

COUNTRY REPORT - CHINA

By Zhenjie ZHOU *

1 Introduction

The concept of corporate crime was confronted with strong academic opposition when it was introduced into China in the late 1980s due to its violation to traditional liability principles based on moral blameworthiness and free will. However, serious political and social concerns over the harms caused by illegal activities by corporations and deeply rooted belief that criminal punishment is the most powerful weapon against crimes paved the way for the concept into the Customs Law that became effective in 1988. Now, this concept has been universally accepted and has attracted a large amount of political and media attention in China (Zhou 2015).¹ More positive economic reforms in the past decade led to further proliferation of corporate crime in criminal law.

According to article 9 of the *Criminal Law of the PRC* that became effective as of 1 October 1997 (hereinafter the *1997 Criminal Law*), China can exercise criminal jurisdiction on crimes which are stipulated in international treaties concluded or acceded to by the PRC within the scope of obligations, prescribed in these treaties, it agrees to perform. As far as corporations are concerned, it first should be noted that no organization has been charged with or convicted of an international crime in China ever since the adoption of the concept of criminal liability. Meanwhile, it should also be noted that international documents containing criminal norms cannot be used as basis of criminal judgement. Therefore, prosecution of international crimes by corporations can only take an indirect approach. This report will first introduce briefly the definitions and scopes of corporation and corporate crime in Chinese criminal Law, then analyse preconditions to and obstacles in persecuting international crimes in China, and finally give a short discussion on related jurisdictional issues.

2 'Corporation' and 'Corporate Crime' in Chinese Criminal Law

2.1 The definition of 'corporation'

A variety of phrases have been used to describe a crime committed by an organization in academic studies, such as crime of legal persons, crime of legal entities, unit crime and corporate crime. Article 30 of the *1997 Criminal Law* adopts the phrase 'unit crime' (*Dan Wei*) instead of 'corporate crime' used in foreign criminal laws, and scope of the former is obviously wider than that of the latter. The 'unit' in the Criminal Law includes not only commercial organizations such as companies and enterprises but also public institutions, State organs and other organizations, and the status of legal person is not necessary.

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¹ Zhenjie Zhou, *Corporate Crime in China: History and Contemporary Debates* (London: Routledge) 30.

'Companies' here refer to limited-liability companies or companies limited by shares established within Chinese territory, either State-owned or private-owned, in accordance with the *Company Law of the PRC* adopted by the Standing Committee of the Eighth National People's Congress on 29 December 1993; 'enterprises' are those for-profit economic organizations with the status of legal entity; and 'public institutions' covers all organizations established according to laws or administrative orders with the purpose of offering public services and activities and promoting social development, such as public schools, universities and academic institutions. Public institutions are further divided into state-owned institutions and collectively owned institutions. The criminal liability of the 'State organ' has generated heated debate in recent years because it includes the Legislature, the military and even people's courts and prosecution offices in addition to administrative authorities. An organization that is not a company, enterprise, public institution or State organ is under the coverage of 'other units'. Meanwhile, a criminal act by a branch or an internal department of a corporation, if committed on behalf and in the interest of the branch or the department, should be punished as a corporate crime according to the *Summary of Meetings of People's Courts at all Levels on Trying Financial Crimes* issued by the Supreme People's Court on 1 January 2001. Briefly, any legally constituted organization, for-profit or not-for-profit, public or private, civil or administrative, with or without the status of legal person, can be the actor of corporate crime. The coverage of the actor of corporate crime in China is apparently much wider than that in foreign countries. At least, the court of law cannot be prosecuted in any jurisdiction except China, although certain jurisdictions, such as France, prosecute public organizations.²

The absence of a definition in the 1997 *Criminal Law* and authoritative legislative and judicial interpretation has led to debates on the scope of State organs. It has been argued that State organs should be narrowly construed to include only administrative authorities at local levels because legislative bodies, judicial authorities and State organs at the central level, such as the State Council, could never become criminal actors due to their constitutionally granted functions.³ However, it is generally accepted that State organs should be broadly construed to include organizations at both central and local levels engaging in public management activities such as national affairs with the national budget as an independent fund source. They are mainly those exercising political powers, including the national legislature, administrative authorities, prosecution organs, trial organs and military services, and the effort to restrict the scope of 'State organs' could not

² According to article 121-2 of French Penal Code, local public authorities and their associations could incur criminal liability for 'offences committed in the course of their activities which may be exercised through public service delegation conventions.'

³ Ningning Zhang, 'Studies on Constituents of Corporate Crime' in Dunxian Yang et al (eds), *Disputed Issues Regarding Implementation of New Criminal Law* (Chinese Procuratorial Press 1999).

find legal basis, as the wording of 'State organs' in the law implies that no State organ should be excluded.⁴

As the 1997 *Criminal Law* contains no specific provision or limitation, it is legally proper to define the scope of State organs according to Chapter 3, the Structure of the State, of *the Constitution of PRC* as last amended in 2004. According to the Chapter, State organs shall include (1) the National People's Congress, as the highest organ of state power, and its Standing Committee; (2) sub-committees of the National People's Congress, such as the Nationalities Committee, the Law Committee, the Finance and Economic Committee, the Foreign Affairs Committee and the Overseas Chinese Committee; (3) the President of the People's Republic of China as the symbol of the State and vice President that succeeds to the office of President in the case the office of the President of the People's Republic of China falls vacant, the Vice-President; (4) the State Council as the executive body of the highest organ of state power, and its Ministries, committees and agencies; (5) the State Audit Administration; (6) the Central Military Commission of the People's Republic of China; (7) people's congresses and people's governments at local levels; (8) the organs of self-government of national autonomous areas; (9) the people's courts as judicial organs at both central and local levels; and (10) the people's procuratorates as organs for legal supervision at both central and local levels. Meanwhile, taking into consideration of current political structure of 'single-party administration, multi-party participation', this work suggests that organizations of the Communist Party of China and committees of people's political consultative conference at all levels should also be included.

