

Prosecutors and Human Rights Protection:  
Case Studies



# 检察官与人权保障 案例评析

主 编 / 胡卫列  
副主编 / 郭立新 周洪波

中国检察出版社

本书出版获得瑞典隆德大学罗尔·瓦伦堡人权与人道法研究所资助，资金来源于瑞典国际发展合作署。

The publication of this textbook was supported by Raoul Wallenberg Institute of Human Rights and Humanitarian Law, with funding from the Swedish International Development Cooperation Agency (SIDA).



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## 图书在版编目 (CIP) 数据

检察官与人权保障案例评析/胡卫列主编. —北京: 中国检察出版社, 2017. 4

ISBN 978 - 7 - 5102 - 1856 - 9

I. ①检… II. ①胡… III. ①人权 - 法律保护 - 案例 - 中国  
IV. ①D920. 5

中国版本图书馆 CIP 数据核字 (2017) 第 050189 号

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出版发行: 中国检察出版社

社 址: 北京市石景山区香山南路 111 号 (100144)

网 址: 中国检察出版社 (www. zgjcbs. com)

编辑电话: (010) 68630385

发行电话: (010) 88954291 88953175 68686531

(010) 68650015 68650016

经 销: 新华书店

印 刷: 保定市中国画美凯印刷有限公司

开 本: 710 mm × 960 mm 16 开

印 张: 20. 25

字 数: 371 千字

版 次: 2017 年 4 月第一版 2017 年 4 月第一次印刷

书 号: ISBN 978 - 7 - 5102 - 1856 - 9

定 价: 60. 00 元

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# 前 言

2004年秋季，国家检察官学院与瑞典罗尔·瓦伦堡人权与人道法研究所在瑞典国际发展合作署的资助下开展了以“检察官与人权保障”为主题的人权师资培训项目。作为项目的重要成果之一，由国家检察官学院人权项目组成员编撰的《检察官与人权保障教程》及其修订版相继于2009年12月和2014年8月问世。教程内容紧密贴合中国检察官的工作实际，从国际人权标准、国内立法以及工作机制三个层面对检察工作环节中的人权保障职能及存在的问题进行了较为深入的剖析，并提出了相应的建议。这本教程的出版填补了我国检察官人权培训专门教材的空白，对于检察官的人权教育起到了积极的推动作用，在使用过程中也获得了授课教师及学员双方面的充分肯定，并得到了人权领域有关专家的好评，取得了积极的社会反响。

人权保护是实践性很强的课题。在几年的培训实践中，参与教程编写的各位教师也逐渐感到，要在教学中将人权理论与检察工作实际更好地结合，案例教学是一种不可或缺的培训方式。然而令编者感到遗憾的是，国内涉及人权保护问题的案例并不像国际或区域性人权机构的案例那样方便查询，虽然随着我国司法公开的逐步推进，各级法院、检察院的网站上都相继公布了一些审结的案件，各大法律数据库和网站也登载了大量的案例，但这些案例都不是依据人权研究的需要而编排的，若想从中找出与检察工作相关的典型性人权案例实为不易。编者遂萌发了编写一本与《检察官与人权保障教程》相配套的案例教学参考用书的想法，以真实的案例阐明检察工作中涉及的人权保护问题，分析国际人权条约对我国法律的影响及二者之间存在的差异，使人权的概念、人权保护的规则和原则对于检察官而言不致成为抽象、遥远的东西，同时，也让人权保护的理念逐渐地内化于心。我们这一想法与瑞典隆德大学罗尔·瓦伦堡人权与人道法研究所中国项目处不谋而合，在他们的大力支持下，这本《检察官与人权保障案例评析》终得以面世。

检察官人权教学的案例如何编写，可资借鉴的材料并不多。李步云、孙世彦主编的《人权案例选编》是我国少有的人权法教学案例教材之一，也是我们在“检察官与人权保障”师资培训项目中的重要学习资料。但是，由于

