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**THE RIGHTS OF THE ACCUSED DURING THE STAGE OF
DETENTION IN THE IRAQI CONSTITUTION (2005) AND
INTERNATIONAL LAW**

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Abstract

Most of the constitutions in the world are keen to pay attention to the rights of the accused during the period of detention, due to the importance and sensitivity of this stage before the accused is brought to justice. And because the accused during this period will be at the mercy of the authority and out of fear of infringing the rights of the accused and torturing them during this period, most of the constitutions came with many guarantees for the rights of the accused during the period of detention, and this approach was followed by the Iraqi constitution 2005.

Further more, for the importance of this stage for the accused at the international level. We also note in this field that a lot of international legislation has been issued in this regard and many international agreements have been concluded worldwide to guarantee the rights of the accused during the period of detention.

The development of peoples depends mainly on ensuring freedoms and rights for their members; And since the international, constitutional and legal rules are the guarantee to protect these rights and stipulate them.

Therefore, it was necessary to shed light on the study of the most important texts related to the guarantees of the accused during the detention phase at the international and internal levels; Among them are international treaties and international conventions that stipulate a set of

guarantees for the accused, the most important of which is the right to freedom and privacy because of the great importance of these two rights for individuals.

It is absolutely impossible to imagine without the right to freedom that there would be talk about other rights, as it stipulated the right to humane treatment and not to be subjected to torture during the detention of the accused, and this ensures the preservation of human dignity and the preservation of the right of the body from all means of torture.

Therefore, it was very necessary to make a comparison between the Iraqi constitution of 2005 and the international texts to find out the extent of the commitment of the new Iraqi legislator to the texts, charters and international norms and the extent to which these rights are guaranteed to individuals during the period of detention.

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Introduction

The legislative development that took place at the international level called on the governments to provide guarantees for the accused in their constitutions at all stages of the criminal case, especially with regard to the subject of our research, which is the guarantees of the accused in the pre-trial stage, as international conventions and international declarations provide for a set of rights of the accused to guarantee him all his rights to this stage, due to the gravity of the pre-trial stage, as the judge relies on it to build his judgment.

With the passage of time and the development of the international community, international legislation has multiplied, especially with regard to the subject of our research, as many international legislations have emerged and many international treaties and agreements have been concluded, leading to the formation of permanent and temporary international courts.

Rather, the situation has reached the increase in the number of the branches of international law to include the humanitarian aspects, human rights, refugees and others in order to create a real guarantee for the human being from the oppression of some dictatorial regimes, and the most important of them are the guarantees of the accused in the pre-trial stage.

Among the most important rights enjoyed by the accused at this stage are the right to freedom and privacy, as the right to freedom is one of the most important rights, and without this right we cannot talk about other rights, if a person loses the right to his freedom, there is no value to other rights and the importance of this right is that It has been included in legislation at the international and national levels. It is the right of every individual to enjoy freedom and privacy in his life, and no one may detain

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a person or deprive him of his freedom without legal justification or interference in private affairs because this is a violation of the right to privacy. Another necessary right at this stage is the right to humane conditions during detention and not to be subjected to torture. It is the right of every individual to be treated humanely and to ensure his dignity without being insulted.

All these guarantees provided by international and national legislation to the accused appearing before the investigating authority are guaranteed to guarantee their rights and we will explain them through a comparison between the International Declaration of Human Rights and some international covenants and agreements with the Iraqi constitution of 2005.

Therefore, the research will be dealt with according to two topics. In the first topic, we address the right to freedom and privacy, and in the second topic, the right to human conditions during detention and not to be subjected to torture.

I did this research as follows:

- **The first topic / the right to freedom and respect for private life**
 - **The first requirement / the right to freedom**
 - **The second requirement / the right to privacy**
- **The second topic / the right to humanitarian conditions in detention and not to be subjected to torture**
 - **The first requirement / the right to humanitarian conditions in detention**
 - **The second requirement / The defendant is not subjected to torture**
- **Conclusion**

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The first topic

The right to freedom and respect for private life

One of the most important rights to be guaranteed at this stage is the right to freedom and respect for private life, as there are many international documents and declarations that protect these rights 2005.

