(Translated from Arabic)

Memorandum in response to the inquiries of the Special Rapporteurs of the Office of the United Nations High Commissioner for Human Rights (OHCHR) regarding the case of unlawful resident [redacted]

Reference is made to letter No. 20160953, dated 12 June 2016, of the Deputy Minister for Foreign Affairs, which contains information provided by the Office of the Public Prosecutor in response to the Special Rapporteurs of the United Nations High Commissioner for Human Rights (OHCHR) regarding the case of unlawful resident [redacted].

We would like to state the following:

I. With reference to the query concerning the detention and trial of the individual concerned on charges of inciting unlawful assembly

An examination of case file No. 1137/2012 Kuwait City (409/2012, Criminal Investigation Division) shows that the case was filed against this individual and others for inciting unlawful assembly.

In an interrogation session that took place on 19 December 2012, the Office of the Public Prosecutor took the statement of this person concerning the charges against him, in the presence of his lawyers Mr. [redacted].

During the session, the Office of the Public Prosecutor ordered that the accused be held in custody pending investigation. Subsequently, on 24 March 2013, he was ordered to be released on bail of 300 Kuwaiti dinars (KD). Since the accused person was unable to pay that sum, the Office of the Public Prosecutor ordered that the bail be reduced to KD 100.

The investigation having been completed, the Office of the Public Prosecutor issued a decision to refer the accused person for criminal trial on the following charges:

That on 10 December 2012 he incited and directed the other accused persons in the case to gather unlawfully in the public square of the Tayma neighbourhood, and the offence occurred as a result of his incitement, and that, without authorization from the authorities, he called — via his Twitter account: HAKEEMQ080 — for a public demonstration, as revealed by the investigations.

The above offences are penalized under the Criminal Code and under Act No. 31 of 1970 amending the Criminal Code as well as under Decree-Law No. 65 of 1979, concerning public gatherings and assemblies.

The outcome of the case was that the criminal court, sitting on 29 January 2015, sentenced him in absentia to a term of imprisonment of 1 year with labour, and to deportation following completion of his sentence, in accordance with the court's prerogatives pursuant to articles 122 and 172 (1) of the Code of Criminal Procedure. The accused filed a challenge against that sentence on 3 February 2015 and his challenge was duly turned down on 11 June 2015. He then lodged an appeal before the Court of Appeal which, on 21 December 2015, upheld the original sentence. On 6 January 2016, the accused lodged a further appeal before the Court of Cassation which, meeting on 16 May 2016, ruled that the appeal was inadmissible.

Dissatisfied with such an outcome, the accused lodged another appeal before the Criminal Court of Cassation which, sitting on 14 June 2016, ordered a temporary

suspension of implementation of the sentence until it could rule on the appeal. The sitting of 20 September 2016 has been set to hear the case.

II. With reference to the earlier detention of the individual concerned from 12 December 2012 to 20 March 2013

An examination of case No. 357/2012, Office of the Public Prosecutor of Jahra — No. 62/2012, criminal court of Sulaibiya — shows that it was filed against this individual and another person for the following:

(1) Attacking two public officials (police officers) whose names and descriptions appear in the case file. The two accused used force and violence to resist the officers who were carrying out their duty to break up a demonstration, causing the injuries to the officers described in the medical reports, as revealed by the investigations.

(2) The two accused participated with other persons unknown in an unlawful assembly composed of more than five persons in a public place, the aim of which was to commit offences and infringe public order. The demonstrators remained in place even after the authorities had ordered them to desist, and some of them were carrying blunt instruments (batons), as revealed by the investigations.

(3) The two accused, with other persons unknown, organized and participated in an unauthorized demonstration and failed to respond to an order to disperse given by public officials. They also used force and aggression against the police, as revealed by the investigations.

(4) The two accused deliberately misused telecommunication equipment, as revealed by the investigations.

The above offences are penalized under the Criminal Code and under Act No. 31 of 1970 amending the Criminal Code as well as under Decree Law No. 65 of 1979, concerning public gatherings and assemblies and under Act No. 9 of 2001, concerning the misuse of telecommunication and eavesdropping equipment.

On 7 November 2012, the criminal court sentenced the accused in absentia to a term of imprisonment of 2 years with labour, and to deportation following completion of his sentence, in accordance with the court's prerogatives pursuant to articles 122 and 172 (1) of the Code of Criminal Procedure.