《人权案例选编》的编写目的和面向的读者群体与我们希望编撰的《检察官与人权保障案例评析》颇为不同，故而在本书的成稿过程中亦无法作太多的借鉴，这也恰从另一方面证明了这本《检察官与人权保障案例评析》存在的意义。

如何选择案例、从哪里寻找案例，以及怎样对案例进行评析是本书首先要明确的问题。基于本书的编写目的，经过认真讨论，编写组首先确定了案例选择的标准：一是相关性。所选案例必须与我国检察工作密切相关，且能尽量反映和揭示人权清单中的核心权利要素。二是典型性。需选取在我国人权保障进程中具有代表性的案例。三是时间性。应尽量选择最新的案例。刑事案例一般不应早于1996年刑事诉讼法修改，除非案例本身就阐明某项人权保护问题有特殊意义并具有不可替代性。这样要求是基于以下两方面的考虑：（1）1996年刑事诉讼法确立了“未经人民法院依法判决不得认定被告人有罪”等重要原则，更加注重保护犯罪嫌疑人、被告人的诉讼权利；（2）1997年修订的刑法确立了罪刑法定原则、法律面前人人平等原则、罪责刑相适应原则，我国在刑事司法领域中更加注重人权保障，对于冤错案件的纠正力度也日益加大，因而也出现了一批可资分析借鉴的典型案列。

其次，关于案例的来源。编写组确定，本书所选取的案例必须是已审结的、可查寻案件来源的真实案例。除各法律数据库和国内各大网站公开登载的案例外，本书作者在案例选择上还参考了“两高公报”《刑事审判参考》《中国审判案例要览》《刑事司法指南》等资料。

最后，关于案例评析的方法。这是编写组遇到的一大难题。一般的法学案例分析都是根据我国现行法律对法院或检察院作出的判决或决定，在事实认定、法律适用及程序方面作出评析。但是人权案例的评析则不同，由于人权保护的理论和原则属于国际法范畴，而在国际法的效力问题上，我国采用的是转化的方法，即法院或者检察院作出的判决或决定都是援引国内法，而非我国已批准或加入的国际条约，故而国际人权标准及其解释和适用是独立于国内法律规则及其适用的，在这种情况下，是否可以以及如何从国际人权标准的视角分析评判国内案例？我们认为是必要的且可行的。其一，国际人权标准及其解释和适用是独立于国内法律规则及其适用的，我国法院如何适用本国法律并不影响根据国际人权标准对同一事件进行判断。其二，中国已经批准或加入了诸多国际人权条约，因而在国际法上负有在国内实施和履行条约规定的义务。通过评析，指出我国通过国内法已经履行条约义务的情况，将有利于我们进一步改

进人权保护状况，使之更加符合国际标准。<sup>①</sup>

在教程的编写体例上，作为《检察官与人权保障教程》配套的案例教学参考书，考虑到与检察官工作的关联性，同时兼顾与教程的一致性，编写组决定仍然采用原有教程的编写体系，按照检察职能分章进行案例编撰。各章内容主要分为“案件概要”和“案件评析”两部分。案件概要是根据案例的原始文本，结合评析的需要，进行适当的加工编辑。案件评析着重从该案涉及的权利要素，评析我国检察官进行人权保障的现行实践状况，并从国际人权标准角度分析在法律规定和实践中存在的问题及改进完善的意见建议。我们试图统一这样的评析模式，但是由于检察工作中检察官履行的具体职能不同，工作机制、方式方法不同，特别是不同作者对同一问题的认识不同，故而难以做到完全一致的评析风格。此外，由于存在不同案件中涉及相同权利要素的情况，因此在评析中亦难免有重复之处，比如，“免于酷刑和其他残忍的、不人道的或有辱人格的待遇或处罚的权利”，在职务犯罪侦查、侦查监督、公诉和刑事执行监督各职能环节都会涉及，在评析中都需要援引有关的国际条约和规则。这些必要的重复，敬请读者谅解。

