penal. Partea Specială)*, vol. II, p. 127.

²³⁴ Official Gazette of the Republic of Moldova, 2012, no. 229-233.

²³⁵ Sobiețki R., *op. cit. (Contrabanda: aspecte juridico-penale: studiu monografic)*, p. 86.

²³⁶ Chisinau Court of Appeal's decision of 25 September 2015, File no. 1a-838/15, <http://instante.justice.md/cms/cac-menu> (visited on 07.12.2015).

²³⁷ Coteanu I., Seche L., Seche M. et al., *op. cit. (Dicționar Explicativ al Limbii Române)*, p. 291.

²³⁸ Official Gazette of the Republic of Moldova, 1998, no. 16-17.

living organisms and humans. The list of harmful waste is laid down in the Government Decision of the Republic of Moldova on the Control of Transboundary Transport of Wastes and their Disposal, no. 637 of 27.05.2003²³⁹. According to this legislation, hazardous waste is waste that has one or more of the hazardous characteristics and is included in List A (specified in Annex 1 to the Regulation on the Control of Transboundary Movements of Wastes and their Disposal).

By means of *dual-use products*, according to the Law of the Republic of Moldova on the control of export, re-export, import and transit of strategic goods, no. 1163 of 26.07.2000²⁴⁰, all technical-scientific knowledge, processes, materials and equipment used for the production, production and exploitation of civilian production, which may also be used in the production of military, nuclear, chemical, biological, and other weapons of mass destruction and weapon delivery and conventional weapons. Given the incorporeal nature of scientific and technical knowledge, processes that can also be used to manufacture military, nuclear, chemical, biological, and other weapons of mass destruction and weapon delivery and conventional weapons, we conclude that dual-purpose products, as a rule, form the immaterial object of the offense provided for in paragraph (2) of article 248 CP RM.

In another context, for the qualification of those committed according to paragraph (2) of article 248 CP RM does not concern the value of the entities crossed over the customs border of the Republic of Moldova. This can only count on the purpose of establishing the criminal punishment.

Concerning smuggling incriminated in paragraph (3) of article 248 CP RM, we specify that the material object of the offense may be: a) weapons; (b) explosive devices; c) ammunition.

Regarding the notion of "*armaments*", we consider that, first of all, it corresponds to all the weapons according to the Law of the Republic of Moldova on the regime of arms and ammunition for civilian use, no.130 of 08.06.2012²⁴¹. By weapon, in the sense of the above-mentioned law, any object or device, designed or adapted, by which a lead, a bullet or other projectile or a gaseous, liquid or other harmful substance can be discharged by means of an explosive, gaseous or atmospheric pressures, or through other propelling agents, to the extent that it is found in one of the categories set out in Annex 1 to the Law. For the classification of those committed in accordance with paragraph (2) article 248 CP RM, the type of weapon is not relevant: firearm, sporting weapon, hunting gun, etc. Eventually, this can be taken into account when applying the penalty.

Secondly, this category includes the technical means of fighting. In this respect, according to DEX²⁴², weapons include both weapons and all technical

²³⁹ Official Gazette of the Republic of Moldova, 2003, no. 099.

²⁴⁰ Official Gazette of the Republic of Moldova, 2000, no. 137-138.

²⁴¹ Official Gazette of the Republic of Moldova, 2012, no. 222-227.

²⁴² Coteanu I., Seche L., Seche M. et al., *op. cit. (Dicționar Explicativ al Limbii Române)*, p. 59.

means of combat. A similar approach is drawn in the native doctrine. Thus, S. Brînză, V. Stati and Gh. Nicolaev claim that the notion of "armament" is generic for all types of weapons and military equipment²⁴³. The same opinion is A.A. Vitvițkii²⁴⁴. Moreover, such a conclusion results from the logical interpretation of the text of the law. We believe that the will of the legislator is not just about including weapons in the armament category. Otherwise, what would be the solution to the hypothesis over which military equipment would pass over the customs border? In addition, referring to the historical interpretation method, we come to the same conclusion. In the text of paragraph (3) article 75 CP RM in the edition of 1961, as a material object were separately provided weapons and firearms.

Explosive devices must understand the technical means intended to carry out its explosion or conduction for military, industrial, hydrological or other purposes²⁴⁵.

Ammunition refers to the totality of cartridges for infantry, grenades, artillery shells, aviation bombs, etc., but not ammunition in the sense of the Civil Aviation Arms and Civil Weapons Law, which gives a lot of definition too narrow.

As in the case of the offense provided for in paragraph (2) of article 248 CP RM, the value of the entities crossed over the customs border of the Republic of Moldova shall not be relevant for the classification of smuggling according to paragraph (3) article 248 CP RM. Eventually, such circumstance may be relevant to the determination of the criminal punishment. We consider that the legislator does not rightly link the crossing over the customs frontier of those entities to their value in terms of their money, given the social danger that these entities involve, being limited goods in the civil circuit.

As a material object of the smuggling provided in paragraph (4) of article 248 CP RM, regardless of the form of expression of the prejudicial act, the cultural values appear.

According to the Law of the Republic of Moldova on the way of introducing and removing goods on the territory of the Republic of Moldova by individuals, cultural values are considered objects which, according to the determination of the competent body, are a value for art, literature, science, culture and religion.

²⁴³ Brînză S., Stati V., *op. cit. (Tratat de drept penal. Partea Specială)*, vol. II, p. 284; Stati V., *op. cit. (Infrațiuni economice: Note de curs)*, p. 434; Stati V., *op. cit. (Infrațiuni săvârșite în sfera activității economice externe (art.248 și 249 CP RM): studiu de drept penal)*, p. 128; Poalelungi M., Dolea I., Vizdoagă T. et al., *op. cit. (Manualul judecătorului pentru cauze penale)*, p. 848.

²⁴⁴ Vitvițkii A. A., *op. cit. (Crimes in the sphere of foreign economic activity...)*, p. 63-64.

²⁴⁵ Stati V., *op. cit. (Infrațiuni săvârșite în sfera activității economice externe (art.248 și 249 CP RM): studiu de drept penal)*, p. 128; Stati V., *op. cit. (Infrațiuni economice: Note de curs)*, p. 434; Brînză S., Stati V., *op. cit., (Tratat de drept penal. Partea Specială)*, vol. II, p. 284.

According to article 133 CP RM, cultural values of a religious or secular nature are the values indicated in the United Nations Convention on Education, Science and Culture of November 14, 1970 on measures aimed at prohibiting and preventing the introduction, removal and transmission of the right to ownership of cultural values²⁴⁶. According to article 1 of the Convention, cultural objects are considered to be those religious or secular goods which are designated by each State as being of particular importance for archeology, prehistory, history, literature, art or science and which are part of the following categories: a) rare collections and specimens of zoology, botany, mineralogy and anatomy; objects exhibiting paleontological interest; b) goods related to history, including history of science and technology, military and social history, as well as the life of national leaders, thinkers, scholars and artists, as well as events of national importance; c) objects obtained by archaeological research (authorized or clandestine) and archaeological discoveries; d) elements arising from the dismantling of artistic or historical monuments and archaeological sites; e) objects older than one hundred years, such as inscriptions, coins and engraved seals; f) ethnological material; g) goods of artistic interest, namely: (i) paintings, paintings and drawings, made entirely, manually, on any medium and in any material (excluding industrial drawings and manufactured articles, hand-decorated); (ii) original objects of monumental and sculptural art, of any material; (iii) original engravings, stamps and lithographs; (iv) original packaging and moldings, of any material; h) rare and incunabula manuscripts, books, documents and old publications of special interest (historical, artistic, scientific, literary, etc.), singular or belonging to collections; i) postage stamps, tax and analogue stamps, singular or in collections; (j) archives, including photographic, phonographic and cinematographic archives; k) pieces of furniture with over one hundred years old and old musical instruments. Also, in order to identify the material object of smuggling provided for in paragraph (4) of article 248 CP RM, the provisions of the Law of the Republic of Moldova on the protection of the national mobile cultural heritage, no. 280 of 27.12.2011, are also useful²⁴⁷.

In the same vein, we note that goods other than those referred to in paragraphs (1) - (4) of article 248 CP RM can not constitute a material/immaterial object of smuggling. The inclusion in this category by the law enforcement officer of entities other than those expressly provided by the legislator in the provision of incriminating rules would be equivalent to ignoring the principle of the lawfulness of criminality by promoting the broadly unfavorable interpretation of the criminal law.

²⁴⁶ *UNESCO Convention on measures to be taken to prohibit and prevent illicit import, export and transfer of property of cultural goods*, (14.11.1970) [http://archaeoheritage.ro/downloads/ArchaeoHeritage.ro%20-%20International%20Archaeological%20Legislation%20\(Romanian\).pdf](http://archaeoheritage.ro/downloads/ArchaeoHeritage.ro%20-%20International%20Archaeological%20Legislation%20(Romanian).pdf) (consulted on. 15.02.2018).

²⁴⁷ Official Gazette of the Republic of Moldova, 2012, no. 82-84.

For example, it would not fall under article 248 CP RM to cross the customs border of the Republic of Moldova with *false money signs*. An identical position is expressed in paragraph 13 of the CSJ Plenum Decision no. 5/2010, according to which the foreign currency can not constitute a material object of smuggling. The same explanation applies to false securities. Other authors are on the same position²⁴⁸.

However, such a detrimental act does not escape criminal law. In this respect, according to point 13 of the CSJ Plenum Decision no. 5/2010, if the person, bypassing the customs control or by concealing it, passes over the customs border of the Republic of Moldova, which in fact is false, the actions of this person must be qualified only in accordance with article 236 CP RM - the manufacture or putting into circulation of false money or false securities. More specifically, the crossing over the customs border of the Republic of Moldova of money signs and/or false securities for putting it into circulation must be qualified as a preparation for the commission of one of the offenses provided by article 236 CP RM (provided the perpetrator does not those entities were manufactured). If the perpetrator has produced the money signs and/or the false securities which he subsequently crosses the customs border, the committed ones have to be classified according to article 236 CP RM in consumed form.

Which must be the solution to the hypothesis where the perpetrator mistakenly believes that genuine money signs pass over the customs border, but in reality they are false? We believe that the answer to this question must be detached from the content and the intention of the perpetrator. Thus, since he considers that genuine money is passed over the customs border, the commissions must be framed according to article 248 CP RM, but not according to article 236 CP RM. At the same time, considering that the criminal intention does not correspond to the objective reality, the committed ones are to be classified as attempted smuggling with authentic money signs [article 27, paragraph (1) article 248 CP RM - assuming that the quantitative parameters of the material object are the large proportions or, article 27, letter d) paragraph (5) article 248 CP RM - assuming that the quantitative parameters of the material object form the particularly large proportions].

It should be noted that from the perspective of the comparative law analysis, in the Penal Code of the People's Republic of China, article 151 stipulates, *inter alia*, the smuggling of false money. A similar legislative model is found in the Criminal Code of Ukraine, which, *inter alia*, establishes at the article 199 the criminal liability for the importation on the territory of Ukraine of the fake national currency in the form of banknotes and coins, foreign currency, as well as

²⁴⁸ Stati V., *op. cit.* (*Infrațiuni economice: Note de curs*), p. 437; Sobiețki R., *op. cit.* (*Contrabanda: aspecte juridico-penale: studiu monografic*), p. 99.

values state-owned securities. Counterfeit money with false money and false securities is also criminalized in the Turkish Criminal Code²⁴⁹.

It is noteworthy that the illegal crossing of the human organs, parts of human organs, tissues and human cells over the Moldovan customs border must be qualified according to the norm of paragraph (1) article 158 CP RM or, as the case may be, according to paragraph (2) article 158 CP RM (trafficking in human organs, tissues and cells).

In another register, we mention that in describing the material/immaterial object of the offenses under the marginal smuggling name, the legislator uses the plural. That is why we have to answer the following question: what must be the qualification solution in the case of passing a single good (e.g. a means of transport) over the customs border? In answer to this question, we will appeal to N. Giurgiu's point of view. "From the syntactic point of view, if the use of the singular also implies the plural, it does not mean that the use of the plural "exceeds" the singular, but, on the contrary, or the law disciplines them separately, both separation and exclusion must be determined explicitly".²⁵⁰ It is common ground that, as a rule, more goods are crossed over the customs border by smuggling. However, the hypothesis of passing a single good across the customs border (eg one means of transport) is not excluded. In our opinion, one of the rules of article 248 CP RM will be infringed in this situation. However, the use of the plurality by the legislator in the provision of the rule of criminalization was most likely conditioned by the potential of the use of perpetrators, in most cases, of passing more goods across the customs frontier. We do not consider, however, that the legislator had the intention to penalize only the passage of more goods across the customs border. At least this does not result from the legal nature of the existing criminality. In fact, the emphasis is on the value parameters of the material object (in the case of goods in the civil circuit) or on the fact that certain goods are restricted or forbidden in the civil circuit, not on the number of goods passed over the customs border. For these reasons, crossing a single good (e.g. a single means of transport, a single weapon, a single object of cultural value, etc.) across the border would be sufficient to be in the presence of offenses smuggling.

In the following we will submit to the analysis the material object of the offenses provided by article 249 CP RM. According to the provision of the criminality rule, we realize that the material object of the said offense is the following: *customs payments in large proportions* (in the case of the offense provided by paragraph (1) article 249 CP RM) or *customs payments in particularly large proportions* offense referred to in paragraph (3) article 249 CP RM). We specify that if the material object materializes in the customs payments in small proportions, the rule from paragraph (13) article 287 C. contr. RM. In the context, R. Sobietki

²⁴⁹ *Criminal Code of the Republic of Turkey*, <http://www.legislationline.org/documents/section/criminal-codes> (visited on 26.12.2015).

²⁵⁰ Giurgiu N., *op. cit. (Legea penală și infracțiunea)*, p. 23.

rightly mentions that the value of customs payments is not a sign of the objective side, but a quantitative sign of the material object of the offense²⁵¹. Indeed, the proportions (large, particularly large) characterize the quantitative aspect of the customs payments from the payment of which the perpetrator has escaped. Similarly, the authors of V. D. Laricev and N. S. Ghilimutdinova notes that the material object of the evasion offenses from the payment of the customs payments is characterized by quantitative and qualitative indices, where the quantitative indices are expressed in the large proportions of the unpaid customs payments²⁵².

As regards the customs payment, as a material object of the offenses stipulated in article 249 CP RM, we note that it appears as a result of the existence of the customs obligation. One of the customs obligations when goods cross the customs border is the obligation to pay import and export duties. In accordance with article 1 CV RM, import and export rights include: customs duty, customs procedure, value added tax, excise duties and any other amounts due to the state upon importation of goods, collected by the customs with the legislation; duty for customs procedures, any other amounts due to the State for the export of goods, collected by the customs authority in accordance with the legislation.

In the case of goods crossing the customs border and in other cases stipulated by the legislation, the following shall be considered as import duties and respectively export duties: a) customs duty; b) value added tax; c) excise duties; d) duty for customs procedures. For the classification of those committed in accordance with the rule of sanctioning the evasion of payment of customs payments, it does not matter the type of customs payment from the payment of which the perpetrator has escaped²⁵³.

As far as customs duties are concerned, we must mention *ab initio* that in any economy they have had and have a complex role, constituting, first of all, an instrument that ensures the protection of national production and producers, the widening of economic cooperation and, secondly, a source of income for the state budget²⁵⁴. According to the Law of the Republic of Moldova on the Customs Tariff, no. 1380 of 20.11.1997²⁵⁵, the customs duty is a tax collected by the customs body according to the customs tariff of import. P. Turcan defines the customs duty as the indirect tax levied by the customs authorities in the case of the introduction or removal of goods from the customs territory of a State²⁵⁶. As far as we are concerned, we are in the position that the customs tax is an indirect tax

²⁵¹ Sobietki R., *op. cit.* (*Contrabanda: aspecte juridico-penale: studiu monografic*), p. 95.

²⁵² Laricev V. D., Ghilimutdinova N. S., *op. cit.* (*Customs crimes*), p. 139.

²⁵³ Cociubei M. A., *op. cit.* (*Criminal liability for crimes in the sphere of customs activity*), p. 13-14.

²⁵⁴ Pasat O., *Analiză asupra infracțiunilor vamale comise pe teritoriul României până în anul 1989 prin prisma metodei istorice*, „Revista Națională de Drept”, no. 3, 2014, p. 69.

²⁵⁵ The Official Gazette of the Republic of Moldova, 1998, no. 40-41.

²⁵⁶ Țurcan P., *Reglementarea tarifară a operațiunilor de import-export*, PhD thesis in law, Chișinău, 2015, p. 14.

levied by the state when goods are passed over the customs frontier of a particular state²⁵⁷.

We distinguish several types of customs duties: 1) *ad valorem*, calculated as a percentage of the customs value of the goods; 2) *specific*, calculated on the basis of the tariff set at one unit of cargo; 3) *combined*, combining the above-mentioned types of customs duties; 4) *exceptional*, which in turn is divided into: a) *special tax* applied for the protection of goods of indigenous origin from the introduction in the customs territory of the foreign production goods in quantities and under conditions that cause or may cause considerable material damage producers of domestic goods; b) *anti-dumping duty* levied in the case of the introduction into the customs territory of goods at prices lower than their value in the country of export at the time of importation, if the interests are harmed or there is a risk of causing material injury to domestic or similar goods producers or organizing or extending the production of identical or similar goods in the country; c) *a countervailing charge* applied in the case of the introduction into the customs territory of goods in the production or export of which subsidies have been used, directly or indirectly, if the interests are harmed or there is a risk of causing material damage to domestic or similar goods obstacle to organizing or extending the production of identical or similar goods in the country. According to the purpose, customs duties are classified into: a) *customs duties of a fiscal nature*; b) *customs duties of a repressive nature*²⁵⁸. The classification of the commissions does not matter the type of customs payment from the payment of which the perpetrator has escaped. This can only be relevant for the purpose of establishing the criminal punishment.

The Law of the Republic of Moldova on the Customs Tariff establishes a full list of situations in which relief from customs duty may take place. In these cases, no payment of the customs duty is required, the rule from article 249 CP RM can not be infringed; the person is not even required to pay the customs duty. In the same register, we mention that the amount of customs duties for goods/goods crossed over the customs border of the Republic of Moldova is set in the Combined Nomenclature of Goods.

As regards value added tax as a customs payment to be paid when goods cross the customs border of the Republic of Moldova, the Customs Code does not define it. The normative support of this notion is the Fiscal Code of the Republic of Moldova²⁵⁹, where, according to point 1), article 93, *the value added tax* is defined as a state tax which represents a form of collection of a part of the value of the goods delivered services that are subject to taxation on the territory of the

²⁵⁷ Pasat O., *Customs duties. Customs tariff*, „Perspectives of Business Law Journal”, Volume 2, Issue 1, November 2013, p. 166.

²⁵⁸ Pasat O., *op. cit.* (*Customs duties. Customs tariff*), p. 167.

²⁵⁹ Official Gazette of the Republic of Moldova, 1997, no. 62/552.

Republic of Moldova, as well as part of the value of goods, taxable services imported into the Republic of Moldova.

The taxable value-added tax on imported goods is their customs value, determined under the law, and import duties (excluding VAT). As with the customs duty, there is a full list of exemptions from the value added tax on the passage of goods/goods across the customs border of the Republic of Moldova, in which case the issue of the application of article 249 CP RM is excluded.

The fee for customs procedures is the fee for services provided by the customs authority, the list and amount of which are provided for by law. Customs procedures are all the services provided by the customs authorities in the field of customs activity. The nomenclature of these services and the fees for them are approved in accordance with the Law on Customs Tariff. The fee for customs procedures shall be paid for the use of any customs destination, except for the abandonment to the State, unless the law otherwise provides. The basis for calculating the duty for customs procedures is the customs value of the goods or the fixed fees, according to the law. The list of customs services and the amount of duty for customs procedures is set out in Annex no. 2 to the Law on Customs Tariff. For services other than those listed in this list, the fee for customs procedures is not collected. In such cases, we can not talk about a possible application of the rule under article 249 CP RM, lacking the obligation to pay such a payment.

For the purposes of point 1) of article 119 CF RM, the *excise duty* constitutes a state tax established for some consumer goods. Objects of taxation are goods subject to excise duties specified in the Annexes to Title IV of the Fiscal Code of the Republic of Moldova. The excise rates shall be established: a) in absolute amount per unit of measurement of the goods; b) *ad valorem* as a percentage of the value of the goods, without taking into account excise duties and VAT, or of the customs value of the imported goods, taking into account the taxes and duties to be paid at the time of import, without excises and VAT are taken into account. The basis for the calculation of excise duty is the natural volume or customs value of the imported goods, determined under the law, as well as the taxes and duties to be paid at the time of import, without taking into account excise and VAT.

As with value added tax, the Fiscal Code contains a list of goods/commodities in respect of which excise payments are established.

Regarding the legislation of Romania, as in the case of the Republic of Moldova, the norm of article 270 CV Rom stipulates as material/immaterial object any entity liable to illegal crossing over Romania's customs border, except for those having special qualities, which is a material object of skilled smuggling. So within the category of material/immaterial entities are included the goods and the goods. They have the same meaning as in Moldovan legislation. *Generaliter*, the material object of smuggling offenses, is the goods stolen from customs clear-

ance and its taxation (goods, regardless of their nature and nature) or goods prohibited from crossing the border without authorization (weapons, ammunition, narcotics, toxic materials, etc.)²⁶⁰.

Here is a case in the judicial practice that highlights the material entity that crosses the customs border and which forms the material object of smuggling: *through the criminal sentence no. 65 of January 25, 1995, pronounced by the Giurgiu Court, the defendant P.N. In fact, on September 10, 1994, the defendant P. N. the amount of 1,500 packs of cigarettes hidden in four vodka packages was paid through Customs Giurgiu to pay reduced customs duties, namely 9,984 RON instead of 250,000 RON. The fact was discovered after leaving the customs and after the control carried out by the customs bodies through the police*²⁶¹.

The material object of smuggling offenses constitutes any good (or any plurality of goods) which, under the law, is subject to customs control²⁶². It does not matter whether the goods are fungible or not, consumable or non-consumable, main or accessories, etc.²⁶³ It is important that they are movable goods. Real estate can not form a material object of smuggling because it is immutable by definition, resulting from the content of the norm of article 537 of the Romanian Civil Code²⁶⁴. It is therefore impossible to enter the real estate in the customs territory, as it is impossible to remove these goods from the customs territory of Romania. At the same time, the material object of the smuggling offenses will be the movable goods detached from the immovable property.

After this incursion, we mention that the material object of smuggling provided in paragraph (1) article 270 CV Rom, is the goods and goods to be subjected to a customs regime. In the context, we adhere to the point expressed by S. Corlățeanu that if goods passed through places other than those established for customs control are not subject to the customs regime, they are not interested in the smuggling offense, and such an act is not offense (for example, personal belongings or luggage)²⁶⁵.

The material object of smuggling provided under letters a) and b) paragraph 2, article 270 CV Rom is the goods or *merchandise to be placed under a customs regime*. According to point 20, article 4 CV Rom, the types of customs regime are considered: the release for free circulation, the transit, the customs warehouse, the inward processing, the processing under customs control, the temporary admission, the passive improvement, the export.

²⁶⁰ Pasat O., *op. cit. (Analiza juridico-vamală a contravențiilor, infracțiunilor vamale prevăzute de Codul vamal al României aflat în vigoare)*, p. 72.

²⁶¹ Tudor G., *op. cit. (Infracțiunea de contrabandă. Practică judiciară)*, p. 274.

²⁶² Cudrîțescu P.G., *op. cit. (Infracțiunea de contrabandă)*, p. 96; Sandu F., *op. cit. (Contrabanda – componentă a crimei organizate)*, p. 15.

²⁶³ Sandu F., *op. cit. (Contrabanda – componentă a crimei organizate)*, p. 17-18.

²⁶⁴ Official Gazette of Romania, Part I, no. 505 of June 15, 2011.

²⁶⁵ Corlățeanu S., *op. cit. (Reflecții în legătură cu infracțiunea de contrabandă)*, p. 168.

Please note that in comparison with the material object of the smuggling offense referred to in paragraph (1) article 270 CV Rom, in the case of the offense referred to in letter a) paragraph 2, article 270 CV Rom it is necessary that the material/immaterial entity to possess some quantitative parameters. *In concreto*, it is necessary that the value of the goods or goods to be placed under a customs procedure and which are introduced into or out of the country through the places established for customs control, but by avoidance of customs control, shall be: a) 20,000 lei in the case of products subject to excise duties *or* b) 40,000 lei for other goods or commodities. It is not necessary to have the respective quantitative indices when the above-mentioned criminal offense is committed twice in the course of one year, a fact that falls within the scope of letter b) paragraph (2) article 270 CV Rom.

Next we will identify the material object of the smuggling offense referred to in letter c) paragraph (2) article 270 CV Rom. It follows from the provision of the rule of criminality that it is *goods in customs transit*. The transit procedure is the one which allows the transport of goods from one customs office to another, without being subject to import duties or commercial policy measures.

Regarding the material object of the offense referred to in paragraph (3) article 270 CV Rom, *ab initio*, we mention that, according to the text of criminalization, a series of actions/operations (listed in a limitative) as object material goods or commodities to be placed under a customs regime, subject to the knowledge by the author of the fact that such goods/commodities come from smuggling or are intended to commit smuggling. The legal content of the offense referred to in paragraph (3) of article 270 implies a presumed situation consisting in the existence of a property deriving from the commission of a criminal law act, regardless of whether, in relation to the perpetrator of the offense provided for by the criminal law, or not criminal nature. As a material object of the said offense, therefore, may appear: *goods which may come from acts committed in accordance with paragraphs (1), (2) of the same article; goods to be placed under a customs procedure and imported/removed from the country through places other than those established for customs control; goods which have to be placed under a customs procedure and imported/removed from the country through the places established for customs control, but removed from customs control, irrespective of their customs value.*

Regarding the material object of the smuggled offense incriminated in article 271 CV Rom, in the category of material entities with special qualities susceptible of illegal crossing over the customs border can be highlighted: a) arms; b) ammunition; c) explosive materials; d) drugs; e) precursors; f) nuclear materials; g) radioactive substances; h) toxic substances; i) waste; (j) residues; k) hazardous chemicals.

We specify that the stated material entities have an alternative character, it being sufficient to cross the customs border of a single entity, as well as the ones committed to be classified according to article 271 CV Rom. Illustrative is

the following fragment of a decision in judicial practice: *the defendant's claims, according to which the offense provided in article 271 CV Rom has a multiple material object represented by "weapons, ammunition, explosive materials, etc." can not be accepted as grounded and the introduction of a single non-lethal weapon in the country can not achieve the objective side of the smuggling crime. It has been found that the objective aspect of the offense is the act of introducing into the country, the material object of the offense being an alternative [emphasis belongs to us - the author's note] and the introduction in the country of any of the objects mentioned in the said text leads to the existence of the offense*²⁶⁶.

After this statement, in another context, the Romanian Law on the regime of weapons and ammunition, no. 295/2004²⁶⁷, the definition of *weapon* emerges as any device whose function determines one or more throwing projectiles, explosives, lit or bright, incendiary mixtures or spreading of harmful, irritating or neutralizing gases, insofar as they are found in one of the categories listed in the Annex to the Law. The *ammunition* must be understood as cartridges, projectiles and cargo of any kind, which can be used for the weapons described above. Regarding the crime of smuggling qualified weapons we refer to the case Criminal Section of the High Court of Cassation and Justice of Romania: *in fact, it was noted that the defendant S. Z., when he came from Italy in August 2006, had unlawfully introduced into the country a "C" gas pistol with its ammunition, without declaring it to the customs authorities, after which went to his home where he held them without right until August 2007*²⁶⁸.