Thus, when the accused was arrested on 12 December 2012, he was admitted to the central prison. On 16 December 2012, he chose to challenge that sentence and he was retried in his presence on the aforementioned charges. On 16 January 2013, the court ruled to accept the challenge in its form and to reject it on its merits, and it upheld the original sentence.

Dissatisfied with that decision, on 23 January 2013 the accused lodged an appeal before the Court of Appeal. On 20 March 2013, the Court ruled to accept the appeal in its form and on its merits, to abrogate the sentence in as much as it affected the accused, and to declare him innocent on all the charges against him. He was then released as far as that case was concerned and, thus, his imprisonment for the first case detailed above began on 21 March 2013.

On 21 April 2013, the Office of the Public Prosecutor lodged an appeal against that ruling before the Court of Cassation which, on 21 July 2013 ruled to reject the appeal in as much as it affected the accused person.

III. With reference to the query concerning the attack against the individual concerned on 7 July 2014

An examination of case No. 626/2014, Office of the Public Prosecutor in Kuwait City, revealed a copy of the documents pertaining to investigations carried out by the Investigations Directorate of the Ministry of the Interior in case No. 65/2014, Criminal Investigation Division, regarding the forensic medical report on the injuries sustained by the individual concerned, which had caused him severe bodily pain and which he claimed had been inflicted by a police officer.

The Office of the Public Prosecutor began its investigations into the case by asking the aforementioned victim about the circumstances of his injuries. He stated that on the night of 7 July 2014 he had gone to the central prison in his capacity as a human rights observer belonging to the organization Front Line: International Foundation for the Protection of Human Rights Defenders to monitor possible violations between supporters of one of the inmates and personnel of the Ministry of the Interior. While at a security post in front of the prison, he was attacked by a police officer who struck him in the sight and hearing of others with the intention of preventing him from carrying out his voluntary task of serving his county and the people.

The Office of the Public Prosecutor also questioned witnesses to the incident who stated that they had not seen any aggression against the individual concerned but that the latter had requested admittance to the central prison, entrance to which is forbidden during the night, and had then verbally assaulted one of the officers present.

In the course of its investigations, the Office of the Public Prosecutor also interrogated the individual against whom the complaint was made (i.e., the police officer) who denied the accusation. He stated that the alleged victim had actually verbally assaulted him while he was carrying out his duties and, he had ordered that the latter be referred to the competent authorities.

The Office of the Public Prosecutor again questioned the alleged victim who claimed that the statements made by the witnesses and the police officer were untrue.

The Office of the Public Prosecutor also questioned the forensic medical examiner who had drawn up the medical report. He confirmed the contents of the report describing the victim's injuries to the effect that the right auricle showed signs of impact with some kind of hard object with an abrasive edge; however, the injury was not such as to cause significant harm or severe bodily pain and it could be permanently cured within less than 30 days without leaving a lasting disability. The injury to the left ear consisted in a recent perforation to the eardrum that could have been caused by a blow. It was not such as to cause significant harm but it did cause severe bodily pain. It had, however, stabilized, and did not leave any permanent disability. The doctor added that the injuries were not of a type that could have been self-inflicted.

The Office of the Public Prosecutor also questioned the officer who had conducted inquiries into the incident on behalf of the Criminal Investigation Division, who stated that his inquiries had not established that the police officer had assaulted the alleged victim.

On 1 April 2015, the Office of the Public Prosecutor issued a ruling rejecting the allegations made against the police officer, temporarily suspending the investigation as the perpetrator remained unknown and delegating the police to continue its inquiries to discover the identity of the perpetrator.

IV. With reference to the claim that the person concerned was sentenced to a term of imprisonment of 6 months on charges of insulting a public official

An examination of case No. 65/2014, Criminal Investigation Division, (4997/2014, ordinary offences) shows that it was filed against this person after he had been referred to the Criminal Investigation Division by police officers on 7 July 2014 on charges of having insulted a public official while attempting to enter the central prison without authorization.

On 8 July 2014, he was brought before the investigator and he asked to be allowed to contact a lawyer. That request was granted and on the same day, in the course of questioning in the presence of his lawyer, Mr. [redacted], he denied the charges against him and claimed that he himself had been assaulted at the time of his arrest while he had been monitoring the detention of a prisoner.

On 9 July 2014, a forensic medical examination of the individual concerned revealed an injury to his left ear that was causing severe bodily pain and had been caused by a blow.

Witnesses to the incident were also questioned during the course of the investigations. They confirmed the report of the referral of the accused person to the Criminal Investigation Division, as set forth above.