It should be noted here that because the SPC has stated in its *Interpretation on Application of Law in Case of Corporate Crime* issued on 25 June 1999 that if an organization is established with a sole intention to commit crimes or if its main activities are illegal after establishment, crimes by the organization shall not be dealt with as corporate crime, organized crime is in principle distinguished from corporate crime in China and therefore beyond the coverage of this work. Meanwhile, corporate crime is also distinguished from white-collar crime, a category of crime committed by a well-educated, socially respected and successful businessman in the course of his or her profession, advocated by Sutherland (1949) more than 60 years ago because what the latter stresses is individual liability instead of the liability of a corporation as a whole.

How and whom should be prosecuted in the case of a corporation being revoked or cancelled or, in the case of a merger, reconstruction or amalgamation, after it commits a crime? The SPP proclaimed in its *Reply to the question raised by Sichuan Provincial People's Procuratorate with regard to how to address criminal liability in the case where a suspected corporation is revoked, cancelled or declared bankruptcy* issued on 4 July 2002 that the persons who are directly in charge of and other persons who are directly responsible for the criminal act in question should be accused instead of the corporation itself. Similarly, in

⁴ Youtian Deng and Yongsheng Li, 'Studies on Unit Crimes' in Muying Ding et al (eds), *Key Issues in Implementation of Criminal Law* (China Law Press 1999).

the case where there is a merger, reconstruction or amalgamation after a corporation commits an offence, culpable individuals will naturally be charged for their contribution to the commission of the crime, and the merged, reconstructed or amalgamated corporation should not be held criminally liable according to the fundamental rationale of modern criminal law that each person shall only be responsible for his/her own acts.

2.2 Definition of Corporate Crime

According to article 30 of the *1997 Criminal Law*,⁵ corporate crime refers to (i) an act committed by an organization mentioned above that endangers society with (ii) a guilty mind and is (iii) prescribed by law as a crime.

2.2.1 'Act' requirement

Corporate crime first must be an 'act'. Theoretically, an act that endangers society is considered an indispensable objective element of the constitution of a crime and the basis of Chinese criminal law.⁶ The 'act' element is required by not only the fundamental principle of combining objective and subjective elements but also article 13 of the *1997 Criminal Law*, which defines a crime as an act that endangers the sovereignty, territorial integrity and security of the State; splits the State; subverts the State power of the people's democratic dictatorship and overthrows the socialist system; undermines public and economic order; or violates collective or individual rights. Therefore, a plan, an idea or a proposal without any external effect (commission, omission or possession), however malicious it may be, shall never be punished by criminal law.

Second, the act must have the potential to endanger or must have endangered society. According to the principles of justified defense in article 20 and necessity in article 21 of the *1997 Criminal Law*, an act should not be punished even if it has caused harmful consequences and satisfied all formal requirements of the constitution of a crime if it was intended to protect legal rights or interests from illegal infringement or in the case of an emergency. Therefore, the decision regarding whether an act has the potential to cause or has caused harm to society is substantial, as it is based on not only the harmful consequences that the act caused or may cause but also what 'good' the act could do or has done to society. As will be expounded below, this in part results in the reluctance of local governments to sanction liable corporations, as corporate illegality might 'benefit' the local economy.

2.2.2 Guilty mind

⁵ The article provides that 'any company, enterprise, institution, State organ, or organization that commits an act that endangers society, which is prescribed by law as a crime committed by a unit, shall bear criminal responsibility.'

⁶ Mingxuan Gao and Kechang Ma, *Criminal Law* (Beijing: High Education Press and Beijing University Press) 63.

The 1997 *Criminal Law* provides two categories of subjective element, intention and negligence, respectively in article 14 and article 15. It is commonly recognised that corporations can be prosecuted for intention crimes, in which the actor clearly knows that his/her act will entail harmful consequences to society and wishes or allows such consequences to occur. The question is whether they can be charged with negligence crimes, in other words, whether negligence is a subjective element of the constitution of corporate crime. The most convincing argument against the inclusion of negligence into the constitution of corporate crime is the purpose to benefit a corporation. It is commonly accepted that negligence in the 1997 *Criminal Law* could actually be divided into following two categories and that neither leaves room for a 'purpose' because the actor does not 'wish' or 'allow' the consequence to occur in either case: (i) where a person should have foreseen that his act would possibly entail harmful consequences to society but fails to do so and (ii) where a person, having foreseen the consequences, readily believes that they can be avoided, and thereby the consequences do occur. Because all of the actors of corporate crime engaged in misconduct with the purpose to benefit a corporation, negligence should be excluded from the constitution of corporate crime.⁷ Obviously, the unsaid precondition of this stance is that the purpose to benefit a corporation is a necessary subjective element of the constitution of corporate crime. Then, is it?