The drug in the sense Romanian criminal law, it is contemplated plants psychotropic and narcotic substances or mixtures containing such plants and substances (Law on preventing and combating trafficking and illicit drugs no. 143 of 26.07.2000)²⁶⁹. In the following case in court practice, the drug was detained as a material object of the skilled smuggling offense: *in fact, on 15 July 2008, the defendant S. E. he presented himself at the Nadlac border crossing, Arad County, to leave Romania. On the occasion of the inspection, it was found that the sheet of the machine has an adhesive tape cut, which is why a more thorough control has been carried out. Four cartons were found above the cargo, containing a powdered substance that responded positively to the MMC test for heroin, with a total of 58.97 kg*²⁷⁰.

²⁶⁶ Decision of the Criminal Section of the High Court of Cassation and Justice, no. 3961 of 11 December 2013, <http://www.scj.ro/1093/Detalii-jurisprudenta?customQuery%5B0%5D.Key=id&customQuery%5B0%5D.Value=119106> (visited on 01.03.2016).

²⁶⁷ Official Gazette of Romania, Part I, 2004, no. 583.

²⁶⁸ Decision of the Criminal Section of the High Court of Cassation and Justice, no. 1429 of April 24, 2014 <http://www.scj.ro/1093/Detalii-jurisprudenta?customQuery%5B0%5D.Key=id&customQuery%5B0%5D.Value=118401> (visited on 01.03.2016).

²⁶⁹ Official Gazette of Romania, Part I, 2000, no. 362.

²⁷⁰ Tudor G., *op. cit. (Infracțiunea de contrabandă. Practică judiciară)*, p.165.

By *precursor*, within the meaning of the law, substances commonly used in the manufacture of drugs have to be understood. We note that, compared to the criminal law of the Republic of Moldova, in Romania the legislator included the precursor in the category of material entities with special qualities liable to cross the customs border illegally. Taking into account the seriousness that it carries across the customs border of such entities that serve as raw material for the manufacture of narcotic drugs and the psychotropic consider appropriate to include precursor in the list of entities material which crossed illegally the customs border of the Republic of Moldova, by completing the paragraph (2) article 248 CP RM similar to the norm inscribed in article 271 CV Rom. We note that the criminal law of some foreign states contains the precursor as an entity capable of appearing as a material object of smuggling (for example, article 229.1 CP FR, article 305 CP Uc etc.).

According to the Romanian Law on the Safe Deployment, Regulation, Authorization and Control of Nuclear Activities, no. 111 of 10 October 1996²⁷¹, *nuclear material* means any nuclear raw material and any special fissionable material. According to the Decision of the Romanian Government on the classification, packaging and labeling of dangerous substances, no. 1408 of 04 November 2008²⁷², *toxic substances* are understood to mean substances and preparations which, even in small quantities, may induce inhalation, swallowing or penetration or acute or chronic health conditions. By *waste*, within the meaning of the Romanian Waste Law no. 211 of November 15, 2011²⁷³, is meant any substance or object which the holder discards or intends or is obliged to discard. By the *residue*, it is to be understood a remainder left behind by a chemical or physical process on a raw material.

Within the meaning of the Romanian Law on the Control of Hazardous Chemical Substances and Preparations, no. 360 of September 2, 2003²⁷⁴, dangerous substances and preparations are those stipulated in Article 7 of the Government Emergency Ordinance no. 200/2000 on Classification, Labeling and Packaging of Substances and dangerous chemical preparations.

It is easy to see that the material object of the smuggling crime is formed by entities that have a strict legal regime. For example, the Romanian Law on state monopoly regime, no. 31/1996²⁷⁵, as activities constituting a state monopoly, indicates: the manufacture and sale of weapons, munitions and explosives; the production and marketing of drugs and drugs containing narcotic substances;

²⁷¹ Official Gazette of Romania, Part I, 1998, no. 78, republished in the Official Gazette of Romania, 2006, no. 552.

²⁷² Official Gazette of Romania, Part I, 2008, no. 813.

²⁷³ Official Gazette of Romania, 2011, no. 837.

²⁷⁴ Official Gazette of Romania, Part I, 2003, no. 635, republished in the Official Gazette of Romania, 2014, no. 178.

²⁷⁵ Official Gazette of Romania, 1996, no. 96.

extraction, production and processing of precious metals and precious stones for industrial purposes.

In other news, the material object of the offenses provided in article 272 and 273 CV Rom, in the case of use of unreal and falsified documents, is the unreal or falsified documents.

The unrealistic acts specified in article 272 CV Rom are those documents that do not correspond to the goods and goods presented to the customs. *Fake customs documents* must be understood as any official or private signature with a probative function in the falsified customs system, in other words, any entity which is liable to generate legal consequences in the sphere of customs relations but whose truth is altered (denatured) or whose content is untrue²⁷⁶.

Which documents, however, are included in the category of "false or unrealistic customs documents"? According to the Moldovan author V. Stati, the material object of the offenses under Articles 177 and 178 of the Customs Code of Romania (according to the new Customs Code, these are articles 272 and 273) are customs, transport or trade documents²⁷⁷. Also, the Romanian author G. I. Olteanu considers that the material object of the offense for use of unreal and counterfeit acts, regardless of the manner or form of committing, is the documents that appear before the customs authority - in the formulation of the Customs Code "customs or transport documents"²⁷⁸. In fact, the answer to the above question is given by the legislator himself, who has expressly indicated in the disposition of the rules of criminalization the type of unreal or falsified document used by the perpetrator to pass over the goods across the customs border.

By documents, in the sense of Romanian legislation, we mean the document of goods transport or, in its absence, other documents issued by the carrier, containing data regarding the goods transported; invoices, in original or in copy, or other documents showing the customs value of the goods; declaration of customs value; the documents required for the application of a preferential tariff or other measures derogating from the basic tariff arrangements; any other document necessary for the application of the provisions laid down in the specific legal rules governing the importation of the goods declared; the tax code of the holder and the customs declaration.

In the context, we consider illustrative the following cases from the judicial practice, where as a material object of smuggling the falsified document was retained: *S. H. introduced in Romania, between June and August 1994, 50 agricultural machineries. Following a review by the Financial Guard, it was found*

²⁷⁶ Sandu F., *op. cit. (Contrabanda – componentă a crimei organizate)*, p. 66; Voicu C., Boroi A., Sandu F. et al., *op. cit. (Drept penal al afacerilor)*, p. 275.

²⁷⁷ Stati V., *op. cit. (Infrațiunea de contrabandă în legislația penală a Republicii Moldova și a României: analiză juridică comparativă)*, p. 165.

²⁷⁸ Olteanu G. I., *op. cit. (Cercetarea contrabandei și a altor infrațiuni ce implică trecerea frontierei de stat)*, p. 85.

that in customs S. H. presented a counterfeit invoice, in which the value of the machines was 450 German marks, and on the original invoice appeared the amount of 57,000 German marks, the defendant abolishing the customs duties of 905,698.20 lei. To cover himself, S. H., knowing that there were exemptions from customs duties for agricultural machinery, made bills on behalf of other people, where prices were much lower than the real ones, on the invoice that agricultural machinery was more of a donation. Also, during the criminal prosecution phase, the defendant claimed that the agricultural machinery was bought for the natural persons enrolled in the bills, but because of the impossibility of being sold, he ordered the restoration of the documents and demanded the recalculation of the fees²⁷⁹; through the indictment of the Prosecutor's Office attached to the Iași Court, the prosecution of the offender for the smuggling offenses was ordered. It was noted that the defendant D. N., a Moldovan citizen, in the period January-May 1996 has crossed 5 times Romania, from Turkey. Upon entering Romania, at Giurgiu Customs, he declared the goods to be in transit to be exempted from customs duties. On the way to Albița Customs, the defendant sold some of the goods and, for not paying the taxes, falsified the customs declarations, passing smaller quantities across the border²⁸⁰. With reference to the above-mentioned cases, the doctrine states that false customs documents are fraudulent means by which the perpetrator of smuggling surprises (or attempts to surprise) the good faith of the customs authorities by committing the criminal offense of smuggling²⁸¹.

However, as noted in the doctrine, it is sufficient that only one document, two or more, or all of them look at or refer to other commodities or goods²⁸². It is also irrelevant whether the acts used are wholly or partly unrealistic. This can be deduced from the following extract from the decision of the High Court of Cassation and Justice: *the use of unrealistic documents at the customs authority, namely customs or transport documents, is obvious since the customs document of transport or trade indicates another commodity than the actual one, namely: detergent instead of cigarettes, and it is irrelevant if there were still detergent boxes in the container that reflected the true reality, in the sense that in some of them the attestation is the real one²⁸³.*

In other respects, the offense of using unreal acts or forged acts is also carried out when the perpetrator uses one false customs document or a single unrealistic document for committing the offense even if the legislator uses the singular to describe the material object. In this respect, we refer to the rigorous

²⁷⁹ Tudor G., *op. cit.* (*Infracțiunea de contrabandă. Practică judiciară*), p. 2.

²⁸⁰ *Ibidem*, p. 130.

²⁸¹ Sandu F., *op. cit.* (*Contrabanda – componentă a crimei organizate*), p. 70.

²⁸² Voicu C., Boroi A., Sandu F. et al., *op. cit.* (*Drept penal al afacerilor*), p. 272.

²⁸³ Decision of the Criminal Section of the High Court of Cassation and Justice, no. 2204 of 21 June 2013, <http://www.scj.ro/1093/Detalii-jurisprudenta?customQuery%5B0%5D.Key=id&customQuery%5B0%5D.Value=101599> (visited on 01.03.2016).

explanations made during the analysis of the material object of smuggling in accordance with the criminal law of the Republic of Moldova, which we consider applicable also in the context of the analysis of the offenses stipulated in articles 272, 273 CV Rom.

Section 2. The subject of the offense

In order to recognize an offense as a criminal offense, in addition to criminal behavior and the subject of criminal proceedings, it is necessary to have a subject involved in such unlawful conduct. This is the subject of the offense.

The criminal law does not define the notion of crime, this being the doctrine. In the opinion of some authors, the subject of the offense is the person who committed an act provided by the criminal law and who, because he possesses all the signs prescribed by law for this category of subject, is liable to criminal liability²⁸⁴.

Preliminarily, we emphasize that for the purpose of revealing to the perpetrator the criminal law of the Republic of Moldova, including the specialized literature, operates with the notion of "subject of crime", while in Romania the phrase "active subject" is used. At the same time, the term "passive subject" is used in Romania to designate the crime victim (a notion characteristic of doctrine and Moldovan law). We consider that for the Republic of Moldova the classification of the offenders in active and passive would not comply with the legislation, but this classification is in line with the Romanian legislation. We support the opinion of the author of R. Popov regarding the inopportunity of Moldovan theorists to use the concept of "active subject" and "passive subject" for the following reasons: "In the Criminal Code of the Republic of Moldova, article 21 is called "Subject of the crime". However, it is clear from the analysis of this article that it refers only to the person who committed the offense, not to the person to whom the crime is committed"²⁸⁵. The same author further states that no articles in the Special Part of the Criminal Code of the Republic of Moldova use the notions of "active subject of the offense" and "passive subject of the offense". Instead, the term "victim of crime" is used to designate the person to whom the offense is committed.

Thus, we conclude that the notion of "active subject of the offense" as a person committing a criminal act is characteristic only of the Romanian legislation. Taking into account the object of our investigation, in the present study, both the notion of "subject of the offense" and the "active subject of the offense" will

²⁸⁴ Grama M., Botnaru S., Șavga A. et al., *op. cit. (Drept penal. Partea Generală)*, p. 207.

²⁸⁵ Popov R., *Subiectul infracțiunilor prevăzute în Capitolele XV și XVI din Partea Specială a Codului penal*, Chișinău: CEP USM, 2012, p. 58.

be used, these notions having the same meaning - the person committing the offense. Similarly, we will deal with the notion of "victim of crime" and "passive subject of crime", considering the person who suffered from committing the offense.

After this digression, absolutely necessary, we underline that, in general, according to the legislation of the Republic of Moldova, the subjects of the offense, as well as the conditions they must meet, are detached from article 21 CP RM, namely: 1) physical person *and* 2) legal person. The same entities derive from the CP Rom provisions in the 2009 edition, which contains a special title on the criminal liability of the legal person (Title VI).

According to the Criminal Code of the Republic of Moldova, the subject of customs offenses can be both the natural person and the legal person. But how is it possible to determine that the legal person is also the subject of smuggling and evasion offenses from paying customs payments? In answer to this question, we would point out that, in accordance with paragraph (4) of article 21 CP RM, legal persons, except public authorities, are criminally responsible for the offenses for which sanctions are provided for legal entities in the Special Part of this Code. Hence, the conclusion that the subject of the offenses provided for in articles 248 and 249 CP RM may also include the legal person (except public authorities), since the legislator provided, in sanctioning the rules of incrimination, the punishable punishment for the legal person.

For the recognition of the individual as a subject of customs offenses (both according to the legislation of the Republic of Moldova and that of Romania) it is necessary to cumulate some general conditions, namely: the character of a natural person; age of criminal liability; the responsibility and ability of the person to act freely without exercising any psychological or physical constraint on the part of foreign physical energy.

Regarding *the age* of the subject of the customs offenses according to the criminal law of the Republic of Moldova, we mention that as a subject of smuggling and evasion of the payment of customs payments can be only a person who has reached the age of 16 years. And this results from the interpretation of the rule in paragraph 2 of article 21 CP RM, in accordance with which the legislator has gone through the way of expressly determining the types of crime for which the criminal responsibility is punished by the person who has reached the age of 14 years. That list does not indicate the smuggling and evasion of customs payments.

Regarding the age of criminal liability of the subject of the customs offenses stipulated by the Romanian legislation, we emphasize that in order to be liable for criminal liability for the commission of any customs offense stipulated by the Romanian Customs Code, it is necessary that the person has reached the age of 16 years. This is the rule. However, if the minor is proved to have committed the act with discernment, the age of criminal liability may also be 14 years, a finding deriving from the provisions of paragraph (2) of article 113 CP Rom. In

any case, the minor who has not reached the age of 14 may not be the subject of the customs offenses provided for by the Customs Code of Romania.

The second condition *sine qua non* to recognize the individual as the subject of the offense is *responsibility*, appearing as the only invariable sign of the composition of the offense²⁸⁶. Responsibility is defined in article 22 CP RM, which consists in the psychological state of the person's understanding of the prejudicial nature of the deed, as well as in its ability to manifest its will and to direct its actions. From the legal definition of responsibility, we infer the existence of two basic functions attached to the human psyche: 1) consciousness; 2) the will. Consciousness, as a function of the human psyche, expresses the person's understanding of what has been done, as well as their harmfulness. On the other hand, the will is the ability of the person to express his desire through externalized material acts and the possibility to regulate these acts.

Age and responsibility, as signs of the crime, are mandatory. Their lack leads to the impossibility of qualifying the facts according to the norms that criminalize criminal offenses in the customs sphere.

In other respects, as a subject of the offense referred to in paragraph (4) of article 248 CP RM, when the harmful act is expressed by the inaction of non-return to the customs territory of the Republic of Moldova of the cultural values removed from the country, in which their return is mandatory, only the legal person may appear, not the individual. According to the customs legislation in force, only legal entities are allowed to legally remove the cultural values from the customs territory of the Republic of Moldova. However, in order to be present in the presence of this alternative normative modalities of the harmful act, it is necessary to have the premise situation - the previous removal of the cultural values over the customs border of the Republic of Moldova under **conditions of legality**. Determined to remove such entities over the customs border for a certain period of time are legal persons. In this respect, according to paragraph (3), article 9 of the Law of the Republic of Moldova on the manner of introduction and removal of goods on the territory of the Republic of Moldova by natural persons, individuals do not have the right to remove from the territory of the Republic of Moldova cultural values.

At the same time, individuals can evolve as a subject of smuggling with cultural values when the degrading act materializes in the action of crossing the customs border of the Republic of Moldova of cultural values, by eluding the customs control or concealing them by hiding them in places specially prepared or adapted for this purpose. This is confirmed by the provision of paragraph (1) article 9 of the aforementioned law, according to which the natural persons have the right to introduce cultural values on the territory of the Republic of Moldova

²⁸⁶ Plop A., *Răspunderea penală pentru provocarea ilegală a avortului*, Chișinău: CEP USM, 2015, p. 209.

provided that the dispatch authorization issued by the the competent state authority, the observance of economic policy measures, the payment of import rights and the declaration in the established manner.

After this clarification another question arises. For the classification of those committed according to the rules of criminality, is it necessary for the subject of the offense to possess any special quality or is the presence of the general features of the subject of the offense sufficient? In other words, is the subject of the offenses provided in articles 248, 249 CP RM or articles 270-274 CV Rom?

Ab initio, we mention that in relation to the active subject, offenses are classified as offenses with general active subject matter and offenses with a particular active subject. Criminal offenses that are generally active are those which, according to the rule of incrimination, can be committed by any person without being required special quality. However, offenses with a particular active subject are offenses that can only be committed by a person who has the quality of the criminality rule²⁸⁷.

The views expressed in the specialized literature in the criminal field regarding the notion of special subject are varied: "the special subject of the offense is obvious when the person has, in addition to the general signs of the subject, certain additional signs required by the law for the composition of the offense that"²⁸⁸; "the active subject for which a special condition is required is called a qualifying or circumstantial subject"²⁸⁹; "the offenses whose existence requires the author to have a certain quality are called his own crimes, and the active subject of these crimes is called the qualitatively or privately active subject"²⁹⁰.

As far as we are concerned, we consider that the particular subject of the offense is the natural or legal person capable of meeting both the general and the special qualities provided under the concrete incrimination rule.

As far as the offenses referred to in article 248 of the Criminal Code are concerned, in my opinion it is not necessary for the subject of the offense to possess certain special qualities; the content of the rule of criminality does not require such a qualification. Such a quality is neither explicit nor implicit in the provision of the rule.

However, as an exception, article 248 of the Criminal Code as an aggravating circumstance specifies the fact that the contraband committed by a person with a responsible function, using the service situation. We observe that under Art.248 of the Moldovan Communist Party, it fulfills a dual role: a) of special quality of the subject of the offense which transforms the subject into a special

²⁸⁷ Streteanu F., Moroşanu R., *Instituții și infracțiuni în noul Cod penal*, Bucharest, 2010, p. 42-46, http://www.csm1909.ro/csm/linkuri/06_01_2011__38061_ro.pdf (visited on 17.07.2014).

²⁸⁸ Botnaru S., Şavga A., Grosu V. et al., *Drept penal. Partea Generală*, vol. I., 2nd edition, Chişinău: Cartier juridic, 2005, p. 196.

²⁸⁹ Mitrache C., *Drept penal român*, 4th edition, revised and added, Bucharest: Universul Juridic, 2005, p. 89.

²⁹⁰ Bulai C., *op. cit. (Manual de drept penal. Partea Generală)*, p. 211.

one; b) an aggravating circumstantial sign. For more information on this particular sign, see below, as part of the analysis of the aggravating circumstantial elements of customs offenses.

In another register, doctrine states that smuggling offenses are often committed by foreign nationals (students and doctoral students, representatives of foreign firms, tourists and other persons) who have the opportunity to enter the territory of foreign states regularly²⁹¹, which, however, in our opinion does not change the subject of the offense of the general in particular.

As far as the offenses under article 249 of the Criminal Code are concerned, we mention that, although the legislator does not expressly indicate the special quality of the subject of the offense, it results, by implication, from the text of the norm of incrimination. *In concreto*, the special quality of the offense derives from the content of the legal obligation of the person to pay the customs payments when passing goods across the customs border of the Republic of Moldova. So the subject of evasion when paying the customs payments is the person [physical or legal (except public authorities)] who is obliged to pay the customs payments when goods cross the customs border.

But who is the person obliged to pay the customs payments? A.A. Vitvițkii is of the opinion that as the subject of the evasion crimes from the payment of the customs payments occurs: a) the person who passes goods over the customs border for himself; b) the person who is employed in an enterprise, institutions, organizations and who is obliged to pay the customs payments²⁹².

However, in our opinion, the provision in article 123 CV RM helps us to answer the question above. According to the above provision, import rights and export rights are paid directly by the declarant, the customs broker or by another person provided for by the legislation. So, only those persons may appear as the subject of offenses under the marginal margin of evasion of paying customs duties.

Any person who has the right to dispose of goods and/or means of transport who draws up the customs declaration on his behalf or on whose behalf the customs declaration is made shall be understood by *the declarant*. In accordance with letter d) paragraph (1) article 178 CV RM, the declarant is obliged to pay the import or export rights.

According to article 162 CV RM, *the customs broker* is a legal person, registered in accordance with the law, who holds a license for the activity of a broker, issued by the Licensing Chamber, and who, under the principles of direct

²⁹¹ Saidov Sh. N., *Уголовная ответственность за контрабанду по законодательству Республики Таджикистан*: Автореферат диссертации на соискание ученой степени кандидата юридических наук (*The criminal responsibility for smuggling under the legislation of the Republic of Tajikistan*: the dissertation Author's abstract on competition of a scientific degree of the candidate of legal sciences), Moscow, 2011, p. 24.

²⁹² Vitvițkii A. A., *op. cit.* (*Crimes in the sphere of foreign economic activity...*), p. 95.

or indirect representation, declares the goods, presents them for customs clearance, carry out other customs operations. For the customs debt incurred, the customs broker shall be jointly liable to the payer. The customs broker carries out his activity in accordance with the Customs Code and other normative acts. The relations between the broker and the person he represents are established on the basis of a contract concluded in compliance with the requirements of the legislation in force, which is to stipulate the type of representation. That contract shall be presented to the customs authorities at their request and shall justify the customs broker's authority to represent the declarant.

In the event of customs clearance, the customs broker fulfills all legal requirements and conditions. The rights, obligations and liability of the broker provided for by law may not be limited by the contract between the broker and the person he represents. The customs broker shall be liable to the customs authorities for their own actions and, depending on the type of representation, for the actions of the person they represent. The customs broker shall be liable, under the conditions laid down in the Customs Code, for breach of applicable law if he fails to demonstrate that the breach is due to the fault of the person he represents.

According to letter i) article 164² CV RM, the customs broker in the customs clearance procedure of the goods and/or means of transport is jointly liable with the payer for the payment of the import rights within the time limits stipulated by the legislation, having the obligation to pay the amount of the rights of import to the state budget, if such payment has not been made by the holder of the operation.

Another person provided for by the legislation shall be any person other than the declarant and the customs broker who is obliged to pay the import/export duties on the crossing of the goods over the customs border of the Republic of Moldova. In this category, the doctrine includes, for example, the customs clearance specialist holding a certificate of qualification or diploma of an accredited education institution²⁹³.

In another context, with regard to the customs offenses provided by Romanian legislation, the content of the incriminating rules does not require the special subject of the offense to have any special qualities, such as any person who has reached the age of criminal liability and acted with discernment. The legislator did not foresee for the perpetrators a certain quality, regardless of the illicit activity they carry out, being able both own and improper. So, the active subject of smuggling is unquantifiable, and any person may appear as an author, accomplice or instigator²⁹⁴.

²⁹³ Stati V., *op. cit. (Infrațiuni economice: Note de curs)*, p. 468; Stati V., *op. cit. (Infrațiuni săvârșite în sfera activității economice externe (art.248 și 249 CP RM): studiu de drept penal)*, p. 139; Brînză S., Stati V., *op. cit. (Tratat de drept penal. Partea Specială)*, vol. II, p. 297.

²⁹⁴ Pasat O., *Stabilirea și determinarea subiecților contravențiilor și infracțiunilor vamale comise pe teritoriul României*, Scientific Review of Socio-Human Research „Vector European”, no. 2, 2014, p. 114.

Finally, we can not support the following statement in the Romanian doctrine: "The active subject of the offenses provided by the Customs Code may be any person, the legislator not imposing on the perpetrators, regardless of the unlawful activity carried out - by the concrete tasks assumed -, the participation being possible both in the form of its own participation and in the form of improper participation; the person who acted guiltily without having the capacity of offender will not be held criminally liable"²⁹⁵. Likewise, V. Bujor and O. Pop indicate that as an active subject of smuggling can be any person, and therefore not a qualified subject²⁹⁶. Being a criminal offense with an unqualified active subject (unqualified by a certain quality), smuggling may, under the law, act not only with unqualified authors, but also with unqualified accomplices or instigators²⁹⁷.

In other news, we note that customs offenses governed both by the criminal law of the Republic of Moldova and by the special law of Romania do not cover *the victim of offense (the passive subject)* as a pre-existing element of the crime composition. In other words, in the context of customs offenses, the victim of the offense does not appear as a compulsory sign in the content of the offense. In this respect, it is rightly stated in the doctrine that, due to their specificity, the offenses stipulated in articles 248 and 249 CP RM do not have a victim²⁹⁸.

As offenses committed in the sphere of external economic activity are located within Chapter X of the Special Part of the Criminal Code entitled "Economic crimes", the State suffers from the commission of the respective offenses. But the state can not evolve as a victim of crimes in general and of those committed in the customs sphere in particular. In the context, in the doctrine, by the victim of the offense, in the juridical-criminal sense, *the person* [emphasis belongs to us - *the author's note*], whose legitimate rights or interests are violated by committing the offense, is considered²⁹⁹. As a victim of the offense, therefore, only the natural person and the legal person can appear. And this also follows implicitly from the rules of the Criminal Procedure Code.

We consider the above-mentioned explanations applicable to customs offenses in Romanian legislation, even though, for the most part, doctrine states

²⁹⁵ Olteanu G. I., *op. cit.* (*Cercetarea contrabandei și a altor infracțiuni ce implică trecerea frontierei de stat*), p. 59.

²⁹⁶ Bujor V., Pop O., *op. cit.* (*Criminalitatea în domeniul fiscal*), p. 34.

²⁹⁷ Sandu F., *op. cit.* (*Contrabanda – componentă a crimei organizate*), p. 21.

²⁹⁸ Stati V., *op. cit.* (*Infracțiuni economice: Note de curs*), p. 437, 465; Stati V., *op. cit.* (*Infracțiuni săvârșite în sfera activității economice externe (art.248 și 249 CP RM): studiu de drept penal*), p. 128, 138; Brînză S., Stati V., *op. cit.* (*Tratat de drept penal. Partea Specială*), vol. II, p. 285, 295.

²⁹⁹ Dedyukhina I.F., *Проблемы установления и реализации уголовной ответственности с учетом признаков потерпевшего: Автореферат диссертации на соискание ученой степени кандидата юридических наук (Problems of establishing and implementing criminal liability, taking into account the characteristics of the victim: The author's abstract of the dissertation on the co-development of the scientific degree of the candidate of legal sciences)*, Moscow, 2008, p. 16.

that the State appears as the passive subject of customs offenses under the Romanian Customs Code³⁰⁰.

Section 3. Conclusions to Chapter III

Following the characterization of the pre-existing elements of the customs offenses stipulated in the legislation of the Republic of Moldova and of Romania, we draw the following **conclusions**:

1) the generic legal object of the customs offenses under articles 248 and 249 CP RM, based on the technical-legislative location of the incrimination rules, as well as of the customs offenses in Romania's criminal law, forms the national economy, as well as the social relations of the so-called social values;

2) offenses committed under the marginal smuggling and evasion of customs duties, forming the group of customs offenses, challenge a common group of social relations inherent in customs activity;

3) by criminalizing smuggling, the legislator wants to protect the customs security, but not the inviolability of the state border, the last social value being protected by the norms that incriminate the illegal crossing of the state border;

4) goods other than those referred to in paragraphs (1) to (4) of article 248 CP RM may not constitute a material/immaterial object of smuggling. Inclusion in this category by law enforcement officials of entities other than those expressly provided by the legislator in the provision of incriminating rules would amount to disregard for the principle of the lawfulness of criminality by promoting the broadly unfavorable interpretation of the criminal law;

5) the crossing over the customs border of the Republic of Moldova of money signs and/or false securities for putting into circulation must be qualified as a preparation for the commission of one of the offenses provided by article 236 CP RM (provided that the perpetrator has not produced those entities). If the perpetrator has produced the money signs and/or the false securities which he subsequently crosses the customs border, the committed ones have to be classified according to article 236 CP RM in consumed form;

6) passing even a single good (e.g. a single means of transport, a single weapon, a single object of cultural value, etc.) across the border will be sufficient to be in the presence of smuggling, even if the legislator uses the plural in describing the material/immaterial object;

7) real estate can not be a material object of smuggling, as it is immutable by definition. At the same time, the material object of the smuggling of movable goods from immovable property will be created;

³⁰⁰ Voicu C., Boroi A., Sandu F. et al., *op. cit. (Drept penal al afacerilor)*, p. 262; Sandu F., *op. cit. (Contrabanda – componentă a crimei organizate)*, p. 52.