本书作者绝大部分参与过《检察官与人权保障教程》的编撰工作，他们从2004年开始先后在国家检察官学院与瑞典罗尔·瓦伦堡人权与人道法研究所合作的“检察官与人权保障”师资培训项目中接受了系统的人权理论与教学方法的培训，不仅对普遍性人权理论和国际人权标准进行了深入的学习、理解和把握，而且就如何开展人权教学也进行了不断的探索，特别是在各自承担的检察官人权培训课程中，对运用案例进行教学均有相当的收获和体会。本书亦是他们人权案例教学的一个成果展现。

全书由国家检察官学院副院长郭立新教授和周洪波教授审定，郭立新教授并负责统稿工作。具体编写分工如下：

缪树权：第一章、第十二章；

郭立新：第二章；

付 磊：第三章；

孙 锐：第四章；

周洪波：第五章；

刘林呐：第六章；

邵世星：第七章；

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<sup>①</sup> 参见李步云、孙世彦主编：《人权案例选编》，高等教育出版社2008年版，“导言”第9~10页。

温 辉：第八章；

朱丽欣：第九章；

上官春光：第十章；

马立东：第十一章。

作为国内第一部检察官人权培训的案例教学用书，我们只是在人权案例学习和研究方面做了初步的探索和尝试，囿于本书作者在人权理论与实践方面的学养，错误和疏漏在所难免。我们愿意通过本书的出版，与同行们交流人权案例分析与教学应用之道，敬希学界和实务部门特别是广大检察官批评指正。

出版之际，谨向对本项目给予资金资助的瑞典国际发展合作署（SIDA）表示衷心的感谢！向对本书付梓出版给予极大关注和支持的瑞典隆德大学罗尔·瓦伦堡人权与人道法研究所及其中国项目处表示诚挚的谢意！中国检察出版社总编辑朱建华先生以及第三编辑室主任李健女士为本书的出版给予了大力支持并付出了辛苦的劳动，谨致谢忱！

胡卫列

2016年12月10日

## Preface<sup>\*</sup>

In the autumn of 2004, National Prosecutors College of China (NPrC) and Rao-ul Wallenberg Institute of Human Rights and Humanitarian Law (RWI) launched their cooperative project named Prosecutors and Human Rights Protection – Training of Trainers’ (Hereinafter the Project) under the financial support by the Swedish International Development Cooperation Agency (SIDA). As one of the important outputs of the project, Prosecutors and Human Rights Protection : *A Textbook* and its revised edition were published successively in December of 2009 and in August of 2014. The content of the textbook closely fit the actual work of Chinese prosecutors. It provides a more in – depth analysis of the existing problems concerning human rights protection in the prosecutorial work from three aspects including international human rights standards, domestic legislation and operational mechanisms. Corresponding suggestions for improvement are also put forward. The publication of this textbook filled the blank that there was no specialized human rights training materials tailored for prosecutors in this country, and obviously played a positive role in the prosecutors’ human rights training. When it was just put into use, the textbook gained full recognition from both the trainers and the trainees, and also won the acclaim of the experts in the human rights field.

It is well recognised that the protection of human rights is a very practical subject. In the training practice of recent years, the teachers who participated in the writing and compilation of the Textbook gradually felt that case study is an indispensable way of training in the human rights education of prosecutors, especially when combining the human rights theories into Chinese prosecutorial work. However, it is unfortunately found that domestic cases involving human rights protection issues are not easy to be inquired compared with the cases of international or regional human rights bodies. Although with the gradual judicial openness in China, more and more