In our talk about human rights and freedoms under the 2005 Iraqi constitution, we would be under the protection of the constitution and that violating it, neglecting it, forgetting it, or being ignorant of it makes the state lose its basic features, which are being democratic and neutral, in addition to be a constitutional law state to become an authoritarian and police state and an outlaw, and thus, the people have the right to change them. In the the third world countries, like Iraq, it is not sufficient to include human rights in the constitution, all texts are beautiful, but the important thing is not to prejudice them or violate them and the possibility of the person enjoying his rights and freedoms and therefore there must be guarantees that guarantee these rights and freedoms. (1)

This requires that the subject be divided into the following two requirements: -

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The first requirement

The right to freedom

A person is originally innocent, and this principle is one of the principles recognized by all legal systems. If a society has an interest in punishing criminals, then the freedoms of innocent people cannot be compromised, and this society must defend these freedoms and guarantee them until there is full evidence of committing the crime, then the freedom is violated as a punishment determined by the law, and it is not permissible to diminish the freedom of the innocent, because this freedom is a fundamental right of the human being. (2) Everyone has the right to personal freedom, and it is not permissible to arrest him/ her except in accordance with the provisions of the law in a way that is free from arbitrariness, so the human right to personal freedom is a basic right of his/ her rights. (3)

And the freedom we mean in research is that the jurist Rousseau says that it is "a set of recognized rights that are essential at a certain civilized level that should be legally protected by the state by ensuring that there is no aggression or exposure to it by enacting a set of means to protect it" because the state remains the one with jurisdiction in organizing and arranging these freedoms.

the position here highlights that whenever the state is in a relationship with individuals in terms of organization or protection it is in the context of a relationship and from this standpoint, the freedom of individuals becomes a general freedom in all its aspects. (4) "So freedom arises from a conscious psychological reality. Its development is limited by objective possibilities. On this objective level, the exercise of freedom is impossible unless life presents multiple possibilities before a person. (5)

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Other freedoms, then, cannot be recognized unless personal freedom is guaranteed and recognized, and the individual has the right to enjoy personal security or to enjoy the safety of his person. (6)

If we compare international declarations with the Iraqi constitution of 2005, we see that the 1948 Universal Declaration of Human Rights affirmed respect for the freedom, the personal security, and the safety of the person. (7) This indicates the importance of the right to freedom to include advertising this right in the forefront of the articles of the declaration, to confirm that its existence is essential to enjoy other rights and that its absence is the absence of other rights, on the other hand, we find that the Iraqi constitution has come up with a set of guarantees pertaining to the right of the individual to freedom, as Article (37 / First) of it stipulates: (A) Human freedom and dignity are protected. B - It is not permissible to arrest or interrogate anyone except according to a judicial decision.

The Iraqi constitution shows that it is necessary to limit the authority to arrest individuals to the competent judicial authority, and therefore any other matter issued by any party in the state is not considered valid and null, and thus the constitution has been in conformity with international standards that affirmed the individual's right to freedom.

International standards prohibit the arbitrary arrest, detention or imprisonment of a person, and this prohibition is a necessary condition that automatically derives from the right to freedom. This prohibition applies to all forms of deprivation of liberty, including house arrest, and the Working Group on Arbitrary Detention, which is the group of authorized experts in the power to investigate cases of arbitrary deprivation of liberty has clarified that deprivation of liberty is arbitrary, among all cases, which is the case of arrest or detention without a legal

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basis, in addition, the arrest or detention permitted by national law may be arbitrary in accordance with international standards. Or its incompatibility with other human rights by the right to freedom of expression, assembly, belief or the right to freedom from discrimination, and detention can also become arbitrary as a result of a violation of the right of a detained person to a fair trial. (8) International conventions have affirmed the right not to be arbitrarily detained, so it is not permissible to arrest or detain any person, imprison him, or exile him arbitrarily. (9) International standards do not only prohibit the arbitrary arrest or detention of any individual.

but also require that this be done based on the procedures specified in the text of the law and in accordance with it. (10) The violation of the right to freedom occurs in another way when a public official or any other person working in an official capacity or an official incitement from him or his consent or approval, deprives a person without a legitimate reason from his freedom through his detention. In a prison or any other detention facility, or placing him under house arrest. (11) The authorities that arrest individuals if they do not keep them in custody or investigate with them, may not exceed the powers conferred upon them by law, and must in their practices be subject to their control by the authority. The judiciary or from another authority, and states must establish rules according to their laws by which they determine the employees to whom they are entitled to order the deprivation of liberty of a person. (12)

The second requirement

The right to privacy

The right to privacy derives from the right to protect the home and the inviolability of communications and postal correspondence, and by means of the sanctity of the home, it means that it is not permissible to

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break into the house or search it except in accordance with the procedures and conditions stipulated by law, whether the residence is permanent or temporary, and whether it is property or rent, it is the natural place in which it feels. A person is comfortable, calm, and reassured, and accordingly, he stays away from the intrusion of others, so it is not permissible to enter it except after permission. (13) And likewise, it is not permissible to see their private life and their internal affairs except with their consent. (14) Therefore, this right is one of the rights necessary for the human being, for every person has his own life that he lives with members of his family in isolation from others, and the residence is the place of each family that must be legally protected.