8) in the context of the use of unrealistic documents, it is sufficient that only one document of all refers to other commodities or goods;

9) as a subject of the offense referred to in paragraph (4) of article 248 CP RM, when the harmful act is expressed by the inaction of non-return to the customs territory of the Republic of Moldova of cultural values removed from the country, if their return it is mandatory, only the legal person may appear, not the individual;

10) although the legislator does not expressly state the special quality of the subject of the offense in article 249 CP RM, it follows by implication from the text of the norm of incrimination, namely: from the content of the legal obligation of the person to pay the customs payments goods over the customs border of the Republic of Moldova;

11) the active subject of the offenses provided for in the Customs Code of Romania may be any person, the legislator not imposing on the perpetrators a special quality, irrespective of the illegal activity unfolded.

Chapter IV

The constitutive and circumstantial elements of the customs offenses, according to the legislation of the Republic of Moldova and Romania

Section 1. The objective side of the offense

Ab initio, we note that the objective side of the content of a crime reflects the sum of all the situations required by the rule of incrimination relating to the act of unlawful conduct.

In the doctrine, the objective side of the offense is defined as the act directed against the social values protected by law, as well as the socially dangerous consequences produced by it, with a causal relationship between them³⁰¹. In this sense, the objective side can be determined as the external, visible part of the offense (which can be perceived by the sense organs)³⁰².

The objective side is one of the four elements of the composition of the offense and consists in the totality of the conditions required by the rule of incrimination regarding the act of conduct for the existence of the offense³⁰³. This concerns: the detrimental act, the injurious effect, the causal link between the action (inaction) that constitutes the material element and the prejudicial effect. They are sometimes attached to other essential requirements, such as the place, time, mode and means of committing the offense.

It should be noted that according to the opinion expressed by L. G. Gîrla and Iu. M. Tabarcea, the legal-criminal norms that criminalize smuggling are built as descriptive, because the signs of these facts are provided in the criminal law text³⁰⁴. Indeed, considering the type of disposition of incriminating rules under article 248 CP RM, we can easily identify the constitutive signs of the objective side of the offenses under the marginal smuggling. Similar provisions have the rules of the Customs Code of Romania that incriminate customs offenses.

In the following we will analyze *the objective side of smuggling offenses according to the Moldovan criminal law*.

The objective side of the smuggling offenses referred to in paragraphs (1), (2), (3) and letter (d), paragraph (5) of article 248 CP RM consists of the following signs: a) the detrimental act materialized in the action for crossing the customs border of the Republic of Moldova of certain entities; b) the method of

³⁰¹ Mirișan V., *Drept penal. Partea Generală*, Bucharest: Lumina Lex, 2004, p. 66.

³⁰² Dima T., *Drept penal. Partea Generală*, vol. I, Bucharest: Lumina Lex, 2001, p. 28.

³⁰³ Grama M., Botnaru S., Șavga A. et al., *op. cit. (Drept penal. Partea Generală)*, p. 185.

³⁰⁴ Gîrla L. G., Tabarcea Iu. M., *op. cit. (Criminal Law of the Republic of Moldova. The special part. Tom I.)*, p. 676.

committing, which consists, alternatively, in: the circumvention of customs control; the concealment of customs control by concealing the goods in specially prepared or adapted places; fraudulent use of documents or means of customs identification; declaring; non-authentication in customs documents or other border crossing documents; c) the place of committing the offense - the customs border of the Republic of Moldova.

The objective side of smuggling provided in paragraph (4) of article 248 CP RM has a different structure, depending on the form of expression of the detrimental act. Thus, if the detrimental act consists in the crossing over the customs border of the Republic of Moldova of cultural values, the objective aspect has the following structure: a) the prejudicial act expressed in the crossing over the customs border; b) the method of committing the offense, which consists, alternatively, in: the circumvention of the customs control; the concealment of customs control by concealing the goods in specially prepared or adapted places; c) the place of committing the offense - the customs border of the Republic of Moldova.

Where the detrimental act consists in the non-return to the customs territory of the Republic of Moldova of the cultural values removed from the country, if their return is mandatory, the objective part of the offense consists of: a) the detrimental act expressed in the inaction of non-return of the goods taken from country, when their return is mandatory; b) place of committing the offense - outside the customs territory of the Republic of Moldova.

In the following, we will analyze the objective aspect of smuggling offenses, according to Moldovan legislation, according to their structure, highlighted above.

Thus, the detrimental act of the offenses referred to in paragraphs (1), (2), (3) and letter (d) paragraph (5) of article 248 CP RM, as well as that provided for in paragraph (4), article 248 CP RM in the first case is expressed in the action of crossing the customs border of the Republic of Moldova of certain entities.

The rule establishing criminal liability for smuggling is a blanket, the content of which is to be determined in accordance with customs legislation³⁰⁵. That is why, when analyzing the objective aspect of the offenses constituted under article 248 CP RM, the regulations in the customs sphere will be taken into account. So, the content of the injurious action is detached from the provisions of the Customs Code of the Republic of Moldova. Thus, in accordance with point 5 of article 1 CV RM, by crossing the customs border it is envisaged the introduction and removal from the customs territory of the Republic of Moldova of goods

³⁰⁵ Rusanov G. A., *Уголовная ответственность за контрабанду (статья 188 Уголовного кодекса Российской Федерации) [Criminal responsibility for smuggling (Article 188 of the Criminal Code of the Russian Federation)]*, „Право. Журнал Высшей школы экономики” („Law. Journal of the Higher School of Economics”), no. 2, 2011, p. 65-76; Rozumani I. V., *op. cit. (Criminal responsibility for smuggling: according to the materials of the Siberian Federal District)*, p. 10.

and means of transport, including by international postal dispatches, by pipelines and by lines electric transport. It is worth mentioning here that international postal dispatches, pipelines and electric transport lines are assimilated with crossing over the customs border.

The general principles for the transit of goods and means of transport across the customs border are governed by the Customs Code of the Republic of Moldova. Rules of crossing the goods across the border of the Republic of Moldova are established not only by the Customs Code, but also by other acts, for example, by the Law of the Republic of Moldova on the way of introducing and removing goods on the territory of the Republic of Moldova by natural persons, by the Law of the Republic of Moldova on foreign exchange regulation.

We will further analyze the methods of committing offenses under the name of smuggling. However, the method used by the perpetrator (inserted by the legislator in the provision of incrimination) confers illegality on the act of passing goods across the customs border. In the context of the offenses provided by article 248 CP RM, the method is a constitutive sign, therefore important for qualification. In other words, the method of committing the offense is a mandatory secondary sign.

Iu. I. Sucicov groups the methods of committing smuggling as follows: a) circumvention of customs control or concealment of customs control; b) fraudulent use of customs documents or means of customs identification; c) non-authentication or non-authentication³⁰⁶.

By *circumventing the customs control* it is necessary to understand the deliberate actions of the perpetrator of the customs border crossing of the Republic of Moldova by avoiding the customs border crossing points or outside the hours of customs at the border crossing points. A. Focov believes that the circumvention of customs control presupposes the commission of any intentional action on the introduction or removal of goods from the customs territory outside the border crossing points or other places where the customs authorities are located or outside the program hours established in accordance with or without the permission of the customs body, whether international or domestic law provides for the free passage of goods across the customs border without carrying out customs control³⁰⁷. By circumventing goods from customs control, I. Macari understands that goods, objects and other values are not presented to the Customs Service's employees to be subjected to control in the established manner³⁰⁸. Other authors appreciate that by circumventing customs control it is envisaged the crossing of the customs border (entering or leaving the country) through places other than those established for customs control³⁰⁹. We think too narrow the last definition. According to article 26 CV RM, according to which "the passage of goods and

³⁰⁶ Sucicov Iu. I., *op. cit.* (*Customs crimes: a study guide*), p. 37.

³⁰⁷ Focov A., *op. cit.*, (*On judicial practice in cases of smuggling*), p. 4.

³⁰⁸ Macari I., *op. cit.* (*Dreptul penal al Republicii Moldova. Partea Specială*), p. 258.

³⁰⁹ Barbăneagră A., Berliba V., Gurschi C. et al., *op. cit.* (*Codul penal comentat și adnotat*), p. 396.

means of transport across the customs border is allowed only in the places established by the customs body and in its hours of work", it is clear that the circumvention of the customs control concerns two aspects: a) the passage of goods through places other than those established by law; b) the passing of the goods through the places established by the law, but outside the hours of the program established by the customs body. However, with the consent of the customs authority, the passage of goods and means of transport across the customs border may be carried out in other places and in extra hours. Under these circumstances, the circumvention of customs control can not be invoked.

The eludation was retained in the following cases from judicial practice:

- *three people discharged 61 cigarette boxes on the Prut river bank and, with the aid of an inflatable boat, transported them across the customs border of the Republic of Moldova*³¹⁰;

- *the defendant M. I., in pursuit of the purpose of smuggling the goods into the Republic of Moldova in particularly large proportions, on 10.04.2015, bypassing customs control, introduced phytosanitary products on the territory of the Republic of Moldova*³¹¹.

For a better understanding of this method it is necessary to explain the notion of customs control. Pursuant to point 21 of article 1 CV RM, customs control means a set of actions taken by the customs authorities to enforce and enforce the laws and regulations that the customs authorities have the duty to apply.

Customs control is carried out by the customs officer and consists of: a) verification of documents and information presented for customs purposes; b) customs control (control of goods and means of transport, body control as an exceptional form of customs control); c) records of goods and means of transport; d) verbal questioning of individuals and persons with responsibility; e) verification of the accounting system and reports; e¹) subsequent verification by re-checking the customs declarations; f) the control of temporary warehouses, customs warehouses, free zones, duty-free shops, other territories and areas where goods and means of transport subject to customs control or where activities subject to customs supervision may be carried out; f¹) post-clearance clearance audit; g) carrying out other operations under the Customs Code and other normative acts.

³¹⁰ Briceni Court Sentence of September 14, 2015, File no. 1-97/2015, www.jbr.instante.justice.md/ro/hot?data_deciziei=&nr_dosar=&denumire_dosar=&tip_dosar=penal&page=4 (visited on 31.03.2016).

³¹¹ Ocnîța Court Sentence of September 23, 2015, File no. 1-115/2015, www.joc.instante.justice.md/ro/hot?data_deciziei=&nr_dosar=&denumire_dosar=&tip_dosar=penal&page=4 (visited on 31.03.2016).

According to the Order of the Customs Service on the approval of the Regulation on the clearance of goods passed over the customs border of the Republic of Moldova by natural persons and of standard forms, no. 56 of 21.02.2008³¹², goods passed by natural persons over the customs border of the Republic of Moldova are subject to customs control. Exceptions to this rule are set by the legislation in force. The customs control of goods passed by natural persons over the customs border starts with the purpose of passing these goods across the customs border of the Republic of Moldova, taking as a basis the passports, visas and other identity documents of the persons, the documents on the goods passed over the customs border, as well as people's explanations.

In case of illegal crossing of the customs border by circumvention of the customs control, when the circumvention is expressed in the passage of the goods through places other than those established by the law for crossing the customs border, as a rule, in addition to one of the norms of article 248 CP RM, the committed ones require additional qualification according to article 362 CP RM (illegal crossing of the state border). In such a case, we are in the presence of the ideal offense contest when the perpetrator in one act commits two offenses: one of the smuggling offenses and the illegal crossing of the state border. For this it is necessary that the border crossing points should be at the state border. Otherwise, we will not be in the presence of the ideal offense contest.

Relevant in this respect is the following case in judicial practice: *by the Hancesti Court judgment of May 21, 2014, T. V. and B. G. have been found guilty of committing the offenses referred to in letter (b), paragraph (5), article 248 and paragraph (1) of article 362 of the Criminal Code. In fact, the Court held that T. V., together with prior understanding with L. D. and B. G., acting with direct intent and aiming at the purpose of crossing the Moldovan customs border of objects in large proportions, on 10 June 2011, approximately at 19.00, they traveled with the "WV Golf" model car at the tractor brigade, where they loaded into D. L.'s cart nine bags of polyethylene with 16,885 cigarette packs of the brand "Plugarul" at the price of 3,14 lei package, totaling 53,018.90 lei. They then transported them to the bank of the Prut River, near the border sign 1142 up to 300 meters from the Sarateni rayon, Hancesti rayon, from where the cigarette sacks were illegally crossed over the river on the Romanian bank*³¹³.

In another context, the circumvention of customs control must be distinguished from the contravention act provided in paragraph (1) article 287 C. contr. RM, expressed by the non-refusal of the vehicle (including the vehicle for personal use), which crosses the state border (customs) of the Republic of Moldova in the place of the customs body, as well as starting, admitting the start without authorization of the customs body of the vehicle for personal use) under customs

³¹² Official Gazette of the Republic of Moldova, 2008, no. 74-75.

³¹³ Judgment of the Supreme Court of Justice of 25 March 2015, File no. 1ra-365/15, www.csj.md (visited on 02.11.2015).

control. Similarly, the circumvention of customs control, as a method of committing smuggling, must be delimited by the contravention act expressed by the failure to present the goods, objects and other values under customs control, transported from one customs office to another, [paragraph (5), article 287 C. contr. RM]. In the case of the said offense, the perpetrator does not avoid passing the goods over the customs border through the specially established places, but delays in presenting the goods for the control.

By *concealing from customs control by hiding in specially prepared or adapted places for this purpose* is meant the failure to present for the customs control of the goods that pass over the customs border of the Republic of Moldova, in a way that prevents their examination and finding, ie with the use of special places prepared or adapted for this purpose (hidden places of the body, clothes, personal objects, places re-established or accommodated in the means of transport as hiding places etc.)³¹⁴.

In the specialized literature of the Republic of Moldova, the concealment from customs control by hiding in places specially prepared or adapted for this purpose is defined as the situation of the passage of the goods through the places destined for this, according to the Customs Code, but by the avoidance of the customs control³¹⁵. Other authors define the concealment of customs controls of goods and other objects as any action aimed at making it difficult to trace such goods or to conceal their particularities and their actual quantities (e.g. the use of shelters, places specially fabricated or adapted for articles smuggling in luggage, clothes or automobiles equipped for the passage of goods across the customs border)³¹⁶. The concealment of smuggling objects (mainly narcotic substances, currency, gold coins, precious stones, etc.) in the natural places of the human body is also included in the concealment of goods from customs control³¹⁷.

In the sense of G. S. Ghireaev, the concealment from customs control is any action to conceal the goods over the customs border by using various hidings or other methods that make it difficult to identify them or to present goods as others (camouflage, masking, etc.)³¹⁸. The doctrine states that narcotic substances, in many cases, are found in the stomach of the perpetrators, placing narcotic substances in polyethylene bags and swallowing them³¹⁹.

³¹⁴ Stati V., *op. cit. (Infrațiuni săvârșite în sfera activității economice externe (art.248 și 249 CP RM): studiu de drept penal)*, p.130; Stati V., *op. cit. (Infrațiuni economice: Note de curs)*, p. 449-450; Brînză S., Stati V., *op. cit. (Tratat de drept penal. Partea Specială)*, vol. II., p. 288.

³¹⁵ Barbăneagră A., Alecu Gh., Berliba V. et al., *op. cit. (Codul penal al Republicii Moldova. Comentariu. Adnotat cu jurisprudența CEDO și a instanțelor naționale)*, p. 539.

³¹⁶ Focov A., *op. cit. (On judicial practice in cases of smuggling)*, p. 4.

³¹⁷ Sucicov Iu. I., *op. cit. (Customs crimes: a study guide)*, p. 38.

³¹⁸ Giryayev G. S., *op. cit. (Criminological characteristic and criminal law measures to counter smuggling)*, p. 18.

³¹⁹ Rogățih L. F., *op. cit. (Criminally punishable contraband)*, p. 72.

This method of committing smuggling offenses is very common in judicial practice. In this respect, eloquent is the following case law practice: *on April 7, 2014, approximately at 19.40, near the customs post Leușeni - Albița (auto), after the customs control and leaving the customs control area, by the representatives of the Section The "Centru" Mobile Teams have been officially stopped by the model "Volvo S80", registered in Bulgaria under no. CA51...., which was run by S.E. In the physical control of the above-nominated transport unit, in specially prepared places for concealment of customs control goods, namely: in the separate space between the rear seat and the luggage compartment, 50 pieces of Ipad Air WiFi Cell 128 GB, with customs value of 586,416 lei, which were illegally introduced by S.E. on the customs territory of the Republic of Moldova, intentionally concealing them from the customs control*³²⁰.

The concealment of goods from customs control must be delimited by the contravention act provided in paragraph (3) article 287 C. contr. RM, according to which it is sanctioned contravening the access of the person with the responsibility of the customs body in the exercise of the function to the goods, objects and other values under customs control. Thus, in the case of the contravention, the perpetrator creates obstacles in the customs control by the customs officer. It is not excluded the presence in the actions of the guilty person both of the signs of the respective contravention act, as well as of the signs of the criminal smuggling. It is the case where the perpetrator intends to pass certain goods through the customs border through customs, after which, upon their identification by the customs officer, they resist the customs control.

Fraudulent use of documents or means of customs identification should be understood as knowingly giving the bodies competent to carry out customs control of false documents, acts obtained illegally or relating to goods other than those crossing the customs frontier, acts without legal force (null), means of false customs identification or those referring to goods other than those crossed over the customs border. The same position is B. V. Voljenkin³²¹.

The reason for the existence of such a method points to Iu. I. Sucicov: "The legislator has established such an action as a method of committing smuggling offenses on the grounds that such a method allows goods passed illegally over the customs border to be given as property under law. So, for example, it is the presentation of a document which, as if establishing that the goods passed over the customs border are not to be subjected to customs control, creates prerequisites for crossing the customs border of various goods, including: weapons, narcotic substances, poisonous substances etc."³²²

This method was retained in the following case law case: *T.C., administrator of the "T" SRL, who is operating in Vorniceni, Strasen district, on January*

³²⁰ Decision of the Supreme Court of Justice of July 8, 2015, File no. 1ra-744/15, <http://www.csj.md> (visited on 02.11.2015).

³²¹ Volzhenkin B. V., *op. cit. (Crimes in the sphere of economic activity)*, p. 395.

³²² Sucicov Iu. I., *op. cit. (Customs crimes: a study guide)*, p. 38-39.

24, 2008, intending to cross the customs border of the Republic of Moldova in particularly large proportions, with the fraudulent use of documents and by the non-authentication of customs documents, tried to export cement purchased from S, official dealer of SC "L" to "A" company from the Russian Federation. SA, in a total quantity of 1,666 tons. In the accounting documents, the cement marker was indicated as "M-400". However, in the customs declarations and in the accompanying documents submitted by the administrator of the SRL "T", C. T. pursuing the achievement of his criminal purpose, intentionally indicated another cement mark - "M-500".³²³

For the given method of committing smuggling offenses, it is characteristic that the subject of the crime resorts to deception in order to pass commodities/goods across the customs border of the Republic of Moldova. To explain the notion of deception, we will reproduce the point outlined by Professor S. Brînză, in the context of crimes against the patrimony, an applicable allegation by extrapolation, and the present investigation. Accordingly, in accordance with the position of the above nominated author, deception is either the manifestly false presentation of reality (active deception) or the silence of reality, which consists in concealing the facts and circumstances to be communicated in the case of the bona fide deed and in accordance with the law of the patrimonial transaction (passive deception)³²⁴.

Deception is used by the perpetrator to pass goods across the customs border of the Republic of Moldova, not for any other purpose. Here we are, in fact, in the presence of active deception when using the documents. We support the view expressed in the theory of criminal law, according to which deception is directed to achieving the result in the form of receiving the consent of the customs body when crossing the goods across the customs border³²⁵.

According to the doctrine, the method outlined implies the use of: a) false documents; b) documents obtained illegally; c) documents lacking legal force (null); (d) documents relating to goods other than those crossing the customs frontier; e) means of false customs identification; f) means of illegally obtaining customs identification; g) means of customs identification referring to goods other than those crossed over the customs border³²⁶.

³²³ Decision of the Supreme Court of Justice of May 20, 2014, File no. 1ra-566/14, www.csj.md (visited on 02.11.2015).

³²⁴ Brînză S., *Infrațiuni contra proprietății*, Chișinău: USM, 1999, p. 124.

³²⁵ Rogățîi L. F., *op. cit. (Criminally punishable contraband)*, p. 74.

³²⁶ Archaya I. V., *Уголовно-правовая характеристика контрабанды (Criminally-legal characteristic of contraband)*, „Вестник Краснодарского Университета МВД России” („Bulletin of the Krasnodar University of the Ministry of Internal Affairs of Russia”), no. 1, 2008, p. 61; Stati V., *op. cit. (Infrațiuni economice: Note de curs)*, p. 451; Brînză S., Stati V., *op. cit. (Tratat de drept penal. Partea Specială)*, vol. II., p. 288; Rogățîi L. F., *op. cit. (Criminally punishable contraband)*, p. 74-75; Vitvițkii A. A., *op. cit. (Crimes in the sphere of foreign economic activity...)*, p. 75-77.

In the doctrine, it is revealed that the document generally means the entity that is customized by the following features: 1) forms a whole unit between the material or electronic support and the information fixed on it; 2) the information on the document is expressed in the form of text, audio recording, image or any other form which permits the unambiguous perception and identification of the information directly or by means of instrumental or programmed means; 3) its destination is to be transmitted in time and space; 4) Its function is to inform and sample; 5) is drawn up by competent subjects; 6) is endowed with formulas and determined formulas³²⁷.

For the purposes of article 248 CP RM, *customs documents* shall take into account all information fixed on paper or in electronic form submitted to the customs body for customs clearance and customs control.

From the provisions of paragraph (1) article 187 CV RM, it is clear that persons who cross goods and means of transport across the customs border or carry out activities under customs supervision are obliged to submit to the customs authority the documents and information necessary for the customs control, paper support or in electronic format, with digital signatures, issued by the Center for the Certification of Public Keys of Public Administration Authorities. The list of documents and information, their presentation procedure is established by the Customs Service. Thus, for example, in accordance with the Government Decision of the Republic of Moldova on the approval of the Regulation on the declaration of the customs value of goods placed on the territory of the Republic of Moldova, no. 600 of 14.05.2002³²⁸, for the confirmation of the customs value of the imported goods, the declarant is obliged to submit to the customs authority, in accordance with the requirements set out in paragraph (1) article 7 of the Law on Customs Tariff, the following documents: a) the contract related to the import transaction and the additional agreements to it have been completed); b) invoice or for conditional value transactions - proforma invoice; c) bank payment documents or other payment documents in case of prior payment; d) transport documents accompanying the goods: CMR (international consignment note), TIR Carnet, Transit declaration (T1), Air bill (fraht), Bill of lading (maritime bill of lading), Letter of credit for the international transport of goods by rail; e) the contract for the provision of transportation services or the shipping invoice if required according to the delivery terms; f) the insurance policy or the contract for the insurance of the goods, if they have been insured either according to the conditions of delivery or insured on the initiative of the declarant. The declarant, on his/her own initiative, has the right to submit other documents in order to confirm the declared customs value.

³²⁷ Reșetnicov A., *Caracteristicile noțiunii de document. Conotații juridico-penale*, „Revista Națională de Drept”, no. 1, 2008, p. 37-41.

³²⁸ Official Gazette of the Republic of Moldova, 2002, no. 66-68.

Similarly, as customs documents, which can be submitted for verification to the customs body, we highlight: any possible agreement between the seller and the buyer that affects the customs value of the goods; contracts with third parties for indirect transactions; trade correspondence waged to conclude and negotiate the price, if it was carried, etc.

We note that all the documents that need to be presented to the customs body for customs clearance and customs control can be classified into three categories: a) *commercial documents* - documents confirming the transactions on the basis of which the declarant has entered the goods he intends to cross the border Customs of the Republic of Moldova (for example, invoice, sale-purchase contracts, etc.); b) *transport documents* - documents accompanying the vehicles transporting the goods to be crossed over the customs border of the Republic of Moldova (e.g. TIR Carnet, CMR (international consignment note), etc.); c) *customs documents themselves* - acts in which all customs actions carried out by the declarant are reflected, except for the customs declaration. In the case of entering false data in the customs declaration, we will not be in the presence of fraudulent use of customs documents, but we will be in the presence of a non-authentic declaration as a method of committing smuggling.

Some authors point out the existence of two categories of documents: a) customs documents; b) Other types of documents. These authors in the first category include the customs documents themselves, and in the second category - the commercial documents and the transport documents³²⁹. L. F. Rogatîh, however, includes in the category of documents: commercial documents, transport documents, customs documents themselves, as well as other documents necessary for customs control³³⁰.

Also now to define each of the categories of documents used fraudulently by the perpetrator at the crossing of the customs border of the Republic of Moldova.

Thus, *false documents* refer to the acts made or those in which their content has been modified so that it does not correspond to reality. In the opinion of the Russian author T. A. Dicanova³³¹, which we embrace, in false documents include both falsified acts in full and those in which changes are introduced regarding their content.

Documents obtained illegally must be understood as documents issued in violation of the legal procedure or received as a result of unlawful acts committed by the person who issued the document, such as for example the quality certificate

³²⁹ Gîrla L. G., Tabarcea Iu. M., *op. cit.* (*Criminal Law of the Republic of Moldova. The special part. Tom I.*), p. 678; Sucicov Iu. I., *op. cit.* (*Customs crimes: a study guide*), p. 39.

³³⁰ Rogatîh L. F., *op. cit.* (*Criminally punishable contraband*), p. 79-80.

³³¹ Skvortsova K. F. (ed.), *Расследование контрабанды: Практическое пособие (Investigation of smuggling: A practical guide)*, Moscow: Lawyers, 1999, p. 17.

received on the basis of a false laboratory chemical finding³³². In the view of L. G. Gîrla and Iu. M. Tabarcea by means of a document obtained illegally must understand the document received by the person concerned as a result of the presentation of a responsible person of false information or documents as a ground for release or as a result of abuse of service by a person with a responsible position; the commission of negligent action on the release of the document³³³.

By *the null document* we are to understand the act which, having no binding legal force, can not produce legal effects for those who have concluded it or for the third parties it concerns. As a rule, a legal act is null when it has not been discharged in accordance with legal provisions. This category also includes legal acts that have been completed in accordance with legal requirements, but for various reasons no longer have legal effects (for example, the term of the contract has expired or the cause of the contract has been executed, etc.).

A *document referring to goods other than those passed over the customs border* is the legal act concluded in accordance with the legal provisions, the content of which concerns goods other than those crossed over the customs border. For example, data from the car purchase contract refers to a particular car, while another car is trying to cross the border.

Regarding the means of customs identification used fraudulently when passing goods across the customs border, we mention the means of transportation, the rooms and other spaces in which the goods and means of transport subject to customs control are or may be located, the spaces where activities are carried out customs supervision as well as goods and means of transport under customs supervision may be identified by the customs authority. The identification shall be carried out by the application of seals, seals (for payment), stamps, markings, identification marks, sampling and sampling, description of goods and means of transport, drawing of the plan, photographing, use of goods accompanying goods, documents and other documents by other means of identification. Means of identification may be exchanged or destroyed only by the customs authority or by its authorization.