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\* 前言英文翻译：陈丽莉，国家检察官学院。



concluded cases are released at the websites of courts and procuratorates at different levels as well as several major legal database, these cases are not arranged by the retrieval needs of human rights research, and therefore it is rather difficult to find the typical cases related to prosecutorial work. The author then had an idea about compiling a reference book of case studies assorted with the aforementioned textbook, aiming at clarifying the problems of the human rights protection incurred in the prosecutorial work, analyzing the influence imposed by international human rights standards upon the domestic legislation of the country and comparing the differences between the two systems. All these will be done based on studies on real cases. The further expectation is to make the international human rights standards and the concepts, rules and principles of human rights protection more concrete and close to the prosecutors, and then deeply rooted in their minds by way of analyzing the cases that dealt with by themselves. RWI China Program showed great interest in this idea, and under their strong support, the *Prosecutors and Human Rights Protection : Case Studies* is finally published.

How to compile human rights protection cases tailored for prosecutors training? It is hard to find related materials that can be used for reference. *A Compilation of Selected Human Rights Cases* chief-edited by Li Buyun and Sun Shiyan is one of the rare teaching materials for human rights education in China, and was therefore the major learning reference for the participants of the Project. However, the author of this book found that there is less to be referenced from the Compilation due to the different publishing purposes and the target groups of the two books, and this in a certain sense just proves the significance of compiling the Case studies.

The primary problems the author faced with are: how to choose the cases, where to find the cases and how to comment and analyze the cases. Based on the purpose of compiling the book and after serious and adequate discussions, the compilation group decided first on the standards of the case selection. Firstly, the cases selected must be closely related to the prosecutors work, and shall reflect and illustrate as much as possible the protection of the core rights. Secondly, the cases selected must be typical in the promotion of human rights protection in this country. Finally, the cases selected must be comparatively new in terms of the time they happened. It is specially emphasized that criminal cases must not be earlier than 1996 when the Criminal Procedure Law was first revised, unless the case selected has exceptional significance for clarifying certain human rights protection issues and there-

fore cannot be replaced. Such criteria were made based on the two following considerations; on one hand, the 1996 Criminal Procedure Law paid more attention than ever to the protection of the procedural rights of the suspects and the accused by setting up “no one shall be held guilty before legally tried and judged by the court” as well as other important principles. On the other hand, the revised Criminal Law in 1997 also established principles of legality, the equality before the law, and the proper crime responsibility, the protection of human rights in the field of criminal justice since then had been much more improved. With quite a number of wrongful convicted cases being corrected, typical cases that can be used for teaching reference emerged.

Second, about the sources of the case, the compilation group decided that all cases selected must be real cases that can be traced and shall be concluded. In addition to openly published cases in legal database and on the major domestic websites, the author also made reference to *the Bulletins of the Supreme Court and the Supreme Procuratorate*, and *Reference to Criminal Trial, Abstract of China Tried Cases*, and *Guideline for Criminal Justice*, etc. .

The third major problem that the author encountered was how to analyze the cases. The normal approach of the legal case study is to make analysis and comments, from perspectives of fact – finding, law application and the procedural issues, on the court judgments or decisions made by the procuratorates according to the current effective laws. The human rights case study is nevertheless different, for that the theory and principles of human rights protection are in a general sense regarded as one part of international law. While on the issue of the effect of international law, China adopts the way of transformation, i. e. the international human rights treaties that China has ratified or acceded cannot be directly employed by the domestic courts or any other judicial organs. In other words, the international human rights protection standards as well as its interpretation and application are entirely separate to the domestic legislations and its application in China. Under such circumstances, whether and how to analyze and evaluate the domestic cases from the perspective of international human rights standards? We found it necessary and feasible. For one hand, since the international human rights standards as well as its interpretation and application are independent to domestic legal system, so how to apply the domestic laws does not affect making judgment of the same event in accordance with international human rights standards. On the other hand, China has ratified or acceded a number of internation-

al human rights treaties, and therefore should accordingly bear the responsibilities to domestically implement the treaty obligations. Summarizing the situation that the domestic legislation and practice have or have not met with international human rights standards will undoubtedly help us to improve the human rights protection in our country.