Negating that 'the purpose to benefit a corporation' is an indispensable subjective element is how researchers for the inclusion of negligence into the constitution of corporate crime begin their rebuttal. For example, *Chen 2007, 40* noted that the purpose to benefit a corporation might be found in most real cases but not in criminal laws.⁸ Moreover, corporations, although taken to be perpetrators, are actually victims in a number of specific corporate crimes, such as the crime of secretly dividing up State-owned assets in article 396 of the 1997 *Criminal Law*. According to the article, it is a crime in which a State organ, State-owned company, enterprise, institution or people's organization, in violation of State regulations and in the name of the unit, divides up State-owned assets in secret among the individuals of the unit. It can be easily observed that the individuals here aim to solely pursue individual instead of collective interests. Therefore, the purpose to benefit a corporation is not an element of the constitution of corporate crime unless provided by criminal law, and it follows that corporations can be charged with negligent crimes. This work holds that the purpose to benefit a corporation should not be a constitutive element if viewed from existing criminal law.

2.2.3 Prescription of criminal law

An act should not be punished unless provided as a corporate crime, as required by the principle of legality in article 3 of the 1997 *Criminal Law*. In addition to the 1997 *Criminal*

⁷ Genju Liu and Limei Shi, 'How to locate the accused in case of corporate crime' (1999) 6 CASS Journal of Law 111.

⁸ Qingfeng Chen, 'An analysis on subject of unit crime' (2002) 3 Journal of Hunan Cadres College of Political and Legal Affairs 11.

Law, corporate crime could only be found in the ‘*Decision of the Standing Committee of the National People’s Congress on Punishing Crimes of Fraudulently Purchasing, Evading and Illegally Trading in Foreign Exchange*’ adopted on 29 December 1998. Chinese legislators adopted a criminalization approach quite similar to that in Japan, that is, confining corporate crime in principle within regulatory offences and listing them in one article after another, although the former lists corporate crimes in criminal laws, while the latter lists them in administrative acts (Kawasaki 2004).⁹

The 1997 *Criminal Law* provides specific corporate crimes in nine chapters of its Special Part, which does not include Chapter X, *Crimes of Servicemen’s Transgression of Duties*. Academic researchers usually divide corporate crimes into two categories according to whether the actor must be a corporation.¹⁰ One category is standard corporate crimes that can only be committed by corporations. For instance, article 137 of the 1997 *Criminal Law* stipulates that standard corporate crimes are crimes in which *any building, designing, construction or engineering supervision corporation*, in violation of State regulations, lowers the quality standard of a project and thereby causes a serious accident. The word ‘*corporation*’ in the article clearly excludes the possibility of any individual person becoming the actor of the crime. Standard corporate crimes could be found in only 14 articles in the 1997 *Criminal Law*, accounting for less than 10 percent of the entire list of corporate crime. It is worth mentioning that it is often not the ‘actor’ but culpable natural persons who are actually punished in the case of standard corporate crime. For example, although the wording in article 396 mentioned above that ‘where a *State organ, State-owned company, enterprise, institution or people’s organization*’ makes it clear that the actor is a corporation, it is the persons who are directly in charge of and the those who are directly responsible for the crime that incur liability. The logic behind this choice is that the ‘true actor’ is actually a victim, and it is therefore unreasonable to punish it as it has suffered financial or reputational loss. However, does it not seem illogical to punish natural persons associated with a corporate crime without punishing its ‘true actor’? Meanwhile, to punish only individuals implies that the organization itself is not considered a prevention target, while the cause of such crimes is mainly systemic deficiencies. The other category is non-standard corporate crime, which can be committed by both individuals and corporations. The 1997 *Criminal Law* prescribes non-standard corporate crime in two ways: (i) insert a paragraph into a specific article stipulating that the crime in the article may also be committed by a corporation, or (ii) stipulate in an independent article at the end of a section that a corporation may become an actor of crimes in the previous articles.

What if a corporation commits a crime that has not been prescribed a corporate crime? This question has been asked and discussed ever since the beginning of new century, when a number of corporations were found to have organized theft of water, electricity and gas.¹¹

⁹ Tomomi Kawasaki, *Corporate Criminal Liability* (Seibundo 2004) 157.

¹⁰ Liangshun Wang, *Study on Unit Crime* (China People’s Public Security University Press 2008) 158.

¹¹ Youtian Dong, ‘On the Case where a Unit Commits a Non-Corporate Crime’ (2006) 6 *Global Law Review* 11.

The people' court usually punished individuals who ordered, approved, directed and carried out the act in question instead of a corporation itself in practice according to the *Official Reply to the Question of How to Apply the Law in Case of a Theft Organized by Given Persons of A Unit* issued by the SPP on 13 August 2002. The *Interpretation on Certain Questions of How to Apply the Law in Handling Theft-related Criminal Cases* jointly issued by the SPP and the SPC on 18 March 2013 confirmed the practice by providing that where a corporation organizes or commands a theft, the organizer, commander and direct director shall be held criminally liable. Confirming the above interpretations, the Standing Committee of the National People's Congress issued the *Interpretation of Article 30 of the Criminal Law of PRC* on 24 April 2014, stating that in the case where an organization commits a crime that has not been provided as a corporate crime, the organizer, planner or the leader of the said act shall be punished. The latest legislative document, while presenting clear guidelines, has intrigued more questions, such as how to justify the punishment of individuals if the theft in question is decided to have been an organizational one and whether the convicted ones shall be responsible for civil compensation.