In other words, identification is one of the forms of customs control. Identification shall be used at the internal customs transit stage in order to enable the customs authorities to detect traces of the withdrawal of goods or the commission of any operations with such goods. The object of identification is the goods and documents, for the identification of which the customs authorities use various means.

By *means of false customs identification*, the means of identification made illegally by the perpetrator are considered. By *means of illegally obtained customs identification* we mean means released in violation of the regulations in

³³² Rogatîh L. F., *op. cit.* (Criminally punishable contraband), p. 75.

³³³ Gîrla L. G., Tabarcea Iu. M., *op. cit.* (Criminal Law of the Republic of Moldova. The special part. Tom I.), p. 678.

force. By *means of customs identification referring to goods other than those crossed over the customs border* is meant the means whose content relates to goods other than those past the customs border.

In the context of the use of false customs documents for the passage of goods across the customs border of the Republic of Moldova, it is necessary to question the correlation between article 248 and article 361 CP RM. In particular, it is necessary to answer the following question: Should the qualification rules be applied in the case of a criminal offense, if the perpetrator uses false official documents (which have the quality of customs documents) for the passage of the material entities specified in article 248 CP RM over customs border?

We believe that there can be no contest between these crimes in the hypothesis outlined above. In our opinion, in this situation, between article 248 and 361 CP RM there is a report of the type of special norm and general norm. The rules of article 248 CP RM are special, while that of article 361 CP RM - general; the presentation to the customs authorities of false customs documents, when these are the official documents of false origin, in order to pass the goods over the customs border of the Republic of Moldova is no more than a special case of using official documents, within the meaning of the norm from article 361 CP RM. According to the qualification rule laid down in paragraph (2) of article 116 CP RM, in the case of competition between the general rule and the special rule, only the special rule applies, i.e. the rule of art.

What will be the qualification solution, if the perpetrator makes the customs document and then presents it to the customs body for passing goods over the customs border?

In the opinion of the authors R. Sobiețki and V. Spatari, if not only the fraudulent use of false documents for the passage of goods, objects and other values in large proportions, but also their counterfeiting, to be classified as a criminal offense: smuggling (article 248 CP RM) and the offense of making, holding, selling or using official documents, prints, stamps or false seals (article 361 CP RM) or counterfeit in public documents (article 332 CP RM), depending on whether the active subject of the latter offenses is a responsible person who has reached the age of 16 years (general subject) or a person with responsibility (special subject)³³⁴.

In our opinion, the solution must be removed from the attitude of the perpetrator. Therefore, if the perpetrator makes the document for the purpose of subsequent presentation to the specific customs body in order to pass the goods over the customs border then the qualification solution must be: a) preparation for one of the smuggling offenses (if the perpetrator merely makes the document, failing to pass the goods over the customs border, b) one of the smuggled offenses (when the perpetrator manages to present the document of the customs body on

³³⁴ Sobiețki R., Spatari V., *op. cit.* (*Folosirea frauduloasă a documentelor – modalitate normativă alternativă prin care se poate manifesta infracțiunea de contrabandă*), p. 38.

the basis of which the goods are passed over the customs border). In either case, neither the first nor the second does not apply the rule of article 361 CP RM, because this norm, in relation to those of article 248 CP RM, will appear as a norm- part, being absorbed by the norms of article 248 CP RM, as full norms. Also in accordance with the provisions of paragraph (2) article 118 CP RM, the classification of the offenses in the case of competition between a party and a whole is carried out on the basis of the norm that includes all the signs of the detrimental act committed, ie according to the entire norm. S. Brînză and V. Stati³³⁵ are of the same opinion. Moreover, in the opinion of the indicated authors, to which we subscribe, article 361 CP RM is also inapplicable if a person produces and/or holds a fake official document, and another person presents it to the customs body³³⁶. In such cases, the authors assert: "The role of the person making the fake official document is a secondary one, accessory, only contributing to the commission of one of the offenses provided in paragraphs (1) - (3) article 248 CP RM. So he is to be seen as a participant (for example, accomplice) in such an offense. It can not be attributed - subjectively or additionally - the offense provided by article 361 CP RM"³³⁷.

In another context, the fraudulent use of customs documents must be distinguished from the contravention act specified in paragraph (4) of article 287 C. contr. RM. According to the said rule, it is punishable by contravention the non-presenting to the customs body within the time limit the documents necessary for the customs control of the goods, objects and other values under customs control, regardless of the presentation of the written declaration. Similarly, the fraudulent use of customs documents should be delimited by the act of failing to present customs documents on goods, objects and other values under customs control, transported from one customs office to another. Also, fraudulent use of means of customs identification as a method of committing smuggling offenses must be distinguished from the change of identification or marking signs from goods, objects or other values or from their packaging without the authorization of the customs body, as well as the deterioration or loss of lead, stamps or other safeguards applied by the customs body [paragraph (6) article 287 C. contr. RM].

The *non-declaration* as a method of committing smuggling offenses means the non-inclusion in the customs declaration of the information about the goods to be declared obligatory³³⁸. Russian author A. Focov claims that by failing

³³⁵ Brînză S., Stati V., *op. cit. (Tratat de drept penal. Partea Specială)*, vol. II, p. 289; Stati V., *op. cit. (Infrațiuni economice: Note de curs)*, p. 455.

³³⁶ Stati V., *op. cit. (Infrațiuni săvârșite în sfera activității economice externe (art.248 și 249 CP RM): studiu de drept penal)*, p. 133; Brînză S., Stati V., *op. cit. (Tratat de drept penal. Partea Specială)*, vol. II, p. 289; Stati V., *op. cit. (Infrațiuni economice: Note de curs)*, p. 456.

³³⁷ Stati V., *op. cit. (Infrațiuni săvârșite în sfera activității economice externe (art.248 și 249 CP RM): studiu de drept penal)*, p. 133; Brînză S., Stati V., *op. cit. (Tratat de drept penal. Partea Specială)*, vol. II, p. 289; Stati V., *op. cit. (Infrațiuni economice: Note de curs)*, p. 456.

³³⁸ Stati V., *op. cit. (Infrațiuni economice: Note de curs)*, p. 452.

to declare it is to be understood the intentional non-indication in the customs declaration or otherwise provided by the law for the declaration of goods information required to make the decision to allow the passing of goods and means of transport subject to declaration, the customs regime chosen and the collection of customs payments³³⁹.

In the following case, the non-declaration as a method of committing smuggling was retained in the judicial practice: *on 10.02.2012, around 16.00, B. V., aiming to introduce smuggled metals into the territory of the Republic of Moldova by moving - with the "Toyota Avensis" model transport vehicle, crossed the Moldovan customs border through PT Palanca (auto), Stefan Voda district. Contrary to the provisions of paragraph (1) of article 8 of the Law no.1569 of 20.12.2002 on the manner of introduction and removal of goods on the territory of the Republic of Moldova by natural persons, he concealed from customs control, by failing to declare in the customs documents, 3 gold ingots, sample 999,9, total mass 149,98 grams and 2 silver ingots lined with gold, sample 996, with a total mass of 111,74 grams, which, according to the expert's report no. 8 15.05.2012, were valued at the price of 90.357 RON, which is large proportions*³⁴⁰. The same method was found in other criminal cases in court practice³⁴¹.

The customs declaration is the unilateral act by which a person manifests, in the forms and in the manner provided by the customs legislation, the will to place the goods under a particular customs destination. The basic rule is that goods and means of transport crossing the customs border, goods and means of transport whose customs destination is changed, other goods and means of transport in the cases established under the law are declared to the customs body.

The declaration shall be made in writing, verbally or by action by electronic means or by other means provided by the law. Verbal declaration is a form of declaration that provides the owner (the possessor), verbally, at the request of the decision-maker, to the customs authority of all the data concerning the quantity, quality and value of the goods, personal effects that are displaced customs border.

We note that the customs declaration is submitted to the customs body in electronic form, using the integrated customs information system. The form and

³³⁹ Focov A., *op. cit.*, (On judicial practice in cases of smuggling), p. 5.

³⁴⁰ Decision of the Supreme Court of Justice of July 3, 2013, File no. 1re-210/13, <http://www.csj.md> (visited on 02.11.2015).

³⁴¹ Sentence of Hancesti Court of June 4, 2013, File no. 2-283/2013, http://instante.justice.md/apps/hotariri_judecata/inst/jhn/jhn.php (visited on 07.12.2015); Sentence of Hancesti Court of July 18, 2013, File no. 1-310/2013, http://instante.justice.md/apps/hotariri_judecata/inst/jhn/jhn.php (visited on 07.12.2015); Sentence of Hancesti Court of October 7, 2013, File no. 1-350/2013, http://instante.justice.md/apps/hotariri_judecata/inst/jhn/jhn.php (visited on 07.12.2015); Sentence of Ungheni Court of February 16, 2016, File no. 1-455/2015, http://www.jun.instante.justice.md/ro/hot?data_deciziei=&nr_dosar=&denumire_dosar=&tip_dosar=penal&page=1 (visited on 31.03.2016).

procedure for the declaration, as well as the information required for customs clearance, shall be determined by the Customs Service. The goods are declared at the customs office determined by the Customs Service. Means of transport of goods are declared with them, except for the means of transporting freight and passenger transport which are declared at the time of crossing the customs border.

The customs declaration shall be lodged at the border customs office on the working day immediately following the day of the crossing of the customs frontier and, in the case of completion of the customs transit procedure, within one working day immediately following the day on which the customs transit procedure was concluded. Individuals who, in their hand luggage and accompanying luggage, do not sell goods shall lodge a customs declaration at the time of presentation of the goods at the crossing of the customs frontier. The deadline for declaring natural gas and imported electricity is from the moment of the customs border crossing until the 20th of the month following the management. In the case of international postal dispatches, the customs declaration shall be lodged with the customs authority within 72 hours of the crossing of the customs frontier.

Similarly, summary statements may be used until the goods are placed under a particular customs destination. The form of the summary declaration and the information to be given in it shall be determined by the Customs Service. The Customs Code, as well as other normative acts of a special nature, further establish the periodic customs declaration and the simplified procedure for the declaration of goods and means of transport.

Special rules for the declaration of goods passed over the customs border of the Republic of Moldova are contained in the Order of the Customs Service regarding the approval of the Regulation on the clearance of goods passed over the customs border of the Republic of Moldova by individuals and some standardized forms.

In another context, the perpetrator may declare some of the goods past the customs frontier, and another party may not declare it. In this case, it will be considered as smuggling only in the undeclared part. Such a solution has been retained in a case in the Russian Federation's judicial practice, where the perpetrator only declared part of the foreign currency when crossing the foreign frontier, the perpetrator only allowed the material smuggling to be considered as a material object of smuggling undeclared foreign currency, but not the entire amount of money³⁴².

³⁴² Bulletin of the Supreme Court of the Russian Federation, 2009 г., no. 10.

By *inappropriate declaration* it is necessary to understand the fact that false customs information has been entered in the customs declaration³⁴³. A similar definition is given by A. Focov³⁴⁴. It is mentioned in the literature that in the case of non-authentication (as well as in the case of fraudulent use of documents), for the recognition of the presence in the actions of the person of the constituent signs of smuggling the relevance is only those data referring to goods and importance for decision about allowing them to cross the customs border³⁴⁵.

Compared with the passing of goods over the customs border of the Republic of Moldova by non-declaration, in the case of non-authentic declaration, the perpetrator fulfills the legal obligation to declare the goods to be crossed over the customs border, but the data reflected in the customs declaration do not correspond to the reality.

Non-authentic declaration must be distinguished from the rectification of the customs declaration. Compared to non-authentication, rectification is an action allowed by law. The data and information indicated in the customs declaration of the natural person with the authorization of the competent customs authority may be rectified. Corrections are made by the declarant by cutting the wrong data line and entering the correct data. Any corrections or changes in the customs declaration shall be validated by the customs officer by the application of the personal stamp instead of the modification or completion.

Similarly, non-authentication must be delimited by the invalidity of the customs declaration at the declarant's initiative. According to article 181² CV RM, at the request of the declarant, the customs authority invalidates the declaration already accepted if the declarant provides proof that the goods have been declared erroneous for the customs regime corresponding to the declaration or whether, in special circumstances, placing the goods under the customs procedure for which they have been declared no longer justified.

In another register, we point out that the non-authentic declaration as a method of committing smuggling offenses is a special case of the forgery in declarations within the meaning of the norm of article 352¹ CP RM, which is why only one of the norms at article 248 CP RM. In this case the qualification rule from paragraph (2) of article 116 CP RM.

Regarding *the place of committing the offense* as a constitutive sign of the smuggling offenses stipulated in paragraphs (1) - (3) article 248 CP RM, we mention that it constitutes *the customs border of the Republic of Moldova*, which is even the result of the provision of the incrimination norm.

³⁴³ Stati V., *op. cit. (Infrațiuni economice: Note de curs)*, p. 455; Stati V., *op. cit. (Infrațiuni săvârșite în sfera activității economice externe (art.248 și 249 CP RM): studiu de drept penal)*, p. 132; L. G. Gîrla, Iu. M. Tabarcea, *op. cit., (Criminal Law of the Republic of Moldova. The special part. Tom I.)*, p. 679.

³⁴⁴ Focov A., *op. cit., (On judicial practice in cases of smuggling)*, p. 5.

³⁴⁵ Rogățil L. F., *op. cit. (Criminally punishable contraband)*, p. 87.

From the norm in paragraph (3) of article 4 CV RM, we find out that the customs border of the Republic of Moldova comprises: a) the state border of the Republic of Moldova; b) perimeter of customs warehouses. It follows that the state border does not completely overlap with the customs border.

In accordance with article 2 of the Moldovan State Border Law no. 215 of 04.11.2011³⁴⁶, *the state border* of the Republic of Moldova represents the natural or conventional line marking the external boundaries of the territory over which the Republic of Moldova exercises its sovereignty exclusive on land, on the aquatic, underground and aerial sectors and crossing in a straight line from one border sign to another or where the state border is not marked on the land with border signs from a coordinate point to another. On the rivers and on the other rivers, the state border is the one established by the treaties concluded by the Republic of Moldova with the neighboring states, respecting the principle of international law, according to which the state border passes in the middle of the main navigable canal, and on the uninhabitable running waters - the middle of the sheet of paper.

Although the state border partly overlaps with the customs border, however, in the context of smuggling, the place of committing the offense is the customs frontier. The state border forms the site of committing the offense provided by article 362 CP RM (the illegal crossing of the state border). For these reasons, we can not support the following wording from the judicial practice: *D. P., between December 13-14, 2013, by concealing from customs control, tried to smuggle goods through road transport across the state border of the Republic of Moldova [emphasis belongs to us - the author's note]*³⁴⁷.

The customs warehouse is the place approved by the customs body and under its supervision, where it can be stored: a) foreign goods, without the application of import rights and economic policy measures; b) domestic goods destined for export. The customs warehouse may be public or private.

In the following, we will continue to analyze the objective aspect of the smuggling offense specified in paragraph (4) of article 248 CP RM, especially when the detrimental act is expressed in the non-return to the customs territory of the Republic of Moldova of cultural values removed from the country, if their return is mandatory. Regarding the other way of the harmful deed mentioned in paragraph (4) of article 248 CP RM (passing over the customs border of the Republic of Moldova of cultural values, eluding the customs control or concealing it by hiding it in specially prepared or adapted places for this purpose), we note that, in large part, the objective side is similar to the offenses set forth in paragraphs (1) - (3) article 248 CP RM, the content of which has been analyzed. Only the special quality of material entities over the customs border of the Republic of

³⁴⁶ Official Gazette of the Republic of Moldova, 2012, no. 76-80.

³⁴⁷ Judgment of the Ungheni Court of 19 December 2014, File no. 1-220/2014, http://www.jun.instante.justice.md/ro/hot?data_deciziei=&nr_dosar=&denumire_dosar=&tip_dosar=penal&page=21 (visited on 31.03.2016).

Moldova differs, namely: cultural values. Therefore, in order to avoid unnecessary repetitions, we will refer to the explanations set out above.

The non-return of cultural values must be understood as the unlawful act of non-fulfillment of the legal obligation to return to the customs territory of the Republic of Moldova of the named material entities within the established term. For the applicability of this omisive act, it is imperative to meet cumulatively two conditions: a) the perpetrator should have the obligation to return the cultural values to the customs territory of the Republic of Moldova at the expiry of the period for which they were removed *and* b) the perpetrator has the real possibility to return the respective values in the customs territory of the Republic of Moldova.

In the doctrine, it is fair to say that in the context of the non-return of cultural values, harm can be accompanied by certain actions that would make it easier to commit inaction (for example, to hide the cultural values that are not returned to the customs territory)³⁴⁸. The term of return of cultural values on the territory of the Republic of Moldova is established in the contract for the return of cultural values temporarily past the customs border, which is concluded between the legal person and the owner of these values (the state in the capacity of the competent bodies, the legal entity or another entity)³⁴⁹.

In the context of the smuggling of cultural values, which is of no interest, is the following question: what must be the solution if the cultural values are crossed over the customs border by fraudulent use of documents or means of customs identification, by non-declaration or by declaration inauthentic? It is certain that the actions of the perpetrator can not be classified according to paragraph (4) of article 248 CP RM, because, as methods of crossing the customs border of cultural values, the legislator established only: a) the circumvention of customs control, and b) concealment from customs control. Other methods are not provided. Their list is exhaustive. It can not be widened by the law enforcement officer. Otherwise, the principle of the lawfulness of criminality would be disappointed. Could the committed ones be classified according to the norm of paragraph (1) article 248 CP RM, considering the insertion in the text of this norm, as methods, of the non-declaration, the inappropriate declaration and the fraudulent use of documents or means of customs identification? We think not. And our argument is as simple as possible: as a material object of smuggling provided for in paragraph (1) of article 248 CP RM, any good may appear except those provided for in paragraphs (2) to (4) of article 248 CP RM; from the point of view of the legal technique, different types of offense are found in each of these paragraphs. Then, what must be the solution? In our opinion, such an act escapes the criminal law. Such an act can not be classified under the Code of Contravention.

³⁴⁸ Zhalinskovo, A. E. (ed.), *op. cit.* (*Educational-practical commentary to the Criminal Code of the Russian Federation*), p. 571.

³⁴⁹ Raroga A. I., *Уголовное право России. Особенная часть* (*The Criminal Law of Russia. Special part*), Moscow: EKSMO, 2009, p. 304.

In this respect, the question arises: why the legislator established at paragraph (1) - (3) article 248 CP RM a more comprehensive list of the methods of passing goods across the customs border, and in paragraph (4) article 248 CP RM - a less comprehensive list? What was the reasoning of the legislator to reduce the number of methods of smuggling with cultural values? Probably, the idea of the perpetrator's inability to resort to such methods, such as non-authentication, non-authentication, or fraudulent use of documents or means of customs identification, has probably begun. May be. Reality, however, is different. In fact, it is possible for cultural values to be crossed over the customs border, including: non-declaration, inappropriate declaration or fraudulent use of documents or means of customs identification. For example: It is possible for a natural person to enter cultural values in the customs territory of the Republic of Moldova through fraudulent use of customs documents. Therefore, in order not to admit the criminal liability of a person who passes cultural values over the customs border of the Republic of Moldova by other means than by circumventing the customs control and keeping them from customs control, we consider it necessary to add the paragraph (4) article 248 CP RM with the list of the methods provided for in paragraphs (1) - (3) article 248 CP RM, so as to fall under the norm of paragraph (4) article 248 CP RM, crossing the cultural border of the Republic of Moldova, by fraudulent use of documents and means of customs identification, by non-declaration or by inappropriate declaration.

In another register, we record that the offenses under the name of smuggling marginal, according to the criminal law of the Republic of Moldova, are *formal*. The time of consumption differs, however, from the way of expressing the detrimental act. In the context, A. Focov argues that the time consuming smuggling offenses depends on the form and the concrete method of committing (export, import, transit through pipelines and power lines, bypassing customs control, fraudulent use of documents and means of customs identification, by non-authentication or non-authentication)³⁵⁰. After P. A. Modestov the smuggling offenses are deemed to have been consumed since the beginning of the customs control of the goods passed over the customs border, or, if the customs control does not take place - from the moment when the customs authority decides to grant a customs regime to the goods that are intended to be passed across the border. When smuggling is committed by circumventing customs control, the offense is deemed to have been consumed since the beginning of the actions aimed at illegally crossing the goods across the customs border³⁵¹.

According to other authors, the content of smuggling offenses is of a formal nature, being considered consumed since the *de facto* crossing of the customs

³⁵⁰ Focov A., *op. cit.*, (On judicial practice in cases of smuggling), p. 3.

³⁵¹ Modestov P. A., *op. cit.* (Smuggling: public danger, qualification, questions of responsibility), p. 23.

border³⁵². A similar position is pointed out in CSJ Plenum Decision no. 5/2010. Similarly, G. P. Cacichina criticizes the position of those authors who differentiate the moment of consumption of smuggling crimes depending on whether the introduction or removal of goods takes place across the customs border, considering that they are consumed since the *de facto* crossing of the customs border³⁵³.

In our opinion, the systemic interpretation of the norms of article 248 CP RM with the norms of the customs legislation is necessary in order to identify the moment of consuming smuggling offenses. Thus, according to point 5 of the article 1 CV RM, in the case of the introduction of goods and means of transport into the customs territory of the Republic of Moldova or in the case of their introduction on the other side of the customs territory of the Republic of Moldova from the territory of the customs warehouses, the *de facto* crossing of the customs border; in the case of removal of goods and means of transport from the customs territory of the Republic of Moldova or in the case of their entry into the customs warehouses on the other part of the customs territory of the Republic of Moldova, the filing of the customs declaration or other customs operations denotes the intention to introduce or to remove goods and means of transport.

Hence the conclusion: in the case of goods entering the customs territory of the Republic of Moldova or when they enter the other part of the customs territory of the Republic of Moldova from the territory of the customs warehouses smuggling offenses are consumed since the *de facto* crossing of the customs border, removal of goods from the customs territory of the Republic of Moldova or their introduction on the territory of customs warehouses on the other side of the customs territory of the Republic of Moldova, the offenses stipulated in article 248 CP RM shall be considered consumed from the time of the customs declaration or other customs operations which reveals the intent of crossing the goods across the Moldovan customs border. There are other authors of the same opinion³⁵⁴.

In the case of smuggling provided for in paragraph (4) of article 248 CP RM, where the harmful act is expressed through the inaction of non-return to the customs territory of the Republic of Moldova of cultural values removed from the country, if their return is mandatory, the offense is considered consumed from

³⁵² Barbăneagră A., Alecu Gh., Berliba V. et al., *op. cit. (Codul penal al Republicii Moldova. Comentarii. Adnotat cu jurisprudența CEDO și a instanțelor naționale)*, p. 540; Kruglikova L. L., *Уголовное право России. Часть Особенная (The Criminal Law of Russia. The Special Part)*, Moscow, 2004, p. 335; Macari I., *op. cit. (Dreptul penal al Republicii Moldova. Partea Specială)*, p. 262; Sucicov Iu. I., *op. cit. (Customs crimes: a study guide)*, p. 43; Magzumov A. B., *op. cit. (Criminally-legal aspects of economic contraband)*, p. 65; Vasilicov I. S., *op. cit. (Crimes in the sphere of economy)*, p. 150.

³⁵³ Kachkina G. P., *op. cit. (Smuggling as a customs offense)*, p. 23.

³⁵⁴ Sobiețki R., *op. cit. (Contrabanda: aspecte juridico-penale: studiu monografic)*, p. 120; Vasilieva I., *Контрабанда: актуальные проблемы квалификации (Contraband: current problems of qualification)*, „Уголовное право” („Criminal Law”), no. 3, 2005, p. 14; Vitvițkii A. A., *op. cit. (Crimes in the sphere of foreign economic activity...)*, p. 72.

the moment of expiration of the deadline for the return of cultural values to the customs territory of the Republic of Moldova. There are other authors on the same position³⁵⁵.

Although smuggling offenses are formal, the presence of the attempt is not excluded as an atypical form of the offense. For example, in the following cases from the practice of the courts was attempted to smuggle:

- *by the judgment of the Central Court, mun. Chisinau, dated March 7, 2013, it was found that P.A. intends to introduce psychotropic substances in particularly large proportions on the territory of the Republic of Moldova. On 21.04.2011, based on the criterion applied to the import of goods by "CA" S.R.L. in the person of P. A. and operative information, on-the-spot investigation was carried out at Customs post 2 "Posta" of the Chisinau customs office, where in postal order no. EE21... PT, shipped from Portugal by S. T. in the address of "CA" S.R.L. located on Ștefan cel Mare no., 40 packages with the inscription "Special gold original", 272 packages with the inscription "Bloom plant feeder", 20 packages with the inscription "Kratom herbs" declared in the customs documents and other documents of the border crossing by the declarant B. V., at the indication of the P.A., with the same code as "combustion preparations acting by combustion",³⁵⁶*

- *C. V., P. D., B. L. and D. C., with the prior understanding, intending to cross the customs border by circumventing the customs control of 9,000 packets of cigarettes, were detained by border police officers while transporting cargo with a boat across the Prut River;³⁵⁷*

- *D. A., following the purpose of crossing the customs border of the Republic of Moldova, without being declared to the customs control body, having no documents confirming the origin of the goods through the customs office Sculeni on the way of entry to the Republic of Moldova, tried to introduce without declaring the goods to the customs body, but for reasons independent of his will, the cargo was not introduced because he was detained by the Customs Service inspectors³⁵⁸.*

If the smuggling attempt is punishable by criminal penalties, then the preparation does not always fall within the scope of article 248 CP RM. Only preparation for committing one of the smuggling offenses referred to in paragraphs (2) - (5) of article 248 CP RM is considered an offense. *Per a contrario*, the preparation for smuggling provided in paragraph (1) of article 248 CP RM is

³⁵⁵ Vasilicov I. S., *op. cit. (Crimes in the sphere of economy)*, p. 163.

³⁵⁶ Decision of the Supreme Court of Justice of 26 February 2014. File no. 1ra-406/14, www.csj.md (visited on 19.11.2015).

³⁵⁷ Briceni Court Sentence of 25 August 2015, File no. 1-94/2015, http://www.jbr.instante.justice.md/ro/hot?data_deciziei=&nr_dosar=&denumire_dosar=&tip_dosar=penal&page=4 (visited on 31.03.2016).

³⁵⁸ Ungheni Court Sentence of 17 August, 2015, File no. 1-268/2015, www.jun.instante.justice.md/ro/hot?data_deciziei=&nr_dosar=&denumire_dosar=&tip_dosar=penal&page=10 (visited on 31.03.2016).

not punishable by criminal penalties. This is because the smuggling specified in paragraph (1) of article 248 CP RM is an easy offense. According to paragraph (2) of article 26 CP RM, criminal responsibility and criminal punishment are subject only to persons who have committed the preparation of a less serious, serious, particularly serious or exceptionally serious offense. So, preparing for a minor offense does not fall under the criminal law.

In order to prepare for smuggling provided for in paragraphs (2) - (4) of article 248 CP RM (criminal penalties), the following actions may be classified: acquisition of the goods intended to be crossed over the customs border; arranging the hiding places in the means of transport, the person, etc. to conceal the goods; falsification of documents to be used to pass goods across the customs border; recruiting accomplices; drawing up the plan, etc.

Next, we will focus our attention on the analysis of *the objective side of the offenses provided by article 249 CP RM* - the evasion of payment of customs payments.

The objective aspect of the offenses provided in article 249 CP RM consists of: a) damaging act expressed in the inaction of non-payment of customs payments; b) the injurious effects of unpaid customs payments within the prescribed period; c) the causal link between the deed and the injurious consequence.