On 21 July 2014, the Investigations Directorate decided to refer the accused to the criminal court on charges of insulting a public official, as stated above. It also decided to refer his injuries and his allegations that he had been beaten to the Office of the Public Prosecutor, which opened case No. 626/2014, Office of the Prosecutor in Kuwait City (see section III above).

The Public Prosecutor in the Investigations Directorate of the Ministry of the Interior brought the case against the accused before the criminal court on the grounds that he had, on 7 July 2014, insulted a public official who was carrying out his duties, using the expressions recorded in the case file, which is a punishable offence under article 134 (2) of the Criminal Code.

On 4 September 2014, in the presence of the accused, the criminal court sentenced him to a term of imprisonment of 1 month. On 7 September 2014, the accused filed an appeal before the Criminal Court of Appeal for the sentence to be overturned. On 15 April 2015, the competent court ruled to accept the appeal in its form and on its merits and to amend the sentence to a term of imprisonment of 2 weeks. On 14 May 2015, the accused lodged an appeal against that sentence before the Criminal Court of Cassation (appeal No.335/2015), but a sitting to hear the appeal has not yet been set.

As regards the detention of the accused between 7 July 2014 and 7 August 2014, he was arrested on the evening of 7 July 2014 in the neighbourhood of Sulaibiya and referred to the investigator who ordered that he be held in detention pending further inquiries for a period of 10 days from the date of his arrest. On 16 July 2014, the judge ordered that his detention be extended and, on 7 August 2014, the criminal court ordered his release.

Clearly, then, the detention of this person took place on the basis of warrants issued by the relevant authorities acting within their legally defined prerogatives, in accordance with articles 9 (2), 10, 11, 39 (1) and (2), 48, 56, 60, 69, 70, and 144 of the Code of Criminal Procedure.

V. With reference to the query concerning the legal grounds for prosecution in cases of public gatherings, to allegations that national law is not in line with international standards concerning restrictions on the right of assembly and to claims that there is a ban on authorizing assemblies of unlawful residents

The right to peaceful assembly is guaranteed under article 44 of the Constitution of Kuwait and elucidated in the explanatory memorandum of the Constitution. In fact, individuals have the right to hold private meetings without authorization or prior notification, and security forces are banned from attending such meetings. At the same time, "public meetings", "rallies" and "assemblies" are established as general rights that have attendant duties while the law is to set forth the conditions in which such public rights may be exercised. All this applies as long as the purpose and means of any meeting, be it private or public, are peaceful and do not offend public morals.

Under article 29 (2) of the Universal Declaration of Human Rights, in the exercise of rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and general welfare in a democratic society.

Moreover, in line with the International Covenant on Civil and Political Rights — ratified under Act No. 12 of 1996 — the right to peaceful assembly, recognized under that article of the Constitution, is subject to certain necessary and indispensable restrictions, which are imposed in conformity with the law and are intended for the protection of national security or public safety, public order, public health or morals or the rights and freedoms of others.

Following its publication and implementation, Decree-Law No. 65 of 1979, concerning public gatherings and assemblies, was submitted to the Constitutional Court for review. On 1 May 2006, the Constitutional Court issued its famous ruling abrogating the articles regulating "public meetings" contained in Decree-Law No. 65 of 1979. Since then no other legislation has been passed to regulate "public meetings" as required under article 44 of the Constitution and no implementing regulations have been issued concerning "public assemblies and demonstrations".

The query covers the following legislation: Decree-Law No. 65 of 1979, as regards public assemblies and demonstrations; article 34 of Act No. 31 of 1970 amending the Criminal Code, as regards the criminalization of unlawful assembly; and article 34 (3) of Decree-Law No. 76 of 1976, concerning traffic, modified by Act No. 52 of 2001, as regards the criminalization of deliberate obstruction of the public highway. A review of that legislation clearly shows that it is in line with international standards. In fact, all the procedures and restrictions relating to the exercise of the right to "assemble and demonstrate in public streets and squares" are set forth in laws that define the prerequisites necessary to ensure national security, public order, public health and public morals as well as protection and respect for the rights and freedoms of others, as set forth in Kuwaiti law.

Thus, the condition whereby organizers must obtain authorization for any public rally, demonstration or assembly is due to the fact that such events occupy public streets and squares which, consequently, have to be temporarily equipped to accommodate them. Such events also require the presence of security forces to guarantee the safety of officials and participants and to facilitate the movement of others. It goes without saying, moreover, that a decision to refuse authorization is, by its nature, subject to review, depending upon the circumstances.