2.2.4 Punishment of Corporations

The 1997 *Criminal Law* provides two principles of corporate punishment in article 31. One is 'dual punishment' principle, requiring that both the corporation itself and liable individuals be punished. The relationship of the corporation and liable persons under dual punishment principle, more specifically, whether they are joint offenders has been heatedly debated, because the answer to this question decides whether an individual who was once convicted as a culpable person in a corporate crime case constitutes recidivist when s/he is convicted of a crime on his or her own behalf or as a culpable individual in another corporate crime again.¹² The most convincing arguments proponents brought forward are that the individuals contribute substantially to the commission of the crime with their physical acts and to consider them joint offenders helps to increase deterrence value of corporate punishment. However, an individual should not be considered a criminal if only s/he is not legally provided as a perpetrator of a crime, and the perpetrator of corporate crime is the corporation according to existing criminal law. Meanwhile, philosophically, as the ideology of people foremost officially advocated in China, a person shall not be used as a means, but considered the end. Therefore, a corporation and its members punished as culpable individuals are not joint offenders. The other is the 'single punishment' principle, which only punishes culpable individuals. This principle is usually applied in negligent crimes, which are thought of as being less dangerous and harmful to society than intentional crimes and in which corporations are

¹² Liangshun Wang, 'Studies on the Problem of Recidivism of Persons Who Bear Direct Liability' (2010) 1 *Journal of Jiangxi Public Security College* 8; Yangcheng Hu, 'On Corporate Recidivism' (2002) 3 *Procuratorial Monthly* 13.

viewed as 'victims' in real sense, such as recklessly causing an accident, as provided in article 135 of the 1997 *Criminal Law*.

The only punishment applicable to a corporation now is the criminal fine provided in article 35 of the 1997 *Criminal Law* as one of supplementary punishments. Principal punishments in article 33 of the 1997 *Criminal Law* are inapplicable to a corporation as they are all deprivation of the rights of the person, specifically, life and freedom. Among supplementary punishments in article 34, confiscation of property, although of pecuniary penalty, cannot be enforced against a corporation because the wording such as 'family members' and 'personally owned' in related articles excludes the possibility of it being imposed on a fictitious existence,¹³ and deprivation of political rights in article 54 cannot be applied to a corporation either as political rights such as the right to vote and to stand for election and the right to hold a position in state organs are all of personal rights and can only be enjoyed by 'persons holding the nationality of the People's Republic of China are citizens of the People's Republic of China'(article 33 of the *Constitution of the PRC*).

The Legislature almost places no limit on the application of criminal fines other than a quite simple and vague statement that the 'amount of any fine imposed shall be determined according to the circumstances of the crime' in article 52 of the General Part of the 1997 *Criminal Law*. Although maximum and/or minimum amounts could be found in certain particular crimes, the application of criminal fines is still strongly disputed due to the absence of a clear-cut calculation standard and method. The SPC issued the *Regulations on Application of Property-related Penalties* on 15 November 2000, but this document is of little help, as it only provides in article 2 that the people's court should decide the amount of fine according to the circumstances of the crime in question, such as criminal proceeds, victim's loss and perpetrator's capability of paying the fine. Where there is no stipulation on the amount of criminal fine, the minimum amount shall be no less than 1,000 Yuan. As a consequence, the people's court has almost unrestricted discretion on the application of criminal fine.

Individual persons involved in a corporate crime case are subject to all penalties available, including the death penalty, life imprisonment, fixed-term imprisonment, criminal detention and public surveillance. It is worth mentioning that although *Amendment VIII to the 1997 Criminal Law*, adopted on 25 February 2011, abolished the death penalty for 13 non-violent economic crimes, 55 crimes are still punishable by death, seven of which are described in Chapter III, *Crimes of Disrupting the Order of the Socialist Market Economy*, of the Special Part of the 1997 *Criminal Law*, which include more than half of existing corporate crimes. For example, it is still possible for a culpable defendant convicted as a person directly in charge of a corporation that is convicted of producing or selling counterfeit

¹³ For example, article 59 of the 1997 *Criminal Law* provides that confiscation of property refers to the confiscation of part or all of the property personally owned by a criminal. Where confiscation of all the property of a criminal is imposed, the amount necessary for the daily expenses of the criminal himself and the family members supported by him shall be taken out.

medicine, in contravention to article 141 of the 1997 *Criminal Law*, to be punished by capital punishment if a death is caused or other especially serious circumstances are established. According to the 2013 Report on Crimes by Chinese Enterprisers released by the Centre for Prevention of Crime by Chinese Enterprisers of Beijing Normal University on 5 January 2014, ten enterprisers were sentenced to death in 2013 after being convicted of economic crimes.

3 Preconditions to Charging Corporations with International Crimes in China

Three preconditions can be distinguished to prosecution of international crimes in China. The first one is that China, in addition to those crimes recognized in customary international law, has ratified the international documents in which specific crimes are provided. Secondly, specific conducts contained by international crimes must have been criminalized by domestic criminal law, and thirdly, the crime based on the given conducts in domestic criminal law has been provided to a corporate crime.