According to some authors, by evasion, within the meaning of the norm of article 249 CP RM, is meant the criminal innocence incriminated in the case of the actual possibility to act and presupposes the intentional non-payment of the customs payments within the stipulated term³⁵⁹. Other authors define the evasion of paying the customs payments as the refusal of the perpetrator to pay those payments within the time limits established by the customs legislation³⁶⁰. Much more complex is the definition of escape given by Z. M. Abdurahmanov, according to which it is the act directed against the unlawful release of customs payments or the reduction of their amount, or for the unjustified refund of customs payments, as well as the non-payment of customs payments within the time limit set in the case of the possibility of payment or the addressing to the customs authorities the request to postpone the payment of the customs payments in the absence of the intention to execute the obligation to pay within the time limit or the knowingly submitting false guarantees for the payment of the customs payments³⁶¹. According to V. D. Laricev and N. S. Ghilimutdinova's evasion of the customs payments is a socially dangerous, deliberate act, provided by the crimi-

³⁵⁹ Mutu M., *op. cit.* (Deosebirea contrabandei de eschivarea de la achitarea plăților vamale), p. 27.

³⁶⁰ Brînză S., Stati V., *op. cit.* (Tratat de drept penal. Partea Specială), vol. II., p. 295; Stati V., *op. cit.* (Infrațiuni economice: Note de curs), p. 465; Stati V., *op. cit.* (Infrațiuni săvârșite în sfera activității economice externe (art.248 și 249 CP RM): studiu de drept penal), p. 138.

³⁶¹ Abdurahmanov, Z. M., *op. cit.* (Criminal liability for non-payment of customs fees levied from the organization or from an individual), p. 15-16.

nal law and punishable by punishment, expressed in the total or partial non-payment within the prescribed period of the legal payments provided by the law, as well as in the unlawful restitution of the paid customs payments previous³⁶². Regarding the latter, we specify that, in accordance with the legislation of the Republic of Moldova, the actions aimed at restitution of the import and export rights collected fall within the scope of paragraph (15) article 287 C. contr. RM.

Generalizing the above definitions, *grosso modo*, by *failing to pay the customs payments*, it is necessary to understand the perpetrator's refusal to honor his/her obligation to pay import/export duties when goods cross the customs border of the Republic of Moldova.

Please note that the offenses analyzed can be reported to the group of offenses committed by mixed inaction. The doctrine shows that mixed inaction is the inaction that, according to criminal law, on the one hand, it is accompanied by various actions and, on the other hand, it can lead to harmful consequences³⁶³. In this regard, the authors L. G. Girla and Iu. M. Tabarcea states that the crimes examined are liable to commit by means of active evasion, including such methods of evasion of payment of customs payments as: a) change of domicile and other actions in order to hide from the customs body; b) payment of incomplete customs payments, etc³⁶⁴. Similarly, the authors V. Berliba and R. Cojocaru point out that the evasion of payment of customs duties as a detrimental act is defined as a negligent activity expressed by the refusal to pay the customs payments within certain deadlines provided by the customs legislation where the refusal can actually be achieved by active factual methods (the presentation of false documents that lead to a reduction of the quota of customs payments) or passive (non-payment of customs duties in general)³⁶⁵.

In another context, in order to be in the presence of evasion of payment of customs payments, it is necessary that the perpetrator fails to fulfill his obligation to pay the customs payments within a specified period. That is why the constitutive sign that confers on the offenses under consideration a distinct physiognomy resides in the presence of injurious consequences, in the form of non-payment of customs payments within the time-limit set by the law.

According to article 124 CV RM, import rights and export rights are paid in advance until the customs declaration is submitted. At the time of customs clearance, only the payment of the difference between the calculated amount and the amount paid in advance is accepted. The difference between the import rights calculated on the basis of the customs value determined by the customs authority

³⁶² Laricev V. D., Ghilimutdinova N. S., *op. cit. (Customs crimes)*, p. 144; Ghilimutdinova N. S., *op. cit. (The criminal liability for evasion from payment of customs payments)*, p.17.

³⁶³ Copețchi St., Hadîrca I., *op. cit. (Calificarea infracțiunilor)*, p. 132.

³⁶⁴ Girla L. G., Tabarcea Iu. M., *op. cit. (Criminal Law of the Republic of Moldova. The special part. Tom I.)*, p. 686.

³⁶⁵ Barbăneagră A., Alecu Gh., Berliba V. et al., *op. cit. (Codul penal al Republicii Moldova. Comentariu. Annotat cu jurisprudența CEDO și a instanțelor naționale)*, p. 543-544.

and the import rights calculated on the basis of the customs value announced by the declarant shall be paid within the term specified in article 199 CV RM, i.e. no later than 5 calendar days from the moment of receipt customs declaration by the customs authority.

The customs authority is empowered to prohibit the import of goods for which the import rights have not been paid in the manner established by the Customs Code. Natural persons who are not subjects of entrepreneurial activity shall pay import or export duties at the time of crossing the customs frontier, with the exception of import or export duties to be paid when unmanned luggage and means of transport are cleared.

Legal entities and individuals pay import and export rights in cash or by transfer (including by card) to the respective accounts of the Ministry of Finance. Legal entities are only allowed to pay in cash the difference of payment determined at the time of clearance.

Similarly, according to point 23 of the Customs Service Order regarding the approval of the Regulation on the clearance of goods over the customs border of the Republic of Moldova by natural persons and of standard forms, if the natural persons declare goods for the passage of which the legislation in force provides for the payment of customs duties, the customs body carries out the calculation and checks the payment thereof. Individuals who do not practice entrepreneurship pay their customs duties when crossing the customs border.

The date of payment of the import and export duties, except for payment by means of bank cards, shall be the date of deposit by the importer (declarant), exporter (declarant) or by a third party of the funds in the respective accounts of the Ministry of Finance, fact confirmed by a treasury report.

The payment of import and export rights through bank cards is considered to be made at the moment of debiting with the amount of the respective payment of the card account from which the card used for payment was issued.

The debit of the respective card account is confirmed by the payment receipt, with a bank card finalized at POS terminal or other bank card use device, receipt issued to the cardholder. The payment of import or export rights via bank cards can only be canceled with the acceptance of the respective Customs Service.

Customs regulations allow for the prolongation of the payment period for customs payments. In this case, we will be in the presence of the offenses provided in article 249 CP RM, if the perpetrator did not pay the customs payments within the extended term. Cases of extension or rescheduling of the payment period of import and export duties are laid down by law. In any case, the deadline for payment of the customs procedure fee [paragraph (2) article 126 CV RM] can not be extended.

The offenses referred to in article 249 CP RM are *material*. The doctrine states that they are considered consumed when the material element was made

under the conditions stipulated by the law³⁶⁶. As far as we are concerned, we believe that the offenses stipulated in article 249 CP RM are considered consumed as soon as the perpetrator fails to pay the customs payments within the stipulated term, as well as in the doctrine³⁶⁷. In the theory of criminal law there is also the opinion that the components of the offenses stipulated in article 249 CP RM are formal, consumed since the evasion of the payment of customs payments³⁶⁸. We can not support such an optical; we have shown that in the structure of the objective side of the crimes examined the harmful consequences and the causal link between the material element and the consequence are.

Concerning the injurious mechanism, M. A. Cociubei points out that the injurious effect is expressed in the fact that the state does not receive the payment it would receive. The specific nature of this type of injurious effect lies in the fact that the perpetrator does not take away anything from the state, his patrimonial assets do not increase, but he leaves what he was obliged to transmit to the state in accordance with its obligations established by law³⁶⁹.

In other respects, we argue in the specialized doctrine that in the case of postponement of the payment of the customs payments, the evasion offenses from the payment of the customs payments will be considered consumed from the expiration of the new term for which the postponement of the payments was established.³⁷⁰

In other contexts, the evasion of paying customs duties must be circumscribed by smuggling. In the legal literature, the issue of the delimitation of the offenses stipulated in article 248 CP RM is much approached by the ones specified in article 249 CP RM, but the points of view on the different aspects remain different. Although some criteria for dissociating these facts are required, they are still not clearly established.

The need to establish demarcation lines between these offenses occurs when smuggling is committed by fraudulent use of customs documents, by non-authentication or inappropriate declaration in customs documents. Also, the delimitation of these offenses is necessary especially when goods, objects or other values are exceeded, except for those stipulated in paragraphs (2), (3), (4) article 248 CP RM. V. V. Hiliuta adds that the difficulty of delimiting these crimes is dictated by the fact that they belong to the category of offenses in the sphere of external economic activity, they have insignificant differences regarding the special legal object, the objective side and the subjective side, and, last but not least,

³⁶⁶ *Ibidem*, p. 544.

³⁶⁷ Brînza S., Stati V., *op. cit.* (*Tratat de drept penal. Partea Specială*), vol. II, p. 296; Stati V., *op. cit.* (*Infrațiuni economice: Note de curs*), p. 466; Stati V., *op. cit.* (*Infrațiuni săvârșite în sfera activității economice externe (art.248 și 249 CP RM): studiu de drept penal*), p. 139; Vitvițkii A. A., *op. cit.* (*Crimes in the sphere of foreign economic activity...*), p. 94.

³⁶⁸ Macari I., *op. cit.* (*Dreptul penal al Republicii Moldova. Partea Specială*), p. 263.

³⁶⁹ Cociubei M. A., *op. cit.* (*Criminal liability for crimes in the sphere of customs activity*), p. 14.

³⁷⁰ *Ibidem*, p. 14.

the provision of the norms of the lawmaker did not specify the particularities of the illegal actions³⁷¹.

A first criterion for delimitation is the subject of criminal protection. In the case of the crimes analyzed it is different. According to the Russian authors O. Cruglova and A. Cotelnicov, if the special legal object of smuggling offenses forms the social relations regarding the order of transit of goods and means of transport across the customs border, then the special legal object of the evasion offenses from paying the customs payments is the social relations regarding the order of payment of the customs payments to the state budget³⁷². So also M. Mutu claims: "The delimitation of these offenses begins even from the special legal object. Thus, if the object of smuggling is the inviolability of the customs border [*read* - the security of the customs border - *the author's note*], then the special legal object of the evasion of payment of customs payments is the security of the tax system, namely customs payments"³⁷³. Also, I. V. Rozumani argues: "The rules that incriminate smuggling do not protect the state's financial interests regarding the formation of the state budget from the paid taxes account. The social danger of smuggling does not consist in the fact that the culprit escapes from the payment of taxes, but in that the perpetrator evades from the state control established by the state for the effective realization of the activity in the economic sphere. The criterion of delimitation of these offenses is the material object, which in the case of smuggling offenses consists of commodities and other objects in large proportions, while in the case of evasion from paying the customs payments this is made up of the customs payments in proportions big"³⁷⁴.

Another delimitation criterion resides in the structure and content of the objective side. Also, through the objective side, the offenses examined are the most similar. Here it is necessary to point out the distinction between smuggling offenses committed by the non-declaration or inappropriate declaration in customs documents and the evasion of payment of customs payments. In other cases, (especially when smuggling involves the circumvention of customs control or the concealment of customs control goods) there are no problems in delimiting those offenses.

Thus, in the delimitation plan after the objective side, it is noted in the literature that if the non-authentication or the non-authentication of the goods was or could be causal to the decision of the customs body to allow goods to pass over

³⁷¹ Hiliuta V. V., *op. cit.* (*Problems of delimitation of smuggling from evasion from payment of customs payments in the criminal law of Belarus*).

³⁷² Cruglova O., Cotelnicov A., *op. cit.* (*Smuggling and evasion of payment of customs payments*), p. 6.

³⁷³ Mutu M., *op. cit.* (*Deosebirea contrabandei de eschivarea de la achitarea plăților vamale*), p. 27.

³⁷⁴ Rozumani I. V., *op. cit.* (*Criminal responsibility for smuggling: according to the materials of the Siberian Federal District*), p. 18.

the customs border or they could make it possible to cross the border without obstacles, the actions of the perpetrator must be classified as smuggling³⁷⁵.

In another similar opinion, it is mentioned that if the distorted indexes materialized in the document presented to the customs control give reasons and create the necessary conditions for passing goods over the customs border of the Republic of Moldova, otherwise this passage can not take place, there is smuggling in the form fraudulent use of documents, and if the fake document points to some characteristics of the good, which also permits in a case (when the document is true) and in the second case (when the document is false) the passing of the good across the border, only the quotas of customs payments are diminished, it is an escape from the payment of customs payments - an offense outside the limits of smuggling and between which an ideal contest of crimes can not be established³⁷⁶. We only share this opinion on the part of the impossibility of an ideal competition for offenses between smuggling and evasion from paying customs. We fully support the doctrinal view that "... in connection with the same goods, it is inconceivable the ideal contest between one of the offenses specified in article 248 and one of the offenses provided by article 249 CP RM. The two offenses are incompatible. This is because the crimes stipulated in article 249 CP RM presuppose the transfer of the goods beyond the customs boundary of the Republic of Moldova under conditions of legality"³⁷⁷.

At the same time, we do not support the authors' opinion, expressed in terms of delimitation of the nominated offenses. We are in favor of the opinion expressed by V. Stati, according to which the recourse of the offender to one of the methods of committing the offenses specified in article 248 CP RM, even if the non payment of the customs payments, excludes the detention of one of the offenses stipulated in article 249 CV RM, in such a case, the liability being applied only in accordance with one of the provisions of article 248 CP RM³⁷⁸.

Some Russian authors state that the evasion of payment of the customs payments presupposes the refusal to pay the payments established by the customs legislation within the prescribed period, where they have to be paid until the customs declaration or the simultaneous declaration, while smuggling can be committed only at the stage of filing the customs declaration, for which the actions for payment of customs payments and goods crossing the customs border do not coincide over time, which excludes the presence of the ideal competition between

³⁷⁵ Skvortsova K. F. (ed.), *op. cit. (Investigation of smuggling: A practical guide)*, p. 38; Dicanova T. A., Osipov V. E., *op. cit. (Combating customs crimes and money laundering: A methodical guide)*, p. 150-151.

³⁷⁶ Sobietki R., *op. cit. (Contrabanda: aspecte juridico-penale: studiu monografic)*, p. 144; Sobietki R., Spatari V., *op. cit. (Folosirea frauduloasă a documentelor – modalitate normativă alternativă prin care se poate manifesta infracțiunea de contrabandă)*, p. 39.

³⁷⁷ Stati V., *op. cit. (Infracțiuni săvârșite în sfera activității economice externe (art.248 și 249 CP RM): studiu de drept penal)*, p. 139.

³⁷⁸ Stati V., *op. cit. (Infracțiuni economice: Note de curs)*, p. 467.

smuggling and evasion of payment of customs payments³⁷⁹. In the opinion of the authors, which we consider correct, there can only be real contest between these crimes³⁸⁰. I. V. Rozumani considers that the action for payment of customs payments and goods crossing the customs border does not overlap over time, which demonstrates the possibility of concurrence between the offenses in question³⁸¹. We support this assertion with one remark - the two facts can enter real, but not ideal. In this sense, R. Sobiełki is right when he states that the actions for paying the customs payments and crossing the customs border of the goods do not coincide with the time, which excludes the ideal contest [emphasis belongs to us - *the author's note*] between the smuggling and the evasion of the payment customs payments³⁸². A similar position is P. A. Modestov³⁸³.

At the same time, we believe that in the case of crossing the customs border of the Republic of Moldova by fraudulent use of documents or means of customs identification, by non-authentication or non-authentication, even if the perpetrator fails to pay the corresponding customs payments, those committed must be qualified only as smuggling. That is why we can not support the view expressed by V.V. Hiliuta: "If the intention of the perpetrator is directed to the passage of goods over the customs frontier in large proportions by the methods indicated in the norms that incriminate the smuggling facts, the committed ones must be qualified as smuggling. If the intention of the perpetrator is to evade the payment of customs duties in full volume or in a substantially lower volume than that which must be paid when the goods are legally shipped, we will be in the presence of evasion of payment of customs payments"³⁸⁴.

The proposed qualification solution is also retained in judicial practice. For example, illustrative is the following case in the judicial practice of the Republic of Moldova, when the committed ones were framed according to article 248 CP RM, although the perpetrator sought to reduce the amount of customs duties required to pay for the goods crossing the customs border of the Republic of Moldova: *by the decision of the Hancesti Court of May 14, 2014 noted that on December 20, 2007, at the Leuseni-Albita customs office of the Customs Office of Leușeni, B. E. presented the "MB" coach model imported from Turkey to the Republic of Moldova for customs clearance. In order to clear the coach, he presented to the customs body the technical passport of the coach series and no. A*

³⁷⁹ Cruglova O., Cotelnicov A., *op. cit.* (Smuggling and evasion of payment of customs payments), p. 20.

³⁸⁰ *Ibidem*, p. 20.

³⁸¹ Rozumani I. V., *op. cit.* (Criminal responsibility for smuggling: according to the materials of the Siberian Federal District), p. 18.

³⁸² Sobiełki R., *op. cit.* (Contrabanda: aspecte juridico-penale: studiu monografic), p. 180.

³⁸³ Modestov P. A., *op. cit.* (Smuggling: public danger, qualification, questions of responsibility), p. 25.

³⁸⁴ Hiliuta V. V., *op. cit.* (Problems of delimitation of smuggling from evasion from payment of customs payments in the criminal law of Belarus).

275089 and invoice series and no. A 020451, on the basis of which it was procured from Turkey at the price of 5,000 USD. For the means of customs clearance, the TV certificate 25 was issued. 0091228 of 20.12.2007 and made the receipt of the printed form PV 14 series and no. 514702 of 20.12.2007, on the basis of which import rights were calculated in the total amount of 42,897.6 RON. But the real value of the imported coach was 54,000 USD, so import duties worth 161,425.11 RON were to be paid. Thus, in pursuit of the purpose of avoiding payment of customs payments, B.E. reduced the purchase price of the coach and thus did not pay the full amount of the import rights in the amount of 118,527.51 RON, which is an extremely large proportion. The prosecutor appealed against the sentence, requesting his dismissal and issuing a new ruling, according to the manner established for the first instance, whereby B. E. be sentenced on the basis of article 248 paragraph (5), letter (d) CP RM. In motivating the appeal, the prosecutor indicated that the wrong instance court recalculated the actions of the defendant according to article 249 paragraph (3) CP RM because he committed the smuggling offense, i.e.: crossed the "MB" coach model illegally over the customs border, the year of manufacture in 1997, in breach of customs rules, by the fraudulent use of customs identification documents. By decision of the Criminal Court of Chisinau Court of Appeal on July 2, 2014, the appeal declared by the prosecutor was dismissed as unfounded. The Appellate Court found that the court of law correctly re-enacted the actions of the defendant B. E. based on article 249 paragraph (3) CP RM. In the actions of the defendant, the court found the presence of the objective aspect of the said offense, namely: that when crossing the "MB" model car, he escaped from paying the customs payments established by the law.

Against the said decision, the ordinary prosecutor filed an ordinary appeal, requesting the quashing of the disputed judgment by remitting the case back to the same court in another court panel, claiming that the court of appeal incorrectly framed the deed. In this respect, he mentioned that the objective side of the smuggling offense is the passage over the customs border, in violation of the customs rules, made by inappropriate declaration in the customs documents or other documents of border crossing. Therefore, the delimitation of the offenses under articles 248 and 249 CP RM was not taken into account, based on the material object and the objective side.

By the decision of the Court of Appeal, it was decided to admit the ordinary appeal declared by the prosecutor, the decision of the Criminal Court of the Chisinau Court of Appeal being totally dismissed and ordered the retrial in the same court in another court. In order to substantiate its solution, the Court of Appeal held that the smuggling provided for in article 248 CP RM represents the passage over the customs border of the Republic of Moldova, in violation of customs rules, goods, objects and other values in large proportions, eluding the control customs by concealing them by hiding them in places specially trained or adapted for that purpose or by fraudulent use of documents or means of customs

identification or by non-authentication or non-authentication in customs documents or other documents of crossing the border customs, committed in particularly large proportions. In addition, the Court of Recourse found that the Court of Appeal did not take into account the fact that at the crossing of the customs border the defendant presented the Turkish tax invoice 8 A series A 763582 dated 18.12.2007, issued in his name, the amount indicated being 5,000 USD, but did not appreciate the evidence in its entirety, namely that the documents submitted by the defendant contained inappropriate data, with data that did not correspond to the reality regarding the coach's price. This fact was confirmed by: the customs export declaration no. VU 0069340 of 18.12.2007, where in item 22, denominated the currency and the total amount of the invoice, the sum of 54,000.00 USD is mentioned, and at item 42 and 46 of the same statement at unit price and statistical value, the same amount of money is indicated; the fiscal invoice A series no. 020451 dated 14.12.2007, where at the unit price is also stated the amount of 54,000.00 USD; the contract of sale-purchase of the means of transport with no. 07846 of 14.14.2007, where at item 3) the declared selling price is 54,000.00 USD³⁸⁵.

We can not support the opinion of the Russian author E. K. Juravleva, according to which the deliberate passage of the goods through fraudulent use of customs documents, by not declaring or unauthentic declaring, if this resulted in the non-payment of customs payments (in whole or in part) exceeds the smuggling facts and it is necessary to qualify in the contest with non-payment of customs payments³⁸⁶. The same opinion is I. Vasilieva³⁸⁷. We consider, however, such a qualification solution to be faulty; it is not excluded that the offenses referred to in article 248 CP RM may be committed in order to avoid payment of the customs payments. In conclusion, we adhere to the point expressed by S. Duşchin and S. Rusov that the action to cross the customs border of goods and other objects to a large extent with the fraudulent use of documents or means of customs identification or by non-declaration or by non-authentication should be qualified only as smuggling, but not in concert with the evasion of payment of customs payments³⁸⁸. Similarly, the authors of the 2009 Penal Code commentary argue: "The use by the guilty of at least one method characteristic of smuggling offenses in order to avoid the payment of customs duties demonstrates the lack in

³⁸⁵ Decision of the Supreme Court of Justice of December 9, 2014, File no. 1ra-1519/14, www.csj.md (visited on 19.11.2015).

³⁸⁶ Zhuravleva E., *К вопросу о разграничении контрабанды и уклонения от уплаты таможенных платежей* (On the issue of delineation of smuggling and evasion from customs payments), „Уголовное право” („Criminal law”), no. 2, 2005, p. 29.

³⁸⁷ Vasilieva I., *op. cit.* (Contraband: current problems of qualification), p. 15.

³⁸⁸ Dushkin S., Rusov S., *Ответственность за уклонение от уплаты таможенных платежей* (Responsibility for evasion of customs duties), „Законность” („Legality”), no. 7, 2000, p. 46.

the culpable actions of the offenses provided by article 249 CP RM. Those committed shall be framed in accordance with article 248 CP RM"³⁸⁹.

Similarly, regarding the delimitation of the two facts, it is worth mentioning the assertion of the Moldovan author M. Mutu, which distinguishes the crimes analyzed by the identification of the moment of their consumption: "Smuggling offenses are consumed from the moment of crossing the fact of the customs border (in the case of the introduction of the goods on the territory of the Republic of Moldova) or the moment of the customs declaration (in the case of removal of goods from the territory of the Republic of Moldova), while the evasion of the customs payments is considered consumed from the expiration of the term for the payment of customs payments, ie until the customs declaration has been lodged"³⁹⁰. Therefore, the author comes to the conclusion, which we embrace, that the offenses stipulated in article 249 CP RM are consumed prior to the crimes stipulated in article 248 CP RM (i.e., at the time of filing the customs declaration the customs payments must already be paid) so that real cumulation [*to read* - the real contest - *the author's note*] of the two offenses is possible. In the opinion of the same author, to which we subscribe, in the case of natural persons who are not entrepreneurial (they pay import or export rights at the time of crossing the customs border), the ones committed should be qualified according to article 248 CP RM, the ideal contest between articles 248 and 249 CP RM³⁹¹.

Similarly, unlike the offenses provided by article 248 CP RM, in the case of those specified in article 249 CP RM, the place of committing the offense is not relevant to the qualification. Also, the evasion of paying the customs payments can be done through various methods, not provided by the legislator (direct refusal to pay, change of residence, ignoring payment notifications, etc.). Thus, the methods by which the offenses provided in article 249 CP RM are committed are: the express refusal to settle the customs payments; ignoring payment orders for customs payments; change of domicile or registered office, etc., in relation to the methods by which the offenses provided in article 248 CP RM.

Further, our effort will be directed towards **the objective side of customs offenses under Romanian law**. We will start with the smuggling investigation provided in article 270 CV Rom. The material element of the offense referred to in paragraph (1) article 270 CV Rom consists in the detrimental act expressed by the action of introducing or removing from the country, by any means, goods or goods through places other than those established for customs control.

The smuggling of goods by crossing the border of goods, by evading customs control, has the intrinsic requirement for the fact that they are committed through places other than those established for customs control. It does not matter

³⁸⁹ Barbăneagră A., Alecu Gh., Berliba V. et al., *op. cit.* (*Codul penal al Republicii Moldova. Comentariu. Adnotat cu jurisprudența CEDO și a instanțelor naționale*), p. 544.

³⁹⁰ Mutu M., *op. cit.* (*Deosebirea contrabandei de eschivarea de la achitarea plăților vamale*), p. 27.

³⁹¹ *Ibidem*, p. 27.

the exact place where the goods were passed³⁹². It is important that this does not constitute a special one for the passage of goods across the customs border. The doctrine states that the existence of the offense does not concern the actual place where the goods or other goods are crossed over Romania's state border, but the fact that the goods or other goods are not presented for customs control before leaving the country or after case, immediately after introduction into their country³⁹³.

The essence of this rule leads us to the hypothesis that the value or the kind of goods that are trying to cross the border does not matter, but the way in which they are "made by any means" and by places where the customs bodies are not controlled, thus failing to comply with the law more than a certainty. So, we notice that in order for this rule of criminality to be infringed, it is necessary that the goods have been entered or removed through places other than those established for customs control. In this respect, according to article 2 CV Rom, the introduction or removal from the country of goods, means of transport and any other goods is allowed only through the border crossing points. The places established for the crossing of the customs border are the *customs offices* or *customs points* which are organized at border crossing checkpoints. In the literature it was shown that the main premise from which the customs regime is established is that the introduction into or removal from the country of goods, means of transport and any other goods is allowed only through the border crossing points state, and at the crossing of the State border they are subject to customs clearance³⁹⁴. *Per a contrario*, the given rule can not be applied if the goods were crossed over the border by the border crossing points, even if under unlawful conditions. In such cases, another rule of criminality (for example, paragraph (2) article 270 CV Rom) will apply. In the sense of the criminal law of the Republic of Moldova, such a passage (considering the one stipulated in paragraph (1) article 270 CV Rom) presupposes the circumvention of the customs control, in terms of avoiding the border crossing points, not under the aspect to avoid going through the hours of the program. It is right to remark the author V. Stati that in the context of the criminal law of the Republic of Moldova, compared to that of Romania, the circumvention of the customs control regards not only the spatial aspect but also the temporal aspect of the circumvention³⁹⁵.

According to paragraph (2) article 270 CV Rom, it also constitutes a smuggling offense and is punished according to paragraph (1): a) introduction into or removal from the country through the places established for customs con-

³⁹² Sandu F., *op. cit. (Contrabanda – componentă a crimei organizate)*, p. 57.

³⁹³ Voicu C., Boroi A., Molnar I. et al., *op. cit. (Dreptul penal al afacerilor)*, p. 305.

³⁹⁴ Boroi A., Gorunescu M., Barbu I. A., *op. cit. (Dreptul penal al afacerilor)*, 5th edition, p. 306.