With regard to the structure and writing style of the book, the editorial group decided to adopt the same stylistic rules with the Textbook, i. e. the contents are catalogued into different chapters according to the functions of prosecutors, in consideration of the consistency of the two books. Each chapter is divided into two parts, namely “Case Summary” and “Case Analysis”. For the needs of analysis, the summary of the case will be edited appropriately based on the original text of the case. The case analysis will focus on the elements of the rights involving in the case, and then make analysis and comments on the current situation of the prosecutor’s performance regarding the human rights protection. The analysis will also touch upon the existing problems in the legislation and judicial practice from the perspective of international human rights standards, and suggestions of improvement are given afterwards. We try to unify the style of case analysis, however, we found it can hardly been done due to the different functions of prosecutors and their different operational mechanisms in dealing with specific cases, especially because of the different understandings of different writers towards the same issue. In addition, since there are cases where the same element of right is involved, there is inevitably an overlapping in the analysis, e. g. “the right to be free from torture and other cruel, inhuman or degrading treatment or punishment” is a crucial right element involved in the job – related crime investigation, the supervision of investigation, the public prosecution and the supervision on the criminal execution, therefore the corresponding international treaties and rules will all be quoted in different chapters. Please allow and understand these necessary repetitions.

Most of the writers of the Case studies are also authors of the Textbook. They participated successively in the Project since 2004 and received systematic training with regard to human rights theories and training skills. By way of in – depth learning and research, they not only obtained a good command of universal human rights theories and international human rights standards, but also made exploration in human rights training. In particular, they have gained a lot in prosecutors training by means of case study. This book is also a collection and presentation of the outcomes of their

human rights case – based training.

The book has Professor Guo Lixin and Zhou Hongbo, Vice Presidents of NPrC, as its deputy chief editors who reviewed and proofread the different segments of the draft. Professor Guo is also responsible for harmonizing the styles and deciding on its final finished version. The division of labor is as follows:

Miao Shuquan: Chapter 1, Prosecutors' Role in Human Rights Protection;  
Chapter 12, Protection of Minors Rights

Guo Lixin, Chapter 2, Supervision on Investigation and Human Rights Protection;

Fu Lei: Chapter 3, Investigation on Job – related Crimes and Human Rights Protection;

Sun Rui: Chapter 4, Public Prosecution and Human Rights Protection;

Zhou Hongbo: Chapter 5, Supervision on Criminal Execution and Human Rights Protection;

Liu Linna: Chapter 6, Criminal Complaints & Appeals and Human Rights Protection;

Shao Shixing: Chapter 7, Prosecutorial Supervision on Civil Litigation and Human Rights Protection;

Wen Hui: Chapter 8, Prosecutorial Supervision on Administrative Litigation and Human Rights Protection;

Zhu Lixin: Chapter 9, Protection of Victim's Rights;

Shangguan Chunguang: Chapter 10, Human Rights Protection of the Witness;

Ma Lidong: Chapter 11, Protection of Women's Rights.

As the author of the book, the first human rights case study reference in the country tailored for prosecutor's training, we have just made a preliminary exploration and an attempt in the analysis and study of human rights cases related to prosecutorial protection. We are fully aware of that this book has still much room to be improved due to the limits of our knowledge and abilities. We would like to take this opportunity to exchange our understandings and experience with our colleagues and peers in the way of human rights case analysis and application during teaching. We also sincerely hope that this reference book could draw constructive criticisms from the academic circle and the practical arena, especially from the prosecutors.

At the moment the book goes to print, we would like to express our deep gratitude to SIDA for its financial support, and RWI especially its staff in Beijing Office for their ongoing attention and support. Our thank also goes to Mr. Zhu

Jianhua the chief – editor of China Procuratorate Press and Ms Li Jian the Head of the 3<sup>rd</sup> Editorial Group for their great help and efforts given during the publication of the book.

Hu Weilie

December 10, 2016

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