The first precondition would not cause too much trouble to charging corporations with international crimes in China. On one hand, China has signed and ratified most international conventions that are particularly important to maintain common security of international community. For example, as table I shows, China has ratified almost all conventions regarding counter-terrorism, excluding protocols. And therefore, all the conducts prohibited by them should be punishable in China. Core international crimes, such as genocide, war crimes, crimes against humanity, and the crime of aggression, have been recognized by customary international law, and China recognizes its jurisdiction on them.

Table I Counter-Terrorism Conventions Ratified by China

	Convention	Year of Ratification
1.	1963 Convention on Offences and Certain Other Acts Committed On Board Aircraft	1978
2.	1970 Convention for the Suppression of Unlawful Seizure of Aircraft	1980
3.	1971 Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation	1974
4.	1973 Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons	1987
5.	1979 International Convention against the Taking of Hostages	1993
6.	1980 Convention on the Physical Protection of Nuclear Material	1989
7.	1988 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation	1988
8.	1988 Protocol for the Suppression of Unlawful Acts	1991

	<i>Against the Safety of Fixed Platforms Located on the Continental Shelf</i>	
9.	1988 Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, supplementary to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation	1991
10.	1991 Convention on the Marking of Plastic Explosives for the Purpose of Detection	1991
11.	1997 International Convention for the Suppression of Terrorist Bombings	2001
12.	1999 International Convention for the Suppression of the Financing of Terrorism	2006
13.	2005 International Convention for the Suppression of Acts of Nuclear Terrorism	2010

The second precondition will cause some trouble, but not too much. Although may be provided under different charges, almost all specific conducts punished by public international law have been criminalized in China. Take for instance crimes against humanity provided in article 7 of the Rome Statute of the International Criminal Court that became effective as of 1 July 2002, as table II shows, although China has so far not signed the Statute and Chinese criminal laws do not use such expressions as enslavement, extermination or apartheid, all the specific conducts can find counterparts in the 1997 *Criminal Law*.

Table II Crimes against Humanity and Corresponding Provisions in 1997 *Criminal Law*

	Specific Conducts punished as crimes against humanity	Possible Corresponding articles in 1997 <i>Criminal Law</i>
1.	Murder	Art. 232 (Murder)
2.	Extermination	Art. 232 (Murder)
3.	Enslavement	Art. 238 (illegal custody); Art. 244 (forced labor)
4.	Deportation or forcible transfer of population	Art. 103 (splitting the State, instigating to split the State) Art. 238 (illegal custody); Art. 239 (kidnapping); Art. 263 (robbery), etc.
5.	Imprisonment or other severe deprivation of physical liberty in violation of	Art. 238 (illegal custody)

	fundamental rules of international law	
6.	Torture	Art. 234 (inflicting injury)
7.	Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity	Art. 236 (rape); Art. 358 (organizing prostitution or forcing others into prostitution).
8.	Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court	Art. 232 (murder); Art. 234 (inflicting injury); Art. 236 (rape); Art. 239 (kidnapping); Art. 249 (inciting national enmity or discrimination); Art. 250 (publishing an article designed to discriminate or humiliate an ethnic group); Art. 251 (unlawfully depriving a citizen of his or her freedom of religious belief or infringing upon the customs and habits of an ethnic group), etc.
9.	Enforced disappearance of persons;	Art. 238 (illegal custody); Art. 263 (robbery).
10.	The crime of apartheid	Art. 103 (splitting the State, instigating to split the State); Art. 249 (inciting national enmity or discrimination); Art. 250 (publishing an article designed to discriminate or humiliate an ethnic group); Art. 251 (unlawfully depriving a citizen of his or her freedom of religious belief or infringing upon the customs and habits of an ethnic group).
11.	Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.	Art. 232 (Murder); Art. 232 (inflicting injury), etc.

However, the third precondition makes it extremely hard to charge corporations with. As mentioned above, it is necessary for prosecution of a corporation that the said crime has been provided by criminal law as a corporate one. This makes it extremely hard to charge a corporation with international crimes in China, especially in the case of core ones. Let us

take crimes against humanity again, as shown in Table III below. None of the offences in Chinese criminal law that corresponds to article 7 of the Rome Statute have been provided to be a corporate one. In other words, a corporation can be charged with no crime here. Of course, there do exist conducts prohibited by international conventions for which a corporation can be charged, such as financing a terrorist organization in the International Convention for the Suppression of the Financing of Terrorism, which is also a crime for which a corporation can be punished in article 120(1) of the *1997 Criminal Law*.

Table III Possibility of Charging a Corporation with related Conducts

	Article	Corporate Crime
1.	Art. 103 (splitting the State, instigating to split the State)	No
2.	Art. 232 (murder)	No
3.	Art. 234 (inflicting injury)	No
4.	Art. 236 (rape)	No
5.	Art. 238 (illegal custody)	No
6.	Art. 239 (kidnapping)	No
7.	Art. 249 (inciting national enmity or discrimination)	No
8.	Art. 250 (publishing an article designed to discriminate or humiliate an ethnic group)	No
9.	Art. 251 (unlawfully depriving a citizen of his or her free-dom of religious belief or infringing upon the customs and habits of an ethnic group)	No
10.	Art. 263 (robbery)	No

Meanwhile, it should be noted that the impossibility of charging a corporation does not mean that of charging culpable individual, because as mentioned above, they can be charged as individual defendants according to the *Interpretation of Article 30 of the Criminal Law of PRC* issued by the Standing Committee of the National People’s Congress. Culpable individuals, referred to as ‘the persons who are directly in charge of or the other persons who are directly responsible for the crime in question’ in article 31 of the *1997 Criminal Law*, are punished under either ‘dual punishment’ or ‘single punishment’ principles. Why should they then be punished when the alleged actors are ‘corporations’? Furthermore, how should the decision of who is directly in charge of and who is directly responsible for a given crime be made?