³⁹⁵ Stati V., *op. cit. (Infrațiunea de contrabandă în legislația penală a Republicii Moldova și a României: analiză juridică comparativă)*, p. 167.

trol, by evading of the control of commodities or goods to be placed under a customs procedure if the customs value of the goods or stolen goods is higher than 20,000 RON for excisable products and more than 40,000 RON for other goods or commodities; b) the introduction into or removal from the country, twice in any one year, through the places laid down for customs control, by removal from customs control of the goods or goods to be placed under a customs procedure, if the customs value of the goods or stolen goods is less than 20,000 RON for products subject to excise duties and less than 40,000 RON for other goods or commodities; c) the alienation of goods in customs transit in any form.

It should be noted that the norm of paragraph (2), article 270 CV Rom incriminates three distinct facts.

The material element of the offense referred to in letter a), paragraph (2) of the article 270 CV Rom forms the action of entering or leaving the country through the places established for customs control, by evading from the customs control, the goods or the goods which shall be placed under a customs procedure in the prescribed proportions. The smuggling provided in letter a), paragraph (2) of the article 270 CV Rom was retained in the following case from the judicial practice: *V. V., based on the same criminal resolution, from June 2009 to February 2010, introduced and removed from Romania, by means of customs clearance, by removing from customs control 11 consignments of counterfeit products (cigarettes and perfumes coming from China or, as the case may be, Turkey), which had to be placed under a customs procedure and whose customs value was more than 20,000 RON*³⁹⁶.

The material element of the offense referred to in letter b), paragraph (2) of the article 270 CV Rom forms the action of entering or leaving the country twice within one year through the places established for customs control by evading from customs control, goods or goods to be placed under a customs procedure. Finally, the material element of the offense referred to in letter c), paragraph (2), article 270 CV Rom forms the act of alienation in any form of goods in customs transit.

In the following, we will analyze the material element of each of the three offenses. *Ab initio*, we note that according to point 18 of the article 4 CV Rom, customs control is defined as the specific actions performed by the customs authority to ensure correct application of customs regulations and may include the verification of the goods, the data entered in the declaration, the existence and the authenticity of electronic or written documents, examination of accounting records of economic agents and other documents, baggage and other goods carried by or on persons, as well as administrative checks and other assimilated actions.

³⁹⁶ Decision of the Criminal Section of the High Court of Cassation and Justice, no. 2212 of 30 June 2014, www.scj.ro/1093/Detalii-jurisprudenta?customQuery%5B0%5D.Key=id&customQuery%5B0%5D.Value=118462 (visited on 01.03.2016).

Grosso modo, as compared to the smuggling provided for in paragraph (1), in the case referred to in letters a) and b), paragraph 2 of the article 270 CV Rom, crossing the customs border takes place through the border crossing points, but through evading goods from customs control. However, the legislator binds such behavior to the value of the goods stolen from the customs control. The same is not true when the act is committed at least twice over a year. Thus, the additional requirements for the minimum amount, which differ according to the type of excise goods or non-excisable goods and the number of acts committed within one year, which we find in this article, were introduced by the legislator for the deed constitute smuggling and fall into the criminal sphere.

Which should be the solution for the assumption that the goods are crossed over Romania's customs border through a border crossing point, but which is unauthorized for the passage of certain goods (which are actually passed) or in the case of the goods are passed by road through authorized crossing points for rail transport?

The answer to this question will be taken from the following fragment of Romanian judicial practice: *"In accordance with the provisions of article 270 paragraph (1) of the Law no. 86/2006 on the Customs Code of Romania, the introduction into or removal from the country through any means, goods or goods, through places other than those established for customs control, is the offense of smuggling. In the case of excisable goods, such as cigarettes, at places set aside for customs control, the authorized customs, by means of normative acts, shall allow the entry, exit and transit of goods carrying excise duties. Therefore, removing excisable goods from the country through unauthorized customs to allow the exit of this category of goods from the country or the removal of excisable goods by road through customs authorized to allow the country to leave this category of goods by rail constitute the smuggling offense"*³⁹⁷.

In other respects, the position of the Romanian legislator on the criminalization of the act of passing goods across the customs border through the border crossing points is unclear, but only by circumventing the goods from the customs control. Under these circumstances, the act of passing goods through border crossing points, but by methods other than by stealing, escapes from the law. We can not disagree with the opinion expressed by I. C. Pașca, who argues that such a legislative means proves that not any activity of passing goods across the border and that results in non-payment of taxes is smuggling³⁹⁸. Indeed, what must be the qualification solution in the case of goods crossing the Romanian customs border, through the crossing points, but by the non-declaration of the goods or by

³⁹⁷ Decision of the Criminal Section of the High Court of Cassation and Justice, no. 1230 of March 29, 2011, www.scj.ro/1093/Detalii-jurisprudenta?customQuery%5B0%5D.Key=id&customQuery%5B0%5D.Value=83836 (visited on 23.02.2016).

³⁹⁸ Pașca I. C., *Concursul între infracțiunea de contrabandă și infracțiunea de luare de mită*, „Analele Universității de Vest din Timișoara. Seria Drept”, no. 2, 2013, p. 41.

the inappropriate declaration, ie by methods other than the removal from the customs control? It is clear that such behavior is not covered by paragraph (2) of the article 270 CV Rom, nor under any other rule. However, non-authentication or non-authentication can not be equated with evading customs control. Avoidance involves concealing (concealing) goods. The same is not true for undeclared or declared inauthentic. In this respect, I. C. Pașca rightly believes that although it would be fair for such an act to assimilate smuggling, we can not, however, observe that the rule of incrimination, as it currently stands, does not cover all assumptions in which goods are passed through customs control without paying the related fees³⁹⁹. That is why, as *de lege ferenda*, we propose that the expression "by any means", similar to the norm in paragraph (1) article 270 CV Rom, should be specified instead of the removal of goods from the customs control, so that under the rule of paragraph (2) article 270 CV Rom to cross any illegal crossing of the customs border through the border crossing points, including by non-authentication or non-authentication.

Similarly, by *alienation*, within the meaning of letter c), paragraph (2), article 270 CV Rom, it is necessary to understand the act of transmission in the ownership or possession and use of a person (physical or legal) of the goods in customs transit procedure.

In another register, according to paragraph (3) article 270 CV Rom, they are assimilated to smuggling and punished according to paragraph (1) the collection, possession, production, transport, taking over, goods to be placed under a customs procedure, knowing that they come from smuggling or are intended to be used for smuggling.

It is easy to note that this deed constitutes a special form of favoring smuggling. The legislator wanted to assimilate with smuggling the oblique facts that come to facilitate or hide the smuggling. In fact, the third paragraph was introduced with the entry into force of the Emergency Ordinance of the Romanian Government no. 54/2010 of 23 June 2010⁴⁰⁰, paragraph that criminalizes the acts assimilated to smuggling. The following case is exemplified in the judicial practice: on March 9, 2011, I.P.J. Giurgiu, the Fraud Investigation Service has filed an appeal against the names of Z. M., Z. F., D. N., D. E., D. V., D. C. L., D. C. F., D. F., N. E. and C. R., indicating that they own and sell smuggled cigarettes. It has been found that the main illicit activities of the unstructured criminal group were materialized in the purchase, storage and marketing of large quantities of smuggled cigarettes from smuggling and counterfeit cigarettes. These cigarettes were purchased from Bulgaria or from Bucharest and marketed within Giurgiu,

³⁹⁹ *Ibidem*, p. 39.

⁴⁰⁰ Official Gazette of Romania, 2010, no. 421.

*especially in the area called "Piața C."*⁴⁰¹. Similar decisions were made on other criminal cases⁴⁰².

In article 271 CV Rom, the fact of skilled smuggling is incriminated. The material element of the offense is the injurious action expressed by the action of introducing or removing certain goods possessing special qualities (e.g. weapons, drugs, etc.) without right. It does not matter to the method of passing the goods with special status over the Romanian customs border. This can be expressed both by obstructing customs control and circumventing customs controls. That is why we support the point of view in the literature that the material element of the skilled smuggling crime subsists, regardless of the way in which such goods are introduced into or removed from the country, i.e. manifested or occult (by means of dosing, craftsmanship) etc.⁴⁰³

It is also necessary that the passage be illegal, i.e. without the person's right to enter or take the goods into/out of Romania's customs territory. In the presence of such a right, those committed will not constitute smuggling.

The phrase "without right" found in the article replaced the phrase "without authorization" in the old Customs Code in the 1997 edition. It should be noted that the formula in the current editorial is wider than the one in the old editorial. In any case, the lack of authorization implies the lack of the right of the person to pass the goods over the Romanian customs border. Although it is a wider expression, the phrase "without right", in most cases, implies the lack of authorization for the introduction/removal of goods into/out of Romania's customs territory. Therefore, it will be considered that the passage of the above mentioned entities over the customs border takes place without right in the following cases: a) the person was not granted authorization; b) the person has been issued with an authorization by an incompetent body; c) the authorization was issued by the competent body but in violation of the release rules (for example, it was issued by a non-authorized person, etc.); d) the authorization has been withdrawn; e) the authorization has been issued for certain goods, but the perpetrator passes other goods across the customs border (for example, the permit is issued for the removal of narcotic substances, but the perpetrator passes the psychotropic substances over the customs border); f) the authorization is issued for the passage of

⁴⁰¹ Decision of the Criminal Section of the High Court of Cassation and Justice, no. 1462 of April 28, 2014, www.scj.ro/1093/Detalii-jurisprudenta?customQuery%5B0%5D.Key=id&customQuery%5B0%5D.Value=118407 (visited on 01.03.2016).

⁴⁰² Decision of the Criminal Section of the High Court of Cassation and Justice, no. 638 of 20 February 2014, www.scj.ro/1093/Detalii-jurisprudenta?customQuery%5B0%5D.Key=id&customQuery%5B0%5D.Value=105730 (visited on 01.03.2016); Decision of the Criminal Section of the High Court of Cassation and Justice, no. 767 of March 23, 2014, www.scj.ro/1093/Detalii-jurisprudenta?customQuery%5B0%5D.Key=id&customQuery%5B0%5D.Value=125505 (visited on 01.03.2016).

⁴⁰³ Voicu C., Boroi A., Sandu F. et al., *op. cit. (Drept penal al afacerilor)*, p. 268.

a quantity of goods over the customs border, but the perpetrator passes another quantity (higher than that indicated in the authorization).

Thus, the legal requirement concerns the absence of an official document permitting the Romanian public authorities to introduce, remove or transit goods such as: weapons, ammunition, explosives, narcotics and psychotropic substances, etc.⁴⁰⁴

If the perpetrator carries out additional actions regarding the material entities stipulated in article 271 CV Rom, the committed ones may be classified according to the rules of the crime contest. An exemplary case in this regard is the following case in the judicial practice: *the defendant Z. M., instigated by the defendant C. A., took the necessary steps to obtain from Spain and the introduction into Romania, dissimulated in a package shipped through a courier company, a firearms and a pistol brand B, model 85 auto cat. 8686, 9 mm, PA, manufactured in Italy, the CG series, which is a non-lethal firearm, manufactured specifically for irritant-tear gas, which it wanted to acquire and possibly resell it*⁴⁰⁵. It should be noted that the court has classified the criminal actions according to article 271 CV Rom (for smuggling with arms), as well as according to article 138 of the Law on the regime of weapons and ammunition, no. 295/2004 (for carrying out, without right, weapons and ammunition operations).

In another context, the objective aspect of the offense of using unreal acts (article 272 CV Rom) is constituted by the material element expressed by the action to use the customs authority for customs, transport or trade documents referring to other commodities or goods or to other quantities of goods or goods than those presented to customs.

Use means the actual use of one or more customs documents on other goods. It is not, therefore, sufficient for the existence of this essential requirement of the objective side of the mere possession of the counter-band in view of the possible use of the fake customs document or of the customs document on other goods (i.e., the simple manifestation, for example, of having such a document at the customs control point)⁴⁰⁶. Usage has the meaning of serving a customs, transport or commercial document (multiple documents) relating to other commodities or goods, namely - serving by filing, by presentation, by the appearance of the customs document as a true means, namely, proof of certain goods or goods controlled by the competent public authorities in the customs units, either at the control points for crossing the state border of Romania or within the country⁴⁰⁷.

⁴⁰⁴ *Ibidem*, p. 268.

⁴⁰⁵ Decision of the Criminal Section of the High Court of Cassation and Justice, no. 4013 of 13 December 2013, <http://www.scj.ro/1093/Detalii-jurisprudenta?customQuery%5B0%5D.Key=id&customQuery%5B0%5D.Value=107085> (visited on 01.03.2016).

⁴⁰⁶ Sandu F., *op. cit.* (*Contrabanda – componentă a crimei organizate*), p. 74; Voicu C., Boroi A., Sandu F. et al., *op. cit.* (*Drept penal al afacerilor*), p. 275-276.

⁴⁰⁷ Voicu C., Boroi A., Sandu F. et al., *op. cit.* (*Drept penal al afacerilor*), p. 272.

The use of unrealistic acts resembles, in large part, the smuggling of criminal law in the Republic of Moldova when the fraudulent use of customs documents appears as a method of committing the offense. For the purposes of article 248 CP RM, one of the forms of fraudulent use of customs documents is the use of documents relating to goods other than those crossed over the customs frontier. Therefore, the explanations made above, regarding the analysis of this method in the context of article 248 CP RM, are also relevant for the study of the offense stipulated in article 272 CV Rom.

We point out that in the case of unrealistic acts we are in the presence of a crime of deception that is committed in a field and under specific conditions. We fully support the position expressed in the literature, according to which, in this case, illicit activity is obviously misleading by presenting a false material entity [*to be read* - which does not correspond to reality - *the author's note*] as true⁴⁰⁸.

In another register, the objective side of the offense of using falsified documents (article 273 CV Rom) is made up of the material element materialized in the use of customs, transport, or falsified customs documents at the customs authority.

As in the case of the offense provided in article 272 CV Rom, the perpetrator uses three categories of falsified documents for passing goods over the customs border, namely: a) customs documents; b) transport documents; c) commercial documents. The content of these documents does not correspond to reality. In order to be in the presence of the offense analyzed the perpetrator must submit the said documents to the customs authority. The mere holding of these without being presented to the customs body does not constitute the offense provided in article 273 CV Rom.

Similarly, of the fact that use unreal documents, the law does not specify what the action is to use and does not indicate any way of committing it. Consequently, the meaning in which this notion is used in the text can not be other than that of the current language, of the common language. Thus, an act is used by the customs authority when it is used to prove a circumstance, presented, presented or filed for examination, registration, etc. Usage can not be accomplished through omission, by the offender's absolution to reveal the act of being unreal or falsified. It is absolutely necessary for the detainee to be removed from his "occult and inert state", even if the authority to which he has appeared has not yet examined him and has not pronounced his validity. In other words, it is not sufficient simply to hold unreal or falsified acts for eventual use, the offense being consumed from the moment of presentation, filing, appearance of acts⁴⁰⁹.

⁴⁰⁸ Olteanu G. I., *op. cit.* (*Cercetarea contrabandei și a altor infracțiuni ce implică trecerea frontierei de stat*), p. 84.

⁴⁰⁹ Pasat O., *op. cit.* (*Efectuarea analizei juridico-vamale a infracțiunilor, contravențiilor vamale prevăzute de Codul vamal al României din 1997*), p. 64.

Please note that the criminalization rule of article 273 CV Rom is a special one in relation to the norm of article 323 CP Rom, a norm that criminalizes the use of forgery. In other words, the use of customs, transport or commercial documents at the customs authority constitutes a special case of forgery, within the meaning of the norm of article 323 CP Rom.

As with the smuggling offenses provided for by the Moldovan criminal law, the customs offenses provided by the Romanian legislation are *formal*, being considered consumed from the moment of materialization. Starting from the fact that the law has not established *expressis verbis* any condition regarding the outcome of the smuggling offenses, the legal literature mentions that they would always result in a state of danger and never a material harm⁴¹⁰. In this respect, V. Bujor and O. Pop note that smuggling offenses are a crime of danger, and the causality ratio results "*ex re*"⁴¹¹. However, in the doctrine it is suggested that the offense of using unreal acts is material, the harmful consequence emerging as a constitutive element of the objective side, this being the result expressed by the actual submission to the customs authority of the unreal documents and the presentation of other goods or goods other than those listed in those documents⁴¹². In the reply, D. Țicău rightly states that the use of unreal acts, being a formal offense (in the legal norm, no result is indicated, but only the action of using documents containing non-real data), is considered consumed from the moment of realization the simple act of using such documents, i.e. from the moment when the documents are presented to the customs authorities⁴¹³.

According to article 275 CV Rom, the attempt at customs offenses is punished. At the same time, compared to the Moldovan criminal law, the preparation for the commission of a customs offense is not punishable because the Romanian legislator does not establish the crime preparation as an atypical form of the offense.

Section 2. The subjective side of the offense

We will start with the analysis of the subjective aspect of the customs offenses provided by the Moldovan criminal law.

Romanian researcher V. Mirișan states that the subjective side of the offense is always deduced from the objective side and consists of a complex of specific conscious states that precede and accompany the act or inaction of the perpetrator and which are directed to produce certain dangerous consequences, if

⁴¹⁰ Bujorean D., *op. cit. (Infrațiunea de contrabandă și infrațiunea de evaziune fiscală)*, p. 88.

⁴¹¹ Bujor V., Pop O., *op. cit. (Criminalitatea în domeniul fiscal)*, p. 37.

⁴¹² Ungureanu A., Ciopraga A., *op. cit. (Dispoziții penale din legi speciale române)*, p. 170.

⁴¹³ Țicău D., *op. cit. (Infrațiuni vamale. Controverse)*, p. 113.

they are not directed in this direction, they do, however, because of the ease or negligence of the offender⁴¹⁴.

The subjective part is part of the constitutive content of the offense, having as its constituent elements: the subjective element (the guilt with its modalities), the mobile and the purpose, as essential requirements of certain crimes. The subjective side consists in the psychic attitude of the person who committed the offense, an attitude consisting of intellectual, affective and volitional elements, on the basis of which the guilt is established. According to this theory, the subjective element consists of a *manifestation of will and conscience*. When someone wills a physical action, he foresees the consequences of that action, meaning that he has in his mind the *representation* (image) of the natural consequences which that action must lead to. This representation of the result, of the finality of the willed action is an act of *conscience* accompanying the act of *will*⁴¹⁵.

A. Mariș mentions: "Guilt refers to the subjective side of the offense, which includes two components, two factors: conscience and will. Conscientiousness deliberates on the act of committing the act and on all the reasons that may lead to a decision, there is a passage from the manifestation of consciousness to the manifestation of will, which through the conscience mobilizes and dynamizes the necessary energies for the realization of the taken decision, this reflection of the consciousness factor on the will, which is the characteristic aspect of the subjective side that is the guilt"⁴¹⁶.

In this sense, the subjective part of the crime component is the inner part of the offense, which determines the perpetrator's psychic attitude towards the detrimental act committed and its consequences in terms of conscience, will and emotions.

Regarding the offenses provided by article 248 CP RM reunified under the name of smuggling, we state that these are committed intentionally. We join the view expressed by T. A. Dicanova, according to which the negligent passage of the goods over the customs border by eluding customs control or by non-authentication or non-authentic declaration can not form the smuggling component⁴¹⁷. So also S. Dorojcov points out that if the passing of the goods is done by not giving them imprudence, the criminal liability for smuggling is excluded⁴¹⁸.

⁴¹⁴ Mirișan V., *op. cit. (Drept penal. Partea Generală)*, p. 71.

⁴¹⁵ Ghigheci C., *Psychological theory of guilt in the Romanian Criminal Code*, „Juridical Tribune – Tribuna Juridica”, Volume 7, Issue 1, June 2017, p. 209.

⁴¹⁶ Mariș A., *Evoluția conceptelor și a reglementărilor cu privire la vinovăția penală*, Bălți: Tipografia Centrală, 2005, p. 173.

⁴¹⁷ Dicanova T. A., Osipov V. E., *op. cit. (Combating customs crimes and money laundering: A methodical guide)*, p. 150; Skvortsova, K.F., (ed.), *op. cit. (Investigation of smuggling: A practical guide)*, p. 37.

⁴¹⁸ Dorozhkov S., *Уголовно-правовая характеристика контрабанды (Criminally-legal characteristics of contraband)*, „Закононость” („Legality”), no. 1, 2003, p. 9.

Russian authors V. D. Laricev and N. S. Ghilimutdinova mentions, in general, that economic crimes are committed only intentionally⁴¹⁹.

Concerning the concrete way of intent, in the theory of criminal law, it is revealed that the offenses stipulated in article 248 CP RM can be committed only with direct intent⁴²⁰. There is also a similar position in the foreign literature⁴²¹. Thus, the offenses referred to in article 248 of the Criminal Code may not be committed indirectly (eventually) or imprudently⁴²². However, the question arises naturally: why the offenses specified in article 248 CP RM can not be committed by imprudence or indirect intention? In answering this question, we emphasize that formal offenses (such as offenses under the name of smuggling) can only be committed with direct intent. Imprudence, as a form of guilt, is foreign to the formal offense. The same is true for the indirect intention. In this sense, in doctrine, it is true that, as far as the guilt towards the very action that forms the objective side of formal crimes, it can express itself only in the form of direct intent, because the will of the person in these cases is directed to the action⁴²³. The Belarusian author A. Z. Ignatiuc, is right to say that in the absence of the direct intention of the person passing goods across the customs border this can not be held criminally liable for committing smuggling offenses⁴²⁴. Finally, we can not em-

⁴¹⁹ Laricev V. D., Ghilimutdinova N. S., *op. cit.* (*Customs crimes*), p. 150.

⁴²⁰ Brînză S., Stati V., *op. cit.* (*Tratat de drept penal. Partea Specială*), vol. II, p. 292; Brînză S., Stati V., *op. cit.* (*Drept penal. Partea Specială*), vol. II, p. 196; Stati V., *op. cit.* (*Infrațiuni economice: Note de curs*), p. 459; Stati V., *op. cit.* (*Infrațiuni săvârșite în sfera activității economice externe (art.248 și 249 CP RM): studiu de drept penal*), p. 135; Gîrlă L. G., Tabarcea Iu. M., *op. cit.* (*Criminal Law of the Republic of Moldova. The special part. Tom I.*), p. 680; Barbăneagră A., Alecu Gh., Berliba V. et al., *op. cit.* (*Codul penal al Republicii Moldova. Comentariu. Adnotat cu jurisprudența CEDO și a instanțelor naționale*), p. 540.

⁴²¹ Saidov Sh. N., *op. cit.* (*The criminal responsibility for smuggling under the legislation of the Republic of Tajikistan*), p. 24; Raroga A. I., *op. cit.* (*The Criminal Law of Russia. Special part*), p. 297; Zhalinskovo, A. E. (ed.), *op. cit.*, (*Educational-practical commentary to the Criminal Code of the Russian Federation*), p. 567; Modestov P. A., *op. cit.* (*Smuggling: public danger, qualification, questions of responsibility*), p. 20; Kachkina G. P., *op. cit.* (*Smuggling as a customs offense*), p. 24; Girayev G. S., *op. cit.* (*Criminological characteristic and criminal law measures to counter smuggling*), p. 19; Sucicov Iu. I., *op. cit.* (*Customs crimes: a study guide*), p. 52; Vasilicicov I. S., *op. cit.* (*Crimes in the sphere of economy*), p. 153; Verin V. P., *op. cit.* (*Crimes in the sphere of economy...*), p. 87; Skvortsova K. F. (ed.), *op. cit.* (*Investigation of smuggling: A practical guide*), p. 37; Dorozhkov S., *op. cit.* (*Criminally-legal characteristics of contraband*), p. 9; Ignatiuc, A. Z., *op. cit.* (*Smuggling and other offenses in foreign economic activity: Theory and practice of investigation.*), p. 75; Vitvițkii A. A., *op. cit.* (*Crimes in the sphere of foreign economic activity...*), p. 78.

⁴²² Pasat O., *op. cit.* (*Analiza juridico-penală a infracțiunilor vamale și penale comise pe teritoriul vamal al Republicii Moldova în conformitate cu Codul penal din 2002*), p. 83.

⁴²³ Ignatova A. N., Krasikova Yu. A., *Уголовное право России. Общая часть* (*The Criminal Law of Russia. The general part*), p. 214.

⁴²⁴ Ignatiuc, A. Z., *op. cit.* (*Smuggling and other offenses in foreign economic activity: Theory and practice of investigation.*), p. 76.

brace the point of view of those authors who consider that smuggling can be committed with both direct and indirect intent⁴²⁵. Also, judicial practice is uniform in terms of the mode of intent. Illustrative in this respect is the following: *S. R., on March 21st, 2013, being on the territory of the Republic of Moldova, acting with direct intent* [emphasis belongs to us - the author's note], *aiming at the smuggling of goods in particularly large proportions across the customs border of the Republic of Moldova has previously hidden in a specially prepared place a consignment of goods consisting of medicines*⁴²⁶.

In other respects, according to Iu. I. Sucicov, the direct intent in the smuggling offenses includes in itself the realization by the perpetrator of the socially dangerous nature of the committed act (action or inaction), the prediction of the harmful consequences and the desire to come up with them⁴²⁷. We can not support this point of view because the offenses stipulated in article 248 CP RM are formal, which makes it unacceptable that the psychic attitude of the perpetrator includes the prediction of the prejudicial consequences, the more the desire for their occurrence. The psychic attitude of the perpetrator is reduced to awareness of the harmful nature of the action/inaction committed and his desire to do so.

In the same vein, according to the opinion of I. V. Rozumani, the subjective side of smuggling is characterized by guilt in the form of direct intent, when the person is aware of the social danger of his actions of illegal crossing over the customs border of concrete goods or other goods and wishes them to be committed. Awareness of the socially dangerous nature of the illegal crossing over the customs border of goods, which are limited or forbidden in the civil circuit, presupposes both the factual perception by the culprit and the social understanding of the committed ones⁴²⁸. So, the perpetrator must be aware not only of the injurious character of his deed, but also of the properties of the goods illegally passed over the customs frontier. Thus, if the perpetrator crosses the customs frontier with narcotic substances, his psychic attitude must include the awareness of the fact of introducing or removing on the customs territory not simple goods but narcotic substances. So when the law requires the presence of special qualities for past goods across the customs frontier, the perpetrator must realize that the goods possess the qualities required by law. For example, in order to be in the presence of qualified smuggling provided for in paragraph (4) of the article 248 CP RM, it is necessary for the perpetrator to know that cultural values, but not

⁴²⁵ Barbăneagră A., Berliba V., Gurschi C. et al., *op. cit. (Codul penal comentat și adnotat)*, p. 398.; Barbăneagră A., Berliba V., Bârgău M. et al., *op. cit. (Comentariu la Codul penal al Republicii Moldova)*, p. 538.

⁴²⁶ Cahul Court Sentence of October 7, 2015, File no. 1-100/2015, www.jch.instante.justice.md/ro/hot?data_deciziei=&nr_dosar=&denumire_dosar=&tip_dosar=penal&page=7 (visited on 31.03.2016).

⁴²⁷ Sucicov Iu. I., *op. cit. (Customs crimes: a study guide)*, p. 52.

⁴²⁸ Rozumani I. V., *op. cit. (Criminal responsibility for smuggling: according to the materials of the Siberian Federal District)*, p. 16.

other types of goods, pass over the customs frontier. If the perpetrator mistakenly believes that goods that do not possess certain special qualities are passed over the customs frontier, although the goods have such a quality (he thinks that drugs pass over the customs border, but in reality the illegal goods are narcotic substances), the qualification of those committed will in accordance with paragraph (1) of article 248 CP RM (provided that large proportions are present), with the additional retention of article 27 CP RM, in accordance with the content and the intention of the guilty person. Another will be the qualification solution if the perpetrator mistakenly believes that goods possessing certain special qualities pass over the customs border, in fact illegally acquired goods having no special quality. For example, if the perpetrator considers narcotic substances to be crossing the customs frontier, in fact they are simple drugs, the committed ones can not be classified according to paragraph (1) article 248 CP RM, but as an attempted smuggling, ie according to article 27, paragraph (2) article 248 CP RM. This is because the offender's intention was directed to the illegal crossing of the customs frontier not of simple goods, but of goods that enjoy certain special qualities conferred by the legislator on the adoption of the text of the norm of incrimination. At the same time, there is a mismatch between the intention of the perpetrator and those committed in the objective reality. The intention of the perpetrator has not found full concretisation in objective reality. It had the intention of crossing the customs border of narcotic substances, but passed simple medications. Therefore, the intent of the perpetrator has not been fully accomplished, for what qualification the norm from article 27 CP RM should be retained.