With regard to the inviolability of communications and postal correspondence, communications and postal correspondence are considered as are other personal rights that no one may view, monitor or spy on, because it constitutes an attack on the right of individuals to own letters and intellectual freedom. (15)

violating communication and postal correspondence constitutes a violation of the individuals' right to privacy, but this does not mean that the individuals' right to privacy is an absolute right but rather a relative right, that is, a restriction of this right may occur for certain considerations, and this restriction is by explaining the rationale for the prohibitions. Such as preserving the security of the state, or because

observing public order and public morals requires that. (16). The procedures for the conduct of the investigation require access to individual correspondence or communications, as law enforcement officials may obtain by virtue of their duties information that may relate to the private life of individuals or. It may harm the interests of others, and their reputation in particular, and care must be taken in preserving this

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information only by virtue of the duty or the service of justice, so any disclosure of this information for other purposes is absolutely unlawful (17). When comparing the Iraqi constitution of 2005 to international declarations regarding the right to privacy, it suffices to mention the principle and refer its organization to the ordinary legislator without setting

conditions and controls that the ordinary legislator must adhere to when organizing this right, and with regard to the privacy of the home, which is one of the manifestations of the right to Privacy, the constitutional legislator did not set conditions, and specific controls to restrict the sanctity of the home, but merely mentioned that there was a judicial decision, as is the case with regard to the privacy of correspondence, because restricting this procedure to issuing a judicial decision does not achieve adequate protection for that secrecy. (18) This is what the standards stipulated. International also, including the Universal Declaration of Human Rights, has stated Article (12) of it: (No individual shall be subjected to arbitrary interference in his private life or his family or to campaigns in his honor and reputation, and everyone has the right to protect the law from such interference or such campaigns).

The second topic

The right to humane conditions while in detention and not to be subjected to torture

One of the most important rights of the accused is to be treated with complete humanity, and if he is placed under the conditions of doubt and evening in a penal institution, he must enjoy his right as a person throughout the period of detention, so it was necessary to explain the most important rights of the accused at this stage, which are represented by the following two requests: -

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The first requirement

The right to humanitarian conditions in detention

The right to human conditions while in detention and not to be subjected to torture requires the availability of human conditions during the detention of individuals for whom a decision was issued to arrest or individuals imprisoned on a particular charge, and not to be subjected to any form of physical or psychological torture. The detention of an individual is considered to be detrimental, even if this is to extract confession from the accused. The right to a fair trial cannot be enforced if the conditions in prisons limit the ability of the accused to prepare for trial, or if he is subjected to torture or ill-treatment. International standards impose a duty on the state to ensure minimum standards of detention and imprisonment by protecting the rights of every detainee while depriving him of His freedom. (19) In any case, when the accused is arrested, it is required not to harm him after he has caught him and his movement has been restricted, but rather to take him and hand him over to the police station. (20)

The Iraqi constitution of 2005 stipulates the right of a person not to be subjected to torture while in custody or detention, as it violates human dignity. Article 37 of its paragraph (b) confirmed: (No one may be arrested or interrogated except under a judicial decision) and through the text of these The article shows that the Iraqi legislator has stressed the necessity of issuing a judicial decision from a competent authority, and otherwise it violates the right of the individual.

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The second requirement

The accused is not subjected to torture

Although most declarations and legislation explicitly state the prohibition of torture and cruel, inhuman or degrading treatment, the practical reality indicates that the mere existence of legal

texts does not protect the individual effectively from the most heinous images of the loss of the individual's dignity and his right to human treatment, therefore it is necessary to have organs Independent and qualified oversight to receive a complaint of individuals and serious investigation and the need to impose punishment on anyone who has been proven to have committed such actions in addition to securing the right of individuals deprived of their liberties to contact their attorneys and their relatives, and in medical care, without prejudice to the investigation procedures as well, the necessary records must be available to prove The name of the detainee and the place of his detention shall have the right of the persons concerned to have access to it.(21)also the confession that is taken from the accused must be done with a free will that is free from violence intimidation and other unlawful means that weaken the will itself.(22)

The long period of detention as a pre-trial procedure in the absence of the detainee's right to communicate with the family and the outside world and enjoy the services of defense attorneys is a form of ill-treatment as well as the consequent explicit violation of the requirements of the right to a fair trial and the achievement of criminal justice that everyone seeks, let alone counted as an absence Forced into the detainee, especially since the government of the Republic of Iraq has become a key member by joining the International Convention for the Protection of Persons from Enforced Absence and Enforced Disappearance, as the twentieth