The answer to the first question can be summarized as follows. On one hand, if a corporation commits a crime as an independent actor of a crime on its own will, the

corporation shall undoubtedly be punished. However, considering that the corporation has neither a brain with which to make decisions nor a body with which to act, the intention to commit the crime and the activities that endangered society shall be deemed to be conscious act of the persons who are responsible within the organization' (see *Liu 1999: 77*). On the other hand, because the corporation has no soul to condemn and no body to punish, the policy end of preventing corporate crime will not be achieved unless the persons through whom the corporation commits a crime suffer the pain of being deprived of freedom, property or even life, as Lindley (1899) once remarked, the close connection of acts of corporations and illegal and criminal acts of individuals makes it necessary for an officer charged with the execution of the law to punish both the corporation and the guilty individual to protect the public interest.

The second question has attracted voluminous exploration, and researchers have arrived at different answers. For example, as to the persons who are directly in charge, at least four opinions have been proposed. First, it has been proposed that the persons who are directly in charge are those who play the role of organizing, directing or decision-making (see, e.g., *Li 2000*). The second school of thought is based on a quite abstract standard, holding that the persons who are directly in charge are all those who make substantial decisions in commission of a corporate crime (see, e.g. *Chen 2002*). The third opinion emphasizes individuals' positions within a corporation and correspondingly suggests that the persons directly in charge are those who should take direct responsibility and are in the position of supervision (see, e.g. *Shi 2006*). The final opinion tries to draw a conclusion from the perspectives of the 'position' that individuals hold within a corporation and the 'role' that they play in the commission of a given crime and defines persons who are directly in charge as those in high-level leading positions who secretly inspire, recklessly connive or even deliberately support crimes perpetrated by their underlings and holds that those who organize, direct or determine should be punished as persons who take direct responsibility (see, e.g., *Chen 1999*).

As an effort to provide a test to distinguish the persons who are directly in charge and other persons who should incur direct liability, the SPC issued the *Summary of Meetings of People's Courts at all Levels on Trying Financial Crimes* in 2001, defining persons who are directly in charge and those who should incur direct responsibility in the following way: persons who are directly in charge are those who decide, approve, direct, inspire or connive in the commission of a corporate crime. They are usually decision-makers in a corporation, including its legal representatives. Other persons who are directly responsible for the crime in question include those who play an important role in the commission of the crime. They might be managers, supervisors or average employees. However, those who are assigned or ordered to take part in the commission of the crime shall not be held culpable, not being directly liable. Meanwhile, the Summary requires that the persons who are directly in charge and other persons who incur direct liability should be punished in accordance with their posts, roles and circumstances in a given crime.

4 Jurisdiction Issues

Now, given that a corporation can and should be charged with an international crime, we have to answer the following three questions before sentencing it: (1) which authority shall investigate the crime in question? (2) where should it be charged? (3) which court should be the one of first instance? Similar to substantive criminal law, the *Criminal Procedure Law of PRC* of 1979 (as last amended on 17 March 2012, the *Criminal Procedure Law*) has been promulgated with criminal liability of natural persons in mind too, and therefore gives no special attention to proceedings of corporate crime case. This fact puts corporate crime cases in an awkward situation where a majority of procedural issues have to be decided according to individual liability.

4.1 Which authority shall investigate the crime in question?

According to article 3 of the *Criminal Law Procedure Law*, both public security organs (including national security organs) and the people's procuratorate have the power to investigate criminal cases.¹⁴ Article 18 of the same Law continues to explain that public security organs are in charge of investigating criminal cases except for those involving the following three categories of crime: (i) embezzlement and bribery in Chapter 8 of the *1997 Criminal Law*; (ii) dereliction of duty by a state functionary in Chapter 9 of the *1997 Criminal Law*; (iii) violation of a citizen's personal or democratic rights by a state employee of government authority by taking advantage of his or her functions. If a case involving a crime committed by an employee of a government authority by taking advantage of his or her functions is so significant that investigation by prosecution authority is necessary, it can be accepted and investigated by a people's procuratorate upon a decision of the people's procuratorate at or above the provincial level. Apparently, two factors are decisive here. One is identity of the perpetrator, that is, whether the actor is a State employee or not; the other is the nature of crime, in other words, whether it involves abuse or misuse of public powers. It can be easily seen that the division of investigation power between police and prosecution authorities in the *Criminal Procedure Law* is applicable only to cases of natural persons. Then, how to decide investigation authority in corporate crime cases?