Also, in practice, there are cases when some people are used in smuggling without their knowledge. Thus, they do not meet the subjective side of the offense. It follows from the legal provisions that such persons are not to be held criminally liable⁴²⁹. Being misled and used as a means of committing the offense, they do not realize the damaging nature of the committed ones, which is why the offenses are considered guilty.

In another register, it is indicated in the literature that smuggling, in most cases, is committed with intentional intent⁴³⁰. Indeed, the perpetrator often takes the decision to pass the goods across the customs frontier, within which he meditates on the way and means of committing smuggling. Also during this time, the perpetrator resorts to various acts of crime preparation (e.g. prepares special places where the goods will be concealed for customs control, etc.). In this respect, doctrine shows that the preparation of a crime is possible only when the perpetrator has a premeditated intention⁴³¹.

⁴²⁹ Pasat O., *op. cit.* (*Analiza juridico-penală a infracțiunilor vamale și penale comise pe teritoriul vamal al Republicii Moldova în conformitate cu Codul penal din 2002*), p. 84.

⁴³⁰ Giryayev G. S., *op. cit.* (*Criminological characteristic and criminal law measures to counter smuggling*), p. 19.

⁴³¹ Copetchi St., Hadîrca I., *op. cit.* (*Calificarea infracțiunilor*), p. 166.

As optional facultative signs of the subjective side, *reason* and *purpose* may appear. G. P. Cacichina mentions that in the context of smuggling offenses, the motive and the purpose have no legal-criminal significance, so that the author in question contradicts himself, stating that the material interest is in fact present in the case of committing any act of smuggling⁴³². We have some reservations about that statement. First of all - even if in most cases the perpetrator is guided by the material interest in committing the offense, we can not totally exclude the hypothesis of committing smuggling on the basis of another inner impetus than the material interest. That is why we fully support the position in the doctrine that the rules that incriminate smuggling do not indicate for the purpose of the criminal actions the reason for which the nominated signs do not fall within the mandatory signs of the subjective side and have no influence on the qualification of the committed ones⁴³³. Secondly - we can not deny the importance of the reason and purpose to the legal and criminal appraisal of smuggling. It is right that they are optional signs of the subjective side of smuggling. So, they do not matter to qualification. At the same time, the reason and purpose are important in individualizing the criminal punishment, characterizing the personality of the offender, etc. In this respect, according to paragraph (2) of article 96 CPP RM, at the same time as the circumstances to be proved in the criminal trial, the causes and conditions that have contributed to the offense must be discovered. Finally, we can not agree with the opinion of the above-mentioned author that reason and purpose have no legal-criminal significance. In fact, they are not only relevant to the qualification of smuggling offenses. Otherwise, their importance is indisputable. That is why we support the following in the doctrine: "Smuggling is included in the category of crimes, the cause and purpose of which do not influence the qualification. This circumstance, however, does not necessarily mean that, when investigating smuggling, identification of the motive and purpose of the offense does not play an important role. Smuggling offenses, like any intentional offense, in each particular case are based on a reason and purpose, which is why their identification and appreciation by the criminal investigation bodies and by the court are of considerable importance in determining the degree of social danger of the perpetrated, the personality of the perpetrator, and, ultimately, are relevant to the punishment"⁴³⁴.

So reason and purpose are not mandatory signs of smuggling. The same position is R. Sobiețki⁴³⁵. The perpetrator can be guided for any reason in committing crimes and tend to achieve any end. In any case, the qualification does not concern the reason for the perpetrator to commit the crime, nor the purpose

⁴³² Kachkina G. P., *op. cit.* (*Smuggling as a customs offense*), p. 24.

⁴³³ Giryayev G. S., *op. cit.* (*Criminological characteristic and criminal law measures to counter smuggling*), p. 19.

⁴³⁴ Sucicov Iu. I., *op. cit.* (*Customs crimes: a study guide*), p. 49.

⁴³⁵ Sobiețki R., *op. cit.* (*Contrabanda: aspecte juridico-penale: studiu monografic*), p. 148.

that he wanted to achieve. The purpose and reason, not relevant to qualification, can only be taken into account in the characterization of the personality of the perpetrator and the judicial individualization of the criminal punishment. However, in most cases, the material interest is the impulse that causes the perpetrator to commit the offenses provided in article 248 CP RM. In this context, it is stated in the doctrine that the most important reason for committing smuggling is the material interest when the perpetrator wishes to use the useful qualities of the objects passed over the customs frontier or to sell them at a higher price great⁴³⁶. Iu. I. Sucicov points out that material interest is met in about 90% of smuggling offenses committed⁴³⁷.

At the same time, it is mentioned that smuggling can be committed in the absence of material interest (for example, the smuggling of goods across the customs border for collections will be considered as smuggling)⁴³⁸. In addition to material interest, Iu. I. Sucicov highlights the following reasons that may lead the perpetrator to committing smuggling: misperception of service duties, careers, friendly relations or other personal reasons, the desire to possess goods forbidden for import or export⁴³⁹. In addition, it is underlined in the doctrine that, as a reason for the offenses provided in article 248 CP RM, can arise: the perpetrator's desire to secure his own consumption of narcotic or psychotropic substances; the desire to facilitate the commission of other offenses (for example, when the material object of the offense is weapons, explosives, ammunition, etc.)⁴⁴⁰.

Like the reason, the purpose is an optional sign of smuggling. Examples of purpose can be: facilitating the commission of certain crimes; purpose of conquest, purpose of alienation, purpose of using the goods for own consumption, etc.

In the view of I. Macari, committing smuggling offenses, the perpetrator always pursues the purpose of cupidity⁴⁴¹, an opinion we do not support, because such a purpose is not expressly provided for in the provision of the rule of incrimination. It does not even follow implicitly, although such a purpose is retained in judicial practice. Illustrative in this respect is the following case law practice: *N. V., acting as an accomplice, by prior understanding with other unidentified persons, pursuing the purpose of obtaining illicit profits by committing smuggling of*

⁴³⁶ Rozumani I. V., *op. cit. (Criminal responsibility for smuggling: according to the materials of the Siberian Federal District)*, p. 16.

⁴³⁷ Sucicov Iu. I., *op. cit. (Customs crimes: a study guide)*, p. 50.

⁴³⁸ Rozumani I. V., *op. cit. (Criminal responsibility for smuggling: according to the materials of the Siberian Federal District)*, p. 16.

⁴³⁹ Sucicov Iu. I., *op. cit. (Customs crimes: a study guide)*, p. 50.

⁴⁴⁰ Brînza S., Stati V., *op. cit. (Tratat de drept penal. Partea Specială)*, vol. II., p. 292; Stati V., *op. cit. (Infrațiuni economice: Note de curs)*, p. 459; Stati V., *op. cit. (Infrațiuni săvârșite în sfera activității economice externe (art.248 și 249 CP RM): studiu de drept penal)*, p. 135.

⁴⁴¹ Macari I., *op. cit. (Dreptul penal al Republicii Moldova. Partea Specială)*, p. 262.

*cigarettes in particularly large proportions, the preparation and realization of the smuggling offense across the Moldovan-Romanian border*⁴⁴².

Within this research section, we have to answer the following question: by committing the offenses provided by article 248 CP RM, does the perpetrator pursue the purpose of evading payment of customs payments? To answer this question, we refer to the choices of the Russian authors O. Cruglova and A. Cotelnicov, who, replicating to another Russian author, indicate: "V. Filimonov claims that smuggling acts are committed only for the purpose of evading payment of customs payments. But it is wrong, because in practice these are often not done for the purpose of evading payment of customs payments. For example, commodities can be stolen on the basis of false documents, but paying the necessary payments." ⁴⁴³

Also in the context of the purpose pursued by the perpetrator in committing the deeds recorded in article 248 CP RM, the question is whether it has or is not relevant to the realization of the consuming moment the realization of the targeted goal. We believe that achieving the goal exceeds the objective side of smuggling, which is why it is irrelevant in identifying the time of consumption. In addition, consuming the act of passing goods across the customs border does not automatically imply the achievement of the finality pursued by the perpetrator by committing the injurious action. In most cases, the crossing of goods across the customs border is not enough to achieve the purpose targeted by the guilty person. Further action is needed after smuggling. For example, in addition to the removal of goods across the customs border of the Republic of Moldova, it is necessary to introduce them into the customs territory of Romania, as subsequently, on that territory, the perpetrator may carry out additional actions in respect of the goods passed over the customs border, allows to achieve the desired end. In this respect, it is rightly mentioned in the literature that the moment of consuming smuggling does not coincide with the moment when the criminal result has been reached⁴⁴⁴. In any case, for the qualification of smuggling, it does not matter whether or not the guilty person has reached the target, as it does not matter what the intended purpose is.

Also in the context of the subjective aspect of the offenses specified in article 248 CP RM, a polemic is imposed on the aspect related to the prolonged form of the offense. In particular, it is necessary to delimit the single offense prolonged by the offense contest. According to paragraph (1) of article 30 CP RM, the offense committed with a single intent, characterized by two or more identical

⁴⁴² Judgment of Ungheni Court of 22 December 2014, File no. 2-179/2014, http://www.jun.instante.justice.md/ro/hot?data_deciziei=&nr_dosar=&denumire_dosar=&tip_dosar=penal&page=20 (visited on 31.03.2016).

⁴⁴³ Cruglova O., Cotelnicov A., *op. cit.* (*Smuggling and evasion of payment of customs payments*), p. 21.

⁴⁴⁴ Sucicov Iu. I., *op. cit.* (*Customs crimes: a study guide*), p. 51.

criminal acts committed with one purpose, constituting a crime as a whole, is considered a prolonged offense. By extrapolation, it follows from the above-mentioned definition that in order to be in the presence of prolonged smuggling it is necessary for the perpetrator to manifest a unique intention, doubled by a single purpose, against all the committed criminal acts. *Per a contrario*, if he/she has different intentions in relation to criminal offenses, the offenses committed will constitute a crime contest. In the context, the authors V. Berliba and R. Cojocaru point out that by repeating the actions of inaction, the prolonged offense resembles the contest of crimes, the difference being under the aspect of the subjective side, the prolonged offenses having a unique intent (one goal), and at the contest of crimes - so many intentions, how many offenses are in the contest⁴⁴⁵.

We support those expressed in the doctrine that if, in fact, a person commits, at different time intervals, but in the execution of the same criminal resolution, actions that each present the content of the smuggling offense while the judiciary unit is established criminal offenses that cross all contraband activities of the same person committed at different time intervals, in law, the imperative rules of the continued offense are and remain inevitably applicable⁴⁴⁶. The undetermination of the unit of dissolution, according to R. SobieŃki, may indicate the qualification of the crime by a crime contest⁴⁴⁷.

In other respects, as regards the offenses referred to in article 249 CP RM, reunified under the marginal title of evasion from payment of customs payments, we mention that they can be committed only with direct intention, sustained opinion and doctrine⁴⁴⁸. The argument in support of this position is, this time, different from that highlighted by smuggling. This is because the offenses provided in article 249 CP RM are material but not formal.

However, the acts listed in article 249 CP RM are possible to be committed only with direct intent, because in the content of the offenses the legislator included the purpose as a constitutive sign. It is not possible for the perpetrator to wish to achieve a certain result and to admit at the same time the commission of

⁴⁴⁵ Berliba V., Cojocaru R., *Controverse referitoare la interpretarea și incriminarea infracțiunii unice prelungite*, „Avocatul poporului”, no. 12, 2004, p. 13-15.

⁴⁴⁶ Sandu F., *op. cit.* (Contrabanda – componentă a crimei organizate), p. 89.

⁴⁴⁷ SobieŃki R., *op. cit.* (Contrabanda: aspecte juridico-penale: studiu monografic), p. 121.

⁴⁴⁸ Brînza S., Stati V., *op. cit.* (Tratat de drept penal. Partea Specială), vol. II, p. 297; Stati V., *op. cit.* (Infracțiuni economice: Note de curs), p. 468; Stati V., *op. cit.* (Infracțiuni săvârșite în sfera activității economice externe (art.248 și 249 CP RM): studiu de drept penal), p. 139; Macari I., *op. cit.* (Dreptul penal al Republicii Moldova. Partea Specială), p. 263; Gîrla L. G., Tabarcea Iu. M., *op. cit.* (Criminal Law of the Republic of Moldova. The special part. Tom I.), p. 687; VitviŃkii A. A., *op. cit.* (Crimes in the sphere of foreign economic activity...), p. 94; Zhalinskovo, A. E. (ed.), *op. cit.*, (Educational-practical commentary to the Criminal Code of the Russian Federation), p. 579; Laricev V. D., Ghilimutdinova N. S., *op. cit.* (Customs crimes), p. 149; Tyunin V. I., *Уклонение от уплаты таможенных платежей (Evasion of payment of customs payments)*, „Юрист” („Lawyer”), no. 4, 2005, p. 37.

the detrimental act. Or, if he wishes to achieve the intended goal, then he wants the harmful action to do, but he does not admit it.

In this sense, we can not disagree with the doctrine: "Since the perpetrator pursues the proposed goal and, implicitly, the result through which this purpose can be achieved, the purpose of the offense is attached exclusively to the direct intention, which thus becomes a qualified intention as a goal"⁴⁴⁹. The author C. Timofei also claims that it is not possible for the perpetrator to consciously acknowledge any finality of his injurious action, since he intends to achieve a particular purpose⁴⁵⁰.

So, because the perpetrator has direct intent to the act and the injurious effect, we can assert that he is aware of the prejudicial nature of his act (inaction), provides for the possibility of the injurious effect expressed by the failure to pay the customs payments within the prescribed time limit and wants such a result.

We reiterate that in the contents of the offenses under article 249 CP RM the purpose appears as a compulsory sign. It is not expressly indicated in the text of the criminal law, but it results by interpretation, in conjunction with the other signs of the offense, and the legal essence of such criminal offense. The doctrine states that the purpose of the offense becomes a mandatory sign if: a) it is expressly provided in the provision of the incriminating rule *or* b) it is deduced from the legal nature of the offense⁴⁵¹. With reference to the offenses provided by article 249 CP RM, the purpose is derived from the material element of the offense. It is precisely the lack of purpose that denotes the framing of those committed in accordance with paragraph (13), article 287 C. contr. RM (non-payment in due time of the import and export rights).

The obligation to identify the purpose expressed in the wish of the perpetrator of non-payment of the customs payments, for the framing of the committed according to article 249 CP RM, is also supported in the native literature. For example, S. Brînza, V. Stati and Gh. Nicolaev mention that the special purpose of the offenses specified in article 249 CP RM is to not pay to the national public budget the customs payments⁴⁵².

Similarly, judicial practice retains the purpose as a mandatory sign of the offenses provided in article 249 CP RM. Illustrative are the following fragments of the judicial practice where the perpetrators have been convicted under article 249 CP RM: *SC "AMG" SRL pursuing the purpose of evading payment of customs*

⁴⁴⁹ Dongoroz V., Kahane S., Oancea I. et al., *Explicații teoretice ale Codului penal român. Partea Specială*, vol. III, Bucharest: ALL Beck, 2003, p. 7.

⁴⁵⁰ Timofei C., *Răspunderea penală pentru traficul de influență*, Chișinău: CEP USM, 2012, p. 216.

⁴⁵¹ Copețchi St., Hadîrca I., *op. cit. (Calificarea infracțiunilor)*, p. 173.

⁴⁵² Brînza S., Stati V., *op. cit. (Tratat de drept penal. Partea Specială)*, vol. II., p. 297; Stati V., *op. cit. (Infracțiuni economice: Note de curs)*, p. 468; Stati V., *op. cit. (Infracțiuni săvârșite în sfera activității economice externe (art.248 și 249 CP RM): studiu de drept penal)*, p. 139; Poalelungi M., Dolea I., Vizdoagă T. et al., *op. cit. (Manualul judecătorului pentru cauze penale)*, p. 857.

payments [emphasis belongs to us - *the author's note*] ...,⁴⁵³ on 19.09.2014, C.N, loaded the goods in the coach and following the purpose of evading from paying the customs payments in large proportions [emphasis belongs to us - *the author's note*]...⁴⁵⁴

Thus, the purpose of the offense is the intention of the perpetrator not to pay the payments (import/export rights) due to the state budget when the goods cross the customs border of the Republic of Moldova.

At the same time, we can not support the point of view expressed in the doctrine that the purpose pursued by the perpetrator of committing the offenses provided in article 249 CP RM is to obtain an income by not paying the customs payments⁴⁵⁵. In fact, the person does not seek to earn an income, but rather to avoid paying proper customs payments.

The motive of the offense, however, is not relevant to the qualification according to article 249 CP RM, being a voluntary sign. In committing the detrimental deed, the perpetrator can be guided for any reason. The most common is material interest. It is not excluded the presence of other reasons.

As for customs offenses in Romanian legislation, we mention that these can only be committed intentionally. We agree with the opinion of the Romanian author G. I. Olteanu, who notes that smuggling, as well as all commissive actions, as far as the incriminating text does not specify any form of guilt, can only be committed intentionally⁴⁵⁶. By extrapolation, we consider the same to be true for the offenses of using unrealistic acts and for using counterfeit acts. As O. Predescu rightly mentions, in customs offenses the guilt takes the form of intent⁴⁵⁷.

Indeed, according to paragraph (6) of article 16 of the Criminal Code of Romania, the committed offense is a crime only when the law expressly provides for it. A careful analysis of the incriminating rules in the Romanian Customs Code reveals that the legislator did not foresee the guilt as a form of guilt, which concludes that customs offenses are susceptible to committing only intentionally.

At the same time, the question arises: what is the concrete way of the intention to commit customs offenses? In this chapter, the opinions of scientists are divided. For example, F. Sandu points out: "The subjective side of smuggling has as a constitutive element the direct or indirect intent. The form of guilty is the

⁴⁵³ Briceni Court Sentence of 21 December 2015, File no. 1-155/2015, www.jbr.instante.justice.md/ro/hot?data_deciziei=&nr_dosar=&denumire_dosar=&tip_dosar=penal&page=2 (visited on 31.03.2016).

⁴⁵⁴ Briceni Court Sentence of April 1, 2015, File no. 1-29/2015, www.jbr.instante.justice.md/ro/hot?data_deciziei=&nr_dosar=&denumire_dosar=&tip_dosar=penal&page=8 (visited on 31.03.2016).

⁴⁵⁵ Barbăneagră A., Berliba V., Bărgău M. et al., *op. cit.* (*Comentariu la Codul penal al Republicii Moldova*), p. 541; Barbăneagră A., Berliba V., Gurschi C. et al., *op. cit.* (*Codul penal comentat și adnotat*), p. 401.

⁴⁵⁶ Olteanu G.I., *op. cit.* (*Cercetarea contrabandei și a altor infracțiuni ce implică trecerea frontierei de stat*), p. 6.

⁴⁵⁷ Predescu O., *op. cit.* (*Drept penal al afacerilor*), p. 261.

intention, direct or indirect, since no precise purpose is provided for. The direct or indirect intent that constitutes the subjective element of the content of the smuggling offense will result from the finding of the materiality of the committed deed and the actual circumstances of its committing, i.e. the intrinsic substance of the committed act and the objective circumstances that preceded, accompanied and followed committing this crime⁴⁵⁸. In addition, the doctrine shows that both modes of intent (both direct and indirect) are attested in the case of the offenses provided in articles 272 and 273 CV Rom⁴⁵⁹. Other authors, however, take the view that customs offenses are committed only with direct intent⁴⁶⁰. We subscribe to the opinion of those authors who consider that customs offenses can be committed only with direct intent, since customs offenses, being formal, are incompatible with the manifestation of indirect intention to the material element of the offense.

Exactly as in the case of the offenses stipulated in article 248 CP RM, for the framing of the ones committed under article 271 CV Rom it is necessary for the guilty person to know the special qualities of the goods that are wanted to be crossed over the customs border. The ignorance of the person introducing/removing such goods does not allow the incarceration of those committed according to article 271 CV Rom. Eventually, it will be retained in article 270 CV Rom. At the same time, the deed of the person entering/leaving the customs territory of goods other than those possessing special qualities whose introduction/removal was pursued by the perpetrator should be qualified as an attempt at article 271 CV Rom (attempt at an object null). The same classification solution should be retained in the case of the customs offenses provided in articles 272 and 273 CV Rom. For example, with reference to the offense of using unrealistic acts, the theory of criminal law mentions that the perpetrator must know that the means presented to the customs authority is a document referring to other goods or goods than what is intended to be passed over customs border.⁴⁶¹

As regards the purpose and the reason for the customs offenses provided for in the Romanian legislation, we mention that these are not mandatory elements of the offense. The purpose and reason are not expressly provided for in the provision of the incriminating rules in the Romanian Customs Code, nor does it result from the interpretation of those rules. That is why we claim that the perpetrator can be guided by any inner urge to commit any customs offense. Similarly, he can pursue any end in committing a customs offense. For these reasons, we can not agree with the optics of some authors who believe that in the case of

⁴⁵⁸ Sandu F., *op. cit.* (*Contrabanda și albirea banilor*), p. 54-55.

⁴⁵⁹ Țicău D., *op. cit.* (*Infrațiuni vamale. Controverse*), p. 113; Voicu C., Boroi A., Sandu F. et al., *op. cit.* (*Drept penal al afacerilor*), p. 273.

⁴⁶⁰ Bujorean D., *op. cit.* (*Infrațiunea de contrabandă și infrațiunea de evaziune fiscală*), p. 89; Bujor V., Pop O., *op. cit.* (*Criminalitatea în domeniul fiscal*), p. 37; Sandu F., *op. cit.* (*Contrabanda – componentă a crimei organizate*), p. 76.

⁴⁶¹ Voicu C., Boroi A., Sandu F. et al., *op. cit.* (*Drept penal al afacerilor*), p. 273.

smuggling, the purpose is a constitutive sign, which consists in disregarding the customs regime and illicit valorisation of these goods at the expense of major social interests⁴⁶². The stated purpose seems to us to be far too generalized, being capable of encompassing any purpose pursued by the perpetrator in the realization of the material element of the customs offenses.

We can not disagree with the doctrine of the smuggled act, according to which the mob with which the perpetrator acts, is not a necessary subjective condition for the existence of the smuggling offense, which is, in other words, an optional element in the content subjective of the criminal offense of smuggling⁴⁶³. The same position is embraced by other authors who believe, in the context of skilled smuggling, that the mobile with which the perpetrator of the smuggling of weapons, ammunition, etc. is acting. is only an optional element of the subjective aspect, and the concrete determination of the mob of the act of deed is useful for individualizing the punishment and other penalties of criminal law applicable in each case⁴⁶⁴.

For more details regarding the role of the motive and purpose pursued by the perpetrator of committing smuggling and other customs offenses, as well as some of their concrete forms, we consider it appropriate to explain the explanations made during the examination of the respective signs in the context of the offenses provided in article 248 CP RM, which can easily be extrapolated within this research segment.

Section 3. Aggravating circumstantial elements of customs offenses

The aggravating circumstances of the customs offenses under the name of smuggling are departed from the rule of paragraph (5) article 248 CP RM. These are: a) smuggling committed by two or more persons [letter b) paragraph (5) article 248 CP RM]; b) smuggling committed by a person with responsibility, using the service situation [letter c) paragraph (5), article 248 CP RM].

It should be noted that at letter d) paragraph (5) of article 248 CP RM there is no aggravating circumstance, but a type-variant. We fully support the assertion made by V. Stati, according to which: "In fact, in paragraph (1) and in the letter d) paragraph (5) of article 248 CP RM, there are stipulated independent crimes. These offenses can be found between them in the contest"⁴⁶⁵. According to the same author, literally, a circumstance is an occurrence (particular) that accompanies [emphasis belongs to V.S. - *the author's note*] an event, a fact, an action or a phenomenon. As a consequence, an aggravating circumstance provided

⁴⁶² Olteanu G.I., *op. cit. (Cercetarea contrabandei și a altor infracțiuni ce implică trecerea frontierei de stat)*, p. 76.

⁴⁶³ Sandu F., *op. cit. (Contrabanda – componentă a crimei organizate)*, p. 64.

⁴⁶⁴ Voicu C., Boroi A., Sandu F. et al., *op. cit. (Drept penal al afacerilor)*, p. 269.

⁴⁶⁵ Stati V., *op. cit. (Infracțiuni economice: Note de curs)*, p. 427.

by criminal law fulfills the role of appendix, addition, supplement, annex to the basic constitution of the offense⁴⁶⁶.

In the following, we will analyze the aggravating circumstances of smuggling. We will initiate the investigation with the aggravating circumstance of *the smuggling committed by two or more persons* [letter b) paragraph (5), article 248 CP RM]. The notion of "two or more persons" designates an objective circumstance, relevant in legal terms, enshrined in the Special Part of the Criminal Code as an aggravating circumstance, constituting the legislator's reaction against the facts of those who facilitate their criminal activity by resorting to the efforts of irresponsible persons, of persons who have not reached the age of criminal responsibility, etc.⁴⁶⁷

According to paragraph 10 of the CSJ Plenum Decision no. 5/2010, two or more persons commit the smuggling of two or more persons from the beginning or during the commencement of the crime, but until it is consumed or until at the end of the smuggling attempt. The same judgment lists the assumptions in which smuggling is considered to have been committed by two or more persons, namely: the co-perpetrator and the offense committed by a person who has the signs of the offense, together or through a person who does not have the status of subject offenses.

We conclude that the assumptions of smuggling committed by two or more people are:

- a) the co-author (simple participation);
- b) committing the offense by a person who has the signs of the offense, together with a person who does not meet the general conditions of the subject of the offense (together with a minor, an irresponsible person, a deceived person, etc.);
- c) the offense is committed by a person who has the signs of the offense by another person who does not meet the general conditions of the offense.

The nominated aggravating circumstance was retained in the following case from the practice of the courts: *I. A. was accused by the criminal investigation body in that he, in 2007, based on an identity card falsified by the replacement of the photograph, presented himself as a C. U., Romanian citizen, on behalf of whom he registered with the Office on National Trade Register of Romania in September 11, 2007 the commercial company "XY" SRL, based in Buzau. Subsequently, on the basis of contract no. 38 HP07 dated November 7, 2007 signed between the IM "M" SA of the Republic of Moldova, based in Chisinau municipality, and the "XY" SRL, based in Buzau, I. A. has loaded in the "Volvo" model truck, registered in Hungary, 29 corrugated cardboard pallets. On May 08, 2008, I. A., following a prior arrangement with unknown persons to the criminal inves-*

⁴⁶⁶ *Ibidem*, p. 22.

⁴⁶⁷ Brînza S., Stati V., *op. cit. (Tratat de drept penal. Partea Specială)*, vol. II, p. 239.

tigating authority, unloaded the cargo (29 corrugated pallets) in the cargo compartment of the "Volvo" model truck, loaded at IM "M" SA and destined for export in Romania, replacing it with another commodity, in which 204,500 cigarette packs of unmarked "SUPERKINGS" were previously seized. As a result, the tobacco products hidden inside the corrugated cardboard pallets, smuggled across the customs border of the Republic of Moldova, were valued at the total amount of 3,133,696.55 RON⁴⁶⁸.