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country that joined the agreement is in the process of preparing its initial report to be submitted to the convention committee and that should be included for measures taken from the Republic Iraq is at all levels of the work of the contents and standards included in the agreement, and in particular, the preventive detention of the Anti-Terrorism Service in Baghdad and its regional regiments in the governorates, as well as in the directorates of counter-terrorism and organized crime of the Ministry of the Interior, and the detention and brigade detention centers and teams that are managed by the Ministry of Defense. (23)

The international covenants and declarations were not devoid of stipulation of this right. The Universal Declaration of Human Rights affirmed in Article (5) of it: "No one shall be subjected to torture or to cruel, inhuman or degrading treatment." This is also indicated by the Declaration on the Protection of All Persons. From being subjected to torture and other cruel, inhuman or degrading treatment in 1975 in Article (2) which stipulates: (Any act of torture or other cruel, inhuman or degrading treatment or punishment in violation of human dignity is condemned as a denial of the purposes of the Charter The United Nations, and a violation of human rights and fundamental freedoms stipulated in the Universal Declaration of Human Rights. (24) The 1977

Standard Minimum Rules for the Treatment of Prisoners of 1977 were not without confirmation of this right, as Article (31) stipulated: (corporal punishment and punishment by placing in a dark cell, and any Cruel, inhuman or degrading punishment is strictly prohibited as disciplinary punishments).

The right to be free from torture is necessary in the pre-trial stage, as the suspect may be subjected to torture or other cruel treatment by investigators or employees of the police station in order to confess or

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compel him to provide incorrect information in order to prove the charge against him, and this is contrary to international law. And the patriot, and this is confirmed by the Code of Conduct for Law Enforcement Officials in Article 5 and Article 6, whereby any law enforcement official for 1979 is not permitted to perform any act of torture or other cruel treatment or punishment. Or inhuman or degrading, or incite or condone it, and none of the law enforcement officials may invoke higher orders or exceptional circumstances such as the state of war, the threat of war, a threat to national security, or internal political instability, or any Another public emergency, to justify torture or other cruel, degrading or inhuman treatment. She also emphasized that law enforcement officials ensure that the detainees they are in custody are fully protected and, in particular, they must take immediate measures to provide them with medical care whenever necessary. As for the Iraqi constitution of 2005, it was stated in Article (37), Paragraph (c): (It prohibits all types of psychological and physical torture and inhuman treatment, and there is no expression of any confession extracted under duress, threats or torture) and in Article (19) in its paragraph (12). It is prohibited: (It is forbidden to detain or be imprisoned or arrested in places other than that designated according to the prison laws covered by health and social care and subject to the authorities of the state), and the role of the

legislator in this regard is positive because it is a crime of all kinds of physical and psychological torture and any confession taken under duress and despite the will of the accused is not. It is recognized and not valid for judgment building by judge.

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Conclusion

After we finished studying the guarantees of the accused before the trial phase in accordance with international law and the Iraqi constitution for the year 2005, the researcher reached the following conclusions and recommendations:

First: the conclusions

- 1- The constitution has conformed to international standards that affirmed the individual's right to liberty.
- 2- International standards prohibit the arbitrary arrest, detention, or imprisonment of a person, and this is what the Iraqi constitution affirmed as well.
- 3- It is not permissible for the authorities that arrest individuals to keep them in custody or investigate with them, to override the powers conferred upon them by law.
- 4- The right to freedom of residence is a necessary right for every person. Every person has his own life that he lives with members of his family in isolation from others.
- 5- The constitutional legislator did not set conditions, and specific controls to restrict the sanctity of the home, but merely mentioned that there was a judicial decision, as was the case with regard to the privacy of correspondence.
- 6- The Iraqi constitution of 2005 dealt with the human right not to be subjected to torture while in custody or detention, as it affects human dignity.

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- 7- International law has tried hard and effort by international organizations and active states to set firm and strict standards to protect the rights of the accused in the pre-trial stage.

8- Punishing countries that do not comply with international law and international treaties with regard to human rights, including the rights of the accused.

9- The multiplicity of international organizations that care and follow human rights, which creates a real guarantee for the follow-up not to violate human rights, including the right of the accused before the trial.

10- Obliging states to include in their constitutions provisions that clarify and guarantee the rights of the accused in the pre-trial stage and other rights, including the 2005 Iraqi constitution.

Second: Recommendations

1. The practical application of achieving the real guarantee of the accused in the pre-trial stage is still ineffective, especially in light of some dictatorial regimes or authoritarian states. Therefore, more effective ways must be found to compel states to abide by international law.
2. Re-reviewing all the international legislation in force and examining its effectiveness and applying it to reality.
3. Issue new legislation allowing the International Court to play its role in achieving the guarantee of the accused's right to have jurisdiction over the internal laws of states.
4. The formation of new international tribunals to follow up on the investigation stages of the accused and ensure their consistency with international standards.

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