The absence of legislative and judicial interpretation has led to inconsistencies and even conflicts in practice. While a few researchers suggest that the authority to investigate corporate crime cases be solely granted to the people's procuratorate (e.g., Ke 1995), the majority insists that article 3 and article 18 of the *Criminal Procedure Law* should be strictly

¹⁴ This article provides that public security authorities are responsible for criminal investigation, detention, execution of arrest warrants, and interrogation in criminal cases. People's Procuratorates are responsible for procuratorial supervision, approval of arrests, investigation of cases directly accepted by procuratorial authorities, and initiation of public prosecution. People's Courts are responsible for trial and sentencing. Except as otherwise provided for by the law, no other authority, organization, or individual shall exercise such powers. However, according to article 290 of the same Law, investigation power with respect to criminal offences that have occurred in the Army rests with the security departments of the Army, and the prison is charge of investigation of crimes committed by prison inmates.

observed and both public security organs and the people's procuratorate should have the authority to investigate (See, e.g., *Chen 1997; Shen 2006*). As to the test of dividing the investigation authority in corporate crimes cases, various proposals have been brought forward for legislative reference (see, e.g., *Chen, 1999; Sun, 1998; Peng, 2004; Chen 2010*), and can generally be divided into five categories. First one suggests the investigation power be divided according to the nature of corporation. Prosecution authority is responsible to investigate cases with respect to crimes by State-owned companies, enterprises, public institutions, governmental organizations and people's groups, and public security organs are responsible for investigation of other corporate crimes. Second one suggests the investigation power be based on administrative function. That is, public security organs shall investigate all corporate crimes except those by organizations that are granted administrative function, including government agencies, public institutions and enterprises. Third one suggests that all cases involving abuse or misuse of public powers be investigated by the people's procuratorate and others goes to the jurisdiction of police authority. Fourth one focuses on the legal identity of individual actors and suggests that all cases where culpable persons are state functionaries be investigated by the people's procuratorate. Last one brings forward with a quite clear and easy standard by proposing that the people's procuratorate be responsible to investigate cases involving crimes of disrupting socialist market order in Chapter 3 and crimes of embezzlement and bribery in Chapter 8 of the 1997 *Criminal Law* and police authority be in charge of investigating all other crimes.

This work holds that the division of investigation authority between police and prosecution authorities in corporate crime cases should abide by the rule in current Criminal Procedure Law and be based on the legal identity of actors and the nature of crime. Specifically, prosecution authority is responsible to accept and investigate directly following two categories of corporate crime case: (i) those involving crimes by State-owned organizations, including administrative and commercial ones, and (ii) those regarding crimes committed by abusing or misusing public powers, and public security organs are responsible for other cases.

4.2 Where should a corporation be charged?

As far as a corporation suspected of an international crime is concerned, two cases can be distinguished from each other. One is that the said crime is committed within the territory of main land of China, the other is that the said crime is committed outside the territory of main land of China by a non-Chinese corporation.

4.2.1 *Commission of a crime within the territory of China*

In the first case, according to article 24 of the *Criminal Procedure Law* that a criminal case shall be under the jurisdiction of the people's court at the place of crime, the defendant corporation should in principle be charged in a court at the place where the crime was committed. Meanwhile, referring to second part of article 24 mentioned above that the case

may be under the jurisdiction of the people's court at the place of residence of the defendant where it is more appropriate for the case to be tried by the people's court at the place of residence of the defendant, more than one academic (e.g. *Chen, 1999; Sun, 1998*) has proposed that following principles should be observed in deciding the territorial jurisdiction on a corporate crime case: (i) it should be in principle be tried by the people's court at the place of crime, and may be tried at the people's court at the place of registration where appropriate; (ii) it should be in principle be tried at the people's court that first accepts the case, and may be tried by the people's court at the place of principal crime. In addition, Li (1999) proposed that if it can be decided that the trial of a corporate crime case is very likely to be interfered by local authorities or political consideration and its fairness may therefore be impaired, the local people's procuratorate in charge should report to and ask the people's procuratorate at higher level to discuss with the people's court at corresponding level to designate another people's court for trial.

Above proposal is basically acceptable. Meanwhile, it should be noted that the place of crime here includes the place of commission, where the criminal conduct begins or finishes, and the place of consequence, where the harm happens. It is more than often in the case of a corporate crime that the place of commission and the place of consequence are separated from each other. Then, which one should exercise jurisdiction in such a case? One of the most significant differences between a crime by a natural person and that by a corporation is the massive size of victimization. Therefore, in the case where the place of commission and the place of consequence are not the same, the case should be tried by the people's court at the place of consequence. If there are more than one places of consequence, the people's court at the place of the most serious consequence shall have the jurisdiction. If two or more people's courts have competing jurisdictions, the people's court at higher level should designate a people's court that it considers appropriate for trial.

4.2.2 *Commission of a crime outside the territory of China*

In the second case, it is apparently impossible to make a decision depending on the place of commission of a crime or the residence of a defendant corporation. According to article 10 the *Interpretation of the Supreme People's Court on Application of the Criminal Procedure Law of PRC* that became effective as 1 January 2013, in the case where China exercises criminal jurisdiction on crimes provided in international conventions China ratified or acceded to, the defendant should be tried by the people's court at the place where the he or she was apprehended. Referring to this article, it might be proper to conclude that the corporation to which the individual defendants belong shall be tried by the people's court at the place where the they were apprehended too, because it has become a custom in practice that individuals and defendant corporations are tried and sentence at the same time.