On the other hand, the aggravating circumstance in question would not be involved in the case of committing complex smuggling offenses. We fully support the view expressed by S. Brînza and V. Stati, according to which there is no equivalence between the notions of "simple participation" and "complex participation", on the one hand, and the notion of "two or more persons" on the other hand⁴⁶⁹. Smuggling acts of complex participation will not fall under the aggravated circumstance analyzed. That is why we consider that the aggravating circumstance has been incorrectly qualified in the following case from the judicial practice: *in fact, the first instance held that P. V., acting with a direct intent, between February 14, 2010 and March 4, 2010, having the status of organizer, through complex participation [emphasis belongs to us - the author's note] with other persons not established by the criminal investigating body, as organizers, G. A. driver, as author, together with the Deputy Head of the Leusenî customs station, F. V., the customs inspector of the the customs office of Leușeni, A. F., as accomplices, following the purpose of crossing the Moldovan customs border in particularly large proportions - "Doina", "Plugarul" and "MT" cigarettes, made a well-considered criminal plan, sharing their roles and organizing the smuggling of cigarette smuggling⁴⁷⁰. Similar solutions have been made in other criminal cases⁴⁷¹.*

In other respects, in the context of this aggravating circumstance we consider it necessary to address the issue of smuggling by an organized criminal group or by a criminal organization. Considering the lack of such a circumstantial element in the content of article 248 CP RM, we consider that only when applying the punishment will it be relevant if the offenses provided by article 248 CP RM were committed by an organized criminal group/criminal organization. However,

⁴⁶⁸ Decision of the Supreme Court of Justice of May 6, 2015, File no. 1ra-444/2015, www.csj.md (visited on 20.11.2015).

⁴⁶⁹ Brînza S., Stati V., *Săvârșirea infracțiunii de două sau mai multe persoane ca presupusă formă a participației penale: demitizarea unei concepții compromise*, „Revista Națională de Drept”, no. 4/2008, p. 5.

⁴⁷⁰ Decision of the Supreme Court of Justice of 12 March 2014. File no. 1ra-510/14, www.csj.md (visited on 07.12.2015).

⁴⁷¹ Cahul Court Sentence of November 9 2015. File no. 1-34/2015, www.jch.instante.justice.md/ro/hot?data_deciziei=&nr_dosar=&denumire_dosar=&tip_dosar=penal&page=6 (visited on 31.03.2016); Cahul Court Sentence of June 12, 2015. File no. 1-68/2015, www.jch.instante.justice.md/ro/hot?data_deciziei=&nr_dosar=&denumire_dosar=&tip_dosar=penal&page=12 (visited on 31.03.2016).

we consider it appropriate to complete article 248 CP RM with such circumstantial element. In our opinion, the insertion of such an aggravating circumstantial element will allow the promotion of a fiercer and effective fight with the phenomenon of smuggling committed by criminal groups and organizations. At present, we can not deny the existence of a close link between smuggling and organized crime. However, one of the sources of existence of the members of the criminal organizations is the income from the sale of smuggled goods. In context, D. K. Sogomonov mentions: "Smuggling is a threat to the economic and national security of several states because it is committed on the territory of two or more states. Therefore, smuggling is included in the category of international crimes"⁴⁷².

The phenomenon of smuggling with narcotics, psychotropic substances, weapons, ammunition, etc. is known as notoriety, conducted by influential criminal organizations, including those of a terrorist nature. A. E. Shalaghin emphasizes: "In a few cases, the financial means obtained from the production of narcotic substances are used to finance terrorism, extremism and other criminal activities"⁴⁷³. These activities are characteristic of criminal organizations. F. Sandu also mentions that smugglers can only be the instruments of those who run or coordinate organized crime, who tend to have access to the decision-making sphere, not only economic but also political⁴⁷⁴.

It should be noted that there is such circumstantial element in the criminal law of several foreign states that it is meant to aggravate the liability and the criminal punishment. Moreover, judicial practice demonstrates that in most cases the offenses referred to in article 248 CP RM are committed by a group of people characterized by stability, cohesion and a good division of roles.

In conclusion, having in mind the indissoluble link between smuggling and organized crime, it is necessary to complete article 248 CP RM with the aggravating circumstance "by an organized criminal group or a criminal organization".

We will continue to examine the aggravating circumstance referred to in letter c), paragraph (5) of article 248 CP RM - ***the smuggling committed by a responsible person, using the service situation.***

⁴⁷² Sogomonov D.K., *Международно-правовые основания криминализации контрабанды в национальном уголовном законодательстве (International legal grounds for the criminalization of the contraband in the national criminal law)*, Научно-теоретический журнал „Научные проблемы гуманитарных исследований” (Scientific and theoretical journal "Scientific problems of humanitarian research"), no. 3, 2012, p. 168.

⁴⁷³ Shalagin A. E., *Особенности квалификации и предупреждения контрабанды наркотиков (Features of the qualification and prevention of drug smuggling)*, „Вестник Казанского юридического института МВД России” („Bulletin of Kazan Law Institute of the Ministry of Internal Affairs of Russia”), no. 3 (17), 2014, p. 39.

⁴⁷⁴ Sandu F., *op. cit. (Contrabanda – componentă a crimei organizate)*, p. 9.

The justification of the criminal liability for smuggling offenses committed by a responsible person with the use of the service situation is dictated by the fact that the subject of the offense having a special quality, defying the rules for the performance of his duties and taking advantage of the special status he has recourse to the passing of goods over the customs border of the Republic of Moldova. In addition, by committing smuggling by a person in charge of secondary care, he is attacking the social relations related to the normal fulfillment of the public service duties.

The nominative aggravating circumstance was retained in the following case of judicial practice: *by Criuleni Court judgment of July 1, 2011, P. R. has been convicted under article 42 paragraph (2), article 248 paragraph (5) letters b), c), d) CP RM. In fact, the P. R., holding the office of inspector of the Central Customs Bureau, having the status of responsible person, on 14.02.2009, exercising the control function at the internal control station "Criuleni, route 7020" and aiming to contribute on the illegal import of HONDA CIVIC model transport unit, year of manufacture 2008, VIN code: SHHFK28608U019814, passed on the territory of the Republic of Moldova by unknown persons whose customs value amounted to 221.843 RON on 14.02.2009, performed the customs clearance the vehicle mentioned in SA's name in its absence. Perfecting and releasing the invoice (sale-purchase contract) with the name "DICHJARAZIONE DI VENDITA VERBALE" dated 20.01.2009, which he personally performed during the period not established by the criminal investigation body, P.R. has included false data, such as that called S.R. from Italy sells to S.A. the nominated vehicle for the sum of 3,000 Euro. The fact of the counterfeiting was confirmed by the expert reports no. 1845, 1846 of 25.06.2009 and no. 2148, 2149 of 10.09.2009, according to which the handwritten documents of the mentioned invoice were made by P. R. According to the same reports, the certificate of ownership of the means of transport with the identification number B26816348, which was found to have been stolen on 16 August 2002 in Italy, does not contain any reliable data. At the same time, P. R. falsified the certificate for the means of transport imported under no. 0112898, as well as the receipts for the collection of customs debts from individuals with the AB series no. 592876, according to which customs payments amounting to 16.950 RON were collected. However, according to the expert report no.1537 of 08.06.2009, they were not signed by A.S.⁴⁷⁵ The circumstance analyzed was also retained in other cases in judicial practice⁴⁷⁶.*

A person with a position of responsibility is a person who, in an enterprise, institution, state organization or local government or subdivision, is granted permanently or provisionally by law, appointment, election or by virtue of an

⁴⁷⁵ Decision of the Supreme Court of Justice of May 6, 2014, File no. 1ra-603/2014, www.csj.md (visited on 19.11.2015).

⁴⁷⁶ Decision of the Chisinau Court of Appeal of 19 June 2014, File no. 1r-159/14, <http://instante.justice.md/cms/cac-menu> (visited on 07.12.2015); Decision of the Chisinau Court of Appeal of July 9, 2015, File no. 1a-836/15, <http://instante.justice.md/cms/cac-menu> (visited on 07.12.2015).

assignment, certain rights and obligations for the performance of the functions of the public authority or of the administrative actions of disposition or organizational-economic.

So, the subject of smuggling provided by letter c) paragraph (5), article 248 CP RM is a special one. As a consequence, the lack of special quality of a person holding a position of responsibility does not allow qualification according to the aggravating circumstance specified. In view of the specificity of the offenses under consideration, namely that they are committed in the customs sphere, the specialty of smuggling is, in particular, the representative of the staff of the customs bodies exercising public functions. According to article 3 of the Law of the Republic of Moldova on Customs Service, no. 1150 of 20.07.2000⁴⁷⁷, customs officers are formed, *inter alia*, by customs officers. According to the same norm, the customs officer is a person with a position of responsibility, appointed according to the law, in a position within the customs body. The customs officer has special grades. Similarly, within the customs bodies, civil servants are subject, subject to the provisions of the Law of the Republic of Moldova on the public function and status of civil servants⁴⁷⁸, and contract staff, who carry out ancillary activities subject to labor law regulations. It should be noted that contract staff carrying out ancillary activities do not fall within the scope of the qualifying mark under examination. In this context, we fully support the opinion of R. Popov: "It follows that those who are part of the contract staff who carry out ancillary activities and are not civil servants can not be considered as collaborators of the customs service within the meaning of the provision of paragraph (2) article 123 CP RM. For the purposes of this rule, customs officers can only be considered civil servants within the customs bodies who hold special grades"⁴⁷⁹.

M. A. Cociubei classifies the special subjects of smuggling into two categories: a) persons carrying out control functions at the customs border (state). This category includes customs officers and Border Police officers who have the task of carrying out customs control; b) other responsible persons who use their service for the passage of goods across the customs border. This category includes representatives of diplomatic missions, consular missions and international organizations, as well as transport managers conducting regular international flights (train drivers, ship captains, etc.)⁴⁸⁰.

After I. S. Vasilicov, subjects of smuggling through the use of the service situation may be the persons with a responsible position as collaborators of the state federal state customs service, which carries out customs control, customs identification and registration of goods and means of transport, as well as other

⁴⁷⁷ Official Gazette of the Republic of Moldova, 2000, no. 106-108.

⁴⁷⁸ Official Gazette of the Republic of Moldova, 2012, no. 76-80.

⁴⁷⁹ Popov R., *op. cit.* (*Subiectul infracțiunilor prevăzute în Capitolele XV și XVI din Partea Specială a Codului penal*), p. 135-136.

⁴⁸⁰ Cociubei M. A., *op. cit.* (*Criminal liability for crimes in the sphere of customs activity*), p. 12.

persons with accountability functions that use their service for committing smuggling⁴⁸¹.

According to the legislation of the Republic of Moldova, we note that the persons with responsibility, liable to liability in accordance with letter c) paragraph (5), article 248 CP RM are those who perform control functions at the customs border of the Republic of Moldova; who performs the functions of representative of the state power at the crossing of the customs border; those responsible for the transport of goods susceptible to customs control and those benefiting from customs facilities under the current legislation across the customs border.

By using the job situation, it is necessary to understand the situation when the special subject - the person with responsibility - has to act within the limits of his/her job duties but fails to observe the obligations that form his/her competence, which is determined by the corresponding normative acts (Customs Code, other normative acts adopted by the Customs Service or other authorities, acts with international vocation in the customs field, etc.)⁴⁸². It follows that the use of the service situation will not be considered to be the case where the perpetrator clearly exceeds the limits of the rights and attributions granted by law. In other words, competition arises between the norm of letter c) paragraph (5), article 248 CP RM and article 327 CP RM (abuse of power or abuse of service), not in relation to that of article 328 CP RM. In any case, in the case of the passing of the goods over the customs border of the Republic of Moldova by a person with a responsible position, with the use of the service situation, only letter c) paragraph (5), article 248 CP RM, not the rule of article 327 CP RM. There is competition between these norms between a part-norm and a whole norm. The rule of article 327 CP RM is the norm - part, whereas the norm from letter c) paragraph (5) of article 248 CP RM forms the norm - whole. In other words, abuse of power or abuse of service is a part of the smuggling committed by a person in charge of using the job situation.

S. Maimescu points out that, in order for the aggravating circumstance to apply, it is necessary to meet cumulatively two conditions: a) the subject should occupy the function of responsibility, and b) the subject should use the function of responsibility for passing goods over the customs border⁴⁸³.

In another context, we must mention that in order for the nominated aggravating circumstance to be present, it is necessary for the person with responsibility to have achieved directly the objective side of the offense. *Per a contrario*,

⁴⁸¹ Vasilicov I. S., *op. cit. (Crimes in the sphere of economy)*, p. 153-154.

⁴⁸² Brînză S., Stati V., *op. cit. (Tratat de drept penal. Partea Specială)*, vol. II, p. 292; Stati V., *op. cit. (Infrațiuni economice: Note de curs)*, p. 460; Stati V., *op. cit. (Infrațiuni săvârșite în sfera activității economice externe (art.248 și 249 CP RM): studiu de drept penal)*, p. 135.

⁴⁸³ Maimescu S., *op. cit. (Contrabanda comisă în circumstanțe agravante pe teritoriul vamal al Republicii Moldova)*, p. 55.

it will not apply when the perpetrator has only contributed to committing the offense as an accomplice, instigator or organizer, and the person who has directly achieved the objective side of the offense has not been the particular person responsible for the offense. If the person with a position of responsibility does not fulfill the role of author, but an organizer, instigator or complicit, and the author does not possess the special quality, then the behavior of the person with responsibility will be framed according to the norm of paragraph (3) and/or paragraph (4) and/or paragraph (5) of article 42 CP RM and one of the provisions of article 248 CP RM, with the exception of letter c) paragraph (5), article 248 CP RM.

In the context of the analysis of the aggravated circumstance mentioned, it is useful to reproduce the point of view of the author I. S. Vasilicicov, who points out: "As a participant (complicity) in committing smuggling can appear the person with responsibility in the customs body. If it receives a material remuneration to facilitate smuggling, criminal liability arises for the contest between complicity to smuggling and passive corruption"⁴⁸⁴.

As for the evasion of payment of customs payments, we mention that article 249 CP RM contains in paragraph (2) the aggravating circumstance "**by two or more persons**". For the interpretation of this circumstantial aggravating element, the appropriate aggravating circumstance referred to in letter (b), paragraph (5) of article 248 CP RM, as discussed above, shall be made with appropriate adjustments.

At the same time, we specify that paragraph (3) of article 249 CP RM does not provide for an aggravating circumstance, but a type of offense. To be in the presence of evasion from paying the customs payments in the respective type variant, it is necessary that the objective side of the offense be expressed by not paying the customs payments in particularly large proportions. Only in this respect the offense provided in paragraph (3) of article 249 CP RM differs from the offense provided in paragraph (1) of article 249 CP RM.

In other news, the aggravating variants of customs offenses under Romanian law are laid down in article 274 CV Rom. *In concreto*, these are: a) simple smuggling, qualified smuggling, the use of unrealistic acts and the use of falsified acts **committed by one or more armed persons**; b) simple smuggling, qualified smuggling, the use of unrealistic acts and the use of falsified acts **committed by two or more persons together**.

Regarding the first aggravating circumstance, we mention that the justification for the aggravation of criminal liability is dictated by the fact that the subject of the offense is not a simple person, but a person endowed with a weapon. The weapon, as a means of committing the offense, may lead to greater success in the implementation of the criminal intent. In addition, the use of the weapon may lead to the removal of any obstacles which may arise in the offender's way of committing the offense.

⁴⁸⁴ Vasilicicov I. S., *op. cit.* (*Crimes in the sphere of economy*), p. 155.

In this respect, we subscribe to those emphasized by the Romanian author G. I. Olteanu, who states: "It is normal that this illicit conduct is considered more serious, attracting a greater punishment, because there is an important disregard for the social order, the offenders being organized and armed in order to be able to go to good ending the activity they initiate, and, if necessary, even to effectively repel the forces that would try to thwart their actions. They know, even before starting their criminal activity, that they will face officials who are invested with the exercise of state authority, and instead of deterring them, on the contrary, it leads them to prepare themselves in a common conception, to acquire means, to assign tasks, etc., in order to be able to defeat the social order and those who defend it"⁴⁸⁵.

According to article 179 CP Rom, the weapons are the instruments, devices or parts so declared by legal provisions. Any other items of a kind that can be used as weapons and which have been used for attack are assimilated to weapons. For the application of the aggravating circumstance in question it is necessary that at least one person be armed. When establishing the penalty, it will be taken into account that the offense was committed by one or more armed persons.

In another context, which must be the solution to the assumption that the offense is committed by several people, and one of them did not have a weapon, and the others had a weapon? We believe that when the person who does not possess the weapon knows that the others have weapons and, by virtue of this, cooperates in committing the offense, it must be remembered for the aggravating circumstance examined. *Per a contrario*, if that person did not know about the other people being armed, they would not be held responsible for that aggravating circumstance. That is why we agree with the following statement in the doctrine: "Considering that the commission of the crime by armed persons is a real and not a personal circumstance, it is to be applied to all participants who, as far as they were aware, could benefit from the effects - even if only morally-volitional - on the fact that they are involved in committing an offense, in a participant with arms. Naturally, if unarmed participants did not know and could not know that one or more participants were armed, they would not be criminally liable under the penalty imposed by the aggravating circumstance concerned"⁴⁸⁶. F. Sandu points out as a real circumstance that smuggling by one or more armed perpetrators radiates to the participants as far as they have known or predicted them⁴⁸⁷. In the circumstance of the circumstantial element under analysis, we should point out that in this case there is no question of the circumstance of the active subject, but only of the condition of "arming"⁴⁸⁸.

⁴⁸⁵ Olteanu G. I., *op. cit.* (*Cercetarea contrabandei și a altor infracțiuni ce implică trecerea frontierei de stat*), p. 58.

⁴⁸⁶ *Ibidem*, p. 95.

⁴⁸⁷ Sandu F., *op. cit.* (*Contrabanda – componentă a crimei organizate*), p. 31.

⁴⁸⁸ Pasat O., *op. cit.* (*Stabilirea și determinarea subiecților contravențiilor și infracțiunilor vamale comise pe teritoriul României*), p. 115.

It should be mentioned that in the case of skilled smuggling committed by one or more armed persons, when weapons are crossed over Romania's customs border, a distinction is to be made between the smuggling weapon and the arms crossed over the customs border. Thus, the weapon used for the illegal crossing of the customs border is considered a means of committing the offense, while the weapon crossing the customs border is a material object.

In other respects, with regard to the aggravating circumstance "by two or more persons together", we specify that it is applicable when at least two persons share in the commission of the offense. The aggravating circumstantial element is inapplicable if, although the offense is committed by several persons, they do not jointly participate in achieving the objective side of the offense (for example, if smuggling is committed by the author and the accomplice).

Thus, in comparison with the aggravating circumstance "of two or more persons" within the framework of letter b) paragraph (5), article 248 CP RM and letter b) paragraph (2), article 249 CP RM, in case of aggravating circumstance similar in article 274 CV Rom is not enough to involve at least two persons at the crime, but it is necessary for them to participate together in the realization of the material element. In other words, if the offense is committed by a person who is the subject of the offense, through a person who does not possess the general conditions of the subject of the offense, the aggravating circumstance under consideration is not applicable. Therefore, the circumstantial element in question is narrower than the similarly aggravating circumstantial element of the Moldovan criminal law.

In another context, we consider the following to be necessary in order to complete the study: it is appropriate to introduce in the Romanian Customs Code, similar to the criminal law of the Republic of Moldova, the aggravating circumstance involving the use of the service situation by the civil servant within state bodies, especially from customs. In this respect, the doctrine emphasizes: "In practice, there may often be situations in which customs workers, border police workers, officials from the Ministry of Transport, Ministry of Health, Ministry of Agriculture, etc. commit customs offenses as authors (less frequently) or as participants - usually accomplices (most of the time). Illegal activity in itself, given that these people use their quality, know the "weaknesses" of activities carried out in the area by the law enforcement authorities, may try to corrupt other officials or try to divert certain operations compromising their results, is getting a high social danger"⁴⁸⁹.

⁴⁸⁹ Olteanu G. I., *op. cit.* (*Cercetarea contrabandei și a altor infracțiuni ce implică trecerea frontierei de stat*), p. 95.

Section 4. Conclusions to Chapter IV

Following the characterization of the constitutive elements and of the aggravating circumstances of the customs offenses stipulated in the legislation of the Republic of Moldova and of Romania we draw the following **conclusions**:

1) the method used by the perpetrator (inserted by the legislator in the provisions of the provisions of article 248 CP RM) confers illegality on the act of crossing the goods over the customs border;

2) compared with the passing of goods across the customs border of the Republic of Moldova by non-declaration, in the case of non-authentic declaration the perpetrator fulfills the legal obligation to declare the goods to be crossed over the customs border, but the data reflected in the customs declaration do not correspond to the reality;

3) if the goods cross the customs border of the Republic of Moldova through the fraudulent use of documents or means of customs identification, by non-authentication or non-authentication, even if the perpetrator fails to pay the corresponding customs payments, the commissions must be qualified only according to one of the norms at article 248 CP RM;

4) for the purposes of the rule in paragraph (1), article 270 CV Rom does not matter the value or the kind of goods that are trying to cross the border but the way in which they materialize: "by any means" and by places where no carries out customs control;

5) under the Customs Code of Romania, the act of crossing the goods through border crossing points escapes, but by other means than by evading customs control;

6) the act provided for in paragraph (3) article 270 CV Rom is a special form of favoring smuggling;

7) in order to be in the presence of unrealistic acts or forged documents, simple possession is not sufficient for the eventual use of a false customs document or a customs document on other goods;

8) crimes brought together under the marginal title of evasion of payment of customs payments may be committed only with a direct intention, since the content of the offense constituted the law as a sign;

9) the incidental aggravating circumstance referred to in letter b) paragraph (5) of article 248 CP RM in the case of complicated participation in smuggling shall not be affected;

10) compared to the aggravating circumstance "of two or more persons" in the framework of letter b) paragraph (5) article 248 CP RM and letter b) paragraph (2) article 249 CP RM, in case of aggravating circumstance similar in article 274 CV Rom is not enough to involve at least two persons at the crime, but it

is necessary for them to participate together in the realization of the material element;

11) for the application of the aggravating circumstantial element "by one or more armed persons", at least one person must have been armed.

Chapter V

General conclusions and recommendations

Synthesizing what is presented in this paper, we formulate the following *general conclusions*:

1) conventionally, the offenses under the name of smuggling marginal and those under the name of marginal avoidance from the payment of customs payments can be referred to as customs offenses, as they are acts committed in the customs sphere, which also apply to customs offenses in Romanian legislation, - considering the legal technique used to criminalize socially dangerous acts in the customs sphere under a special criminal law;

2) according to the criminal law of the Republic of Moldova, customs offenses must be understood as prejudicial acts that may take the form of action or inaction, intentionally committed, punishable by criminal penalties, committed in the sphere of foreign economic activity in connection with goods crossing the customs border, by ignoring the customs regulations, facts that are attentive to the values and social relations related to the customs activity, stipulated in articles 248 and 249 CP RM;

3) lawmakers of foreign states have different positions in relation to the number and content of customs offenses, as well as the technical-legislative placement within the criminal law of the norms which criminalize them, positions which are determined, in particular, by the level of economic development, the established historical traditions, the specificity of external relations, including commercial ones, etc.;

4) crimes culled under the marginal smuggling and those under the marginal margin of evasion of paying customs duties, forming the group of customs offenses, challenge a common group of social relations inherent in customs activity;

5) if the goods cross the customs border of the Republic of Moldova through fraudulent use of documents or means of customs identification, by non-authentication or non-authentication, even if the perpetrator does not pay the corresponding customs payments, the commissions must be qualified only according to one of the norms at article 248 CP RM;

6) passing even a single good across the border will be sufficient to be in the presence of smuggling, even if the legislator uses the plural to describe the material/immaterial object;

7) the active subject of the offenses provided by the Customs Code of Romania may be any person, the legislator not imposing a certain special quality on perpetrators, irrespective of the illegal activity unfolded;

8) the special quality of the subject of the evasion from the payment of the customs payments derives from the content of the legal obligation of the person to pay the customs payments when passing goods over the customs border of the Republic of Moldova;

9) for the purposes of the norm of paragraph (1) article 270 CV Rom, it does not matter the value or the kind of goods that are trying to cross the border but the way in which they materialize: "by any means" and by places where no the control of the customs bodies takes place;

10) under the Customs Code of Romania, the act of passing goods through border crossing points, but by other methods than by evading customs control, escapes;

11) the deed referred to in paragraph (3) article 270 CV Rom constitutes a special form of favoring smuggling;

12) the offenses referred to in article 249 CP RM may be committed only with a direct intent, because in the content of the offenses the legislator included the purpose as a constitutive sign.

The solved scientific problem consisted in the elaboration of the tools for identifying the constitutive elements and the aggravating circumstantial customs offenses in the legislation of the Republic of Moldova and Romania, in accordance with the current theoretical and normative framework, which led to the submission of proposals for improving the the law to prevent and combat crime more effectively in the customs sphere.

In order to improve the legislation of the Republic of Moldova and Romania in the area of customs criminalization, the following *recommendations*⁴⁹⁰ were advanced:

- *for the Republic of Moldova*: 1) adjusting the content of the norm in which the definition of smuggling is included in the Customs Code in relation to the norm of incrimination in the Criminal Code; 2) the exclusion of the expression "other kind of energy" from the content of point 1) article 1 of the Customs Code of the Republic of Moldova and from the text of letter f), article 2 of the Law of the Republic of Moldova on the introduction and removal of goods on the territory of the Republic of Moldova by natural persons, no. 1569 of 20.12.2002; 3) completing paragraph (4) of article 248 CP RM with the other three methods of committing smuggling provided in paragraphs (1) - (3) article 248 CP RM, missing in paragraph (4) article 248 CP RM (assuming the harmful act is expressed in the action of crossing the cultural values across the customs border); 4) the introduction of the precursors in the list of material entities susceptible of illegally crossing the customs border, within the meaning of the norm of paragraph (2)

⁴⁹⁰ See also Pasat A. O., *Analysis criminology customs offenses under Moldovan law*, „Juridical Tribune – Tribuna Juridica”, Volume 6, Issue 2, December 2016, p. 214, 215.

article 248 CP RM; 5) completing article 248 CP RM with a new paragraph containing the particularly aggravating circumstantial element "committing smuggling by an organized criminal group or a criminal organization".

- *for Romania*: 1) replacing the phrase "by evading customs control" with the phrase "by any means" similar to the norm in paragraph (1) article 270 CV Rom, so that under the rule of paragraph (2) article 270 CV Rom to cross any illegal border crossing at border crossing points, including by non-authentication or inappropriate declaration; 2) introducing in article 274 CV Rom the aggravating circumstance similar to that of letter c) paragraph (5) article 248 CP RM, namely: "by a civil servant, using the service situation".

The advantages of such recommendations are:

a) improving the enforcement of criminal law by authorized persons;
b) non-admission by the perpetrator of the criminal liability for the crossing of cultural values of the Republic of Moldova when he makes use of non-declaration, inappropriate declaration or fraudulent use of documents or means of customs identification;

c) the aggravation of criminal liability for committing smuggling or other customs offenses in the presence of circumstances to justify such aggravation, which would consequently lead to the diminution of crime in the customs sphere;

d) covering legislative vacuums (for example, replacing the phrase "by evading customs control" in paragraph (2) article 270 CV Rom with the phrase "by any means" would not allow the criminal responsibility of the person passing the goods customs border, through border crossing points, not by evading customs control, but by another method, for example, by not declaring goods);

e) by establishing the aggravating circumstances proposed, it would be possible to differentiate fairly and equitably the character and the harmfulness of the committed ones.

The plan of forward-looking research on the theme of the scientific paper is oriented towards:

- develop a draft of a new Order of the Plenary of the Supreme Court of Justice in criminal cases concerning customs offenses.

- identify the link between offenses under the marginal smuggling and cross-border crime.

- reporting smuggling peculiarities with biological, nuclear, chemical weapons.

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