A relevant question here is whether Chinese parent corporations (and their CEOs) can be held liable for human rights violations committed by their subsidiaries, subcontractors and

suppliers abroad. As mentioned above, the following facts must be established before filing a charge against a corporation, including one based on human rights violation: (1) one or more persons who are considered directly responsible for the crime in question have been located; (2) the culpable person/s acted within his or her employment on behalf of the corporation, and (3) he or she acted for the benefit of the corporation. If such a person/persons can be identified, then, the persons in charge of the issues that resulted in human rights violations or gave authorization, corporations and the corporation could be prosecuted. Again, it should be noted here that if specific conducts are not being provided by Chinese criminal law as corporate crime, only the persons who carried out then can be held culpable, unless it can be proven that the CEOs directed or organized them to do so.

In the case of subsidiaries, parent corporations, including their CEOs, at least theoretically, can be held liable for human violations committed abroad, if, in addition to conditions listed above, two more requirements were satisfied: (1) the conducts in question have been criminalized by Chinese criminal law and that of the place where they were carried out, and (2) the person/s directly responsible for the conducts with the exception of public servants and soldiers , if proven guilty, shall be sentenced to more than 3-year imprisonment according to article 7 of Chinese Criminal Law, which provides that 'this Law shall be applicable to any citizen of the People's Republic of China who commits a crime prescribed in this Law outside the territory and territorial waters and space of the People's Republic of China; however, if the maximum punishment to be imposed is fixed-term imprisonment of not more than three years as stipulated in this Law, he may be exempted from the investigation for his criminal responsibility.'

However as far as subcontractors and suppliers abroad are concerned, it is highly impossible for the parent corporations and their CEOs to be held liable for their conducts that violated human rights, because persons working for subcontractors and suppliers abroad do not work on half of and to benefit the parent corporations in China, unless it can be proven that the subsidiary of a Chinese parent corporation or even the latter itself conspired with its subcontractor and supplier abroad and jointly committed said human rights violations.

4.3 Trial court of first instance

Then, by the people's court at which level should the case be tried? China is now practicing a system of the people's courts characterized by 'four levels and two instances of trials'. 'Four levels' mean that people's courts are divided into basic people's courts, intermediate people's courts, higher people's courts at provincial level and the Supreme People's Court; 'two instances of trial' means that a case should be finally decided after two trials. That is, first, a judgment or orders of a first instance must come from a local people's court, and both the defendant and the people's procuratorate may present a protest to the people's court at the next higher level. Secondly, judgment or orders of the first instance of the local people's courts at various levels become legally effective if, within

the prescribed period for appeal, no party makes an appeal. Thirdly, judgments and orders of the court of the second instance shall be seen as final decisions of the case. Therefore, to choose an appropriate trial court of first instance is crucial to ensure the trial quality of a corporate crime case.

According to article 19 to article 22 of the *Criminal Procedure Law*, a basic people's court has jurisdiction over ordinary criminal cases as a court of first instance except for (i) cases regarding compromising national security or terrorist activities, or a crime punishable by life imprisonment or death penalty, which will be handled by intermediate people's court as a court of first instance, (ii) cases that are considered significant in a province or equivalent administration region, which will be handled by a higher court as a court of first instance, and (iii) cases that are considered significant in the entire nation that will be handled by the Supreme People's Court as a court of first instance. Meanwhile, article 23 of the *Criminal Procedure Law* provides that a people's court at a higher level may have hear a criminal case under the jurisdiction of a people's court at a lower level as a court of first instance; and when a people's court at a lower level as a court of first instance deems that a criminal case is significant or complicated and therefore needs to be tried by a people's court at a higher level, it may request that the case be transferred to the people's court at the next higher level for trial.

Referring to above rules and characteristics of corporate crime, this work holds that the trial court of first instance of a corporate crime case should be decided on the basis of the following three factors: (i) punishments that may be imposed on natural persons involved in the case, (ii) expertise required to try the case, e.g. intellectual property verification and (iii) the scope of its adverse influence. Specifically, first, it shall be in principle tried by a basic people's if none of natural persons involved in the case is likely to be given a sentence more severe than life imprisonment and no expertise is required. Second, it shall be tried by an intermediate people's court if a life imprisonment sentence is likely or expertise is necessary. Third, if its adverse influence on society is so major, politically, psychologically or geographically, that trial by a court at higher level is necessary, it should be transferred. It is worthy of being noted that although a higher court and even the Supreme People's Court *may* try a corporate crime case as a first instance court according to the *Criminal Procedure Law*, it has not happened so far in practice.

5 Conclusion

Although 'corporation'(unit) has been accepted into Chinese criminal law as early as in 1988, to charge it with international crimes has to overcome major legal obstacles mainly for two reasons. One is that a corporation cannot be charged directly according to international conventions or customary international law, and the other that whether a charge can be filed against a corporation is subject to whether the crime in question has been provided as a corporate crime. The fact that core international crimes such as crimes against humanity and war crimes are mainly composed of conducts infringing on rights of the person and that those conducts, although have been criminalized in Chinese criminal

law, have not been provided as corporate crimes leave us no choice but filing charges against culpable persons involved in related international crimes. This choice, however, has many disadvantages, such as letting the responsible corporation go unpunished may lead to further crimes, reducing crime cost and decreasing prevention effect of criminal punishment as the responsible corporation may remain even if individuals were sentenced to the most severe punishment.