Article 12 (1) of Decree-Law No. 65 of 1979 expressly excludes meetings of a private nature, which are not regulated, meetings involving fewer than 20 participants and meetings associated with national customs, as long as they do not infringe public order or public morals.

As regards the ban in Decree-Law No. 65 of 1979 on the participation of non-Kuwaitis in public meetings, we would like to draw attention to the ruling issued by the Constitutional Court on 25 November 2013. According to that ruling, the designation of participation in an unlawful assembly as an offence was not a contradiction of the principle of "equality of rights and duties", as set forth in article 29 of the Constitution. By designating such participation as a punishable offence, the ban takes no account of the origins or political and social affiliations of the persons concerned and, in that regard, the same provisions are applied to citizens and non-citizens alike.

As regards a review of the legal provisions relative to demonstrations and assemblies, and the criminal penalties imposed in that regard, we can state that such a review was in fact carried out by the Constitutional Court when, on 18 March 2015, it

decided to reject appeals against Decree-Law No. 65 of 1979. The reasoning of the Court was that, when individuals exercised their natural right to assemble publically, that necessarily had an effect on society as a whole or extended to other individuals who might happen to be present in public streets and squares. Therefore, such a right had to be regulated within a framework delimiting the time and place in which it could be exercised. The Court concluded that the regulations contained in Decree-Law No. 65 of 1979 were not such as to hinder persons from exercising their natural right to assemble in public and were, therefore, in line with legal standards for the exercise of the right of assembly.

VI. With reference to the judicial deportation orders against persons convicted in criminal cases

The penalty of deportation, as set forth in articles 66 (7), 67 and 79 of the Criminal Code, can only be applied on the basis of a definitive judicial sentence — and after all available remedies in the case have been exhausted — against a foreign national who has been sentenced to a term of imprisonment. The person concerned is not deported from Kuwait until after completion of the prison sentence. A judge must order the deportation of a foreigner from Kuwait when the prison sentence is in excess of three years.

The Court of Cassation has established that the definition of "citizen" for the purposes of the aforesaid article 79 refers to a person holding a certificate of nationality pursuant to Royal Decree No. 15 of 1959 promulgating the Kuwaiti Nationality Act. It follows, then, that a person not in possession of Kuwaiti nationality has the legal status of foreigner.

(Court of Cassation criminal ruling No. 244/2001, session of 23 October 2001, and criminal appeal No. 228/96, session of 30 June 1997).

In this context it should also be pointed out that, out of consideration for the humanitarian conditions of unlawful residents and in accordance with the provisions of a general royal amnesty of prisoners in 2013 and 2014, unlawful residents who have been convicted of an offence are pardoned from the penalty of deportation (see page 31 of the second national report under the universal periodic review mechanism, A/HRC/WG.6/21/KWT/1). Requests for a royal pardon from deportation are periodically submitted by interested parties or their legal representatives to the Office of the Public Prosecutor, which examines them in the light of the aforementioned royal amnesty (see the website of the Office of the Public Prosecutor at https://www.pp.moj.gov.kw).

VII. With reference to authorizing the police to use force to break up public meetings

The law grants State officials certain coercive powers, which they must exercise within the limits of their authorization in order to enable the State to exercise its constitutionally mandated prerogatives and to achieve, at one and the same time, both the public good and the interests of citizens. These powers include the powers granted to the police to help them maintain order and ensure public security, tranquillity and peace in society.

Article 2 of the Police Act No. 23 of 1968 states that the police are a regular armed force under the Ministry of the Interior that maintains security and order inside the country, protects persons, goods and property and enforces laws and regulations. According to article 10 of the same Act, the police are also responsible for taking the measures necessary to prevent crime, recording crimes that do take place and carrying out investigations and inquiries under the direction of the competent authorities, as prescribed by law. To that end, police officers are authorized to arrest offenders — either on a warrant from the competent authorities or without a warrant in the case of an offence discovered in flagrante — and to use the force necessary to effect that arrest and to overcome resistance on the part of the

person being arrested or others, in accordance with article 48 (1) 49, 56, 57 (2) and 60 (1) of the Code of Criminal Procedure.

Police powers to break up public meetings may not be used unless the meeting deviates from its original purpose and the participants begin to infringe public security, block roads or attack other persons or private or public property.

It goes without saying that responsibility for evaluating situations of that nature lies with the national judiciary, embodied in the Office of the Public Prosecutor and the criminal courts. They decide on the legality of breaking up a meeting and the appropriateness of using force to that end. They also ensure that legal action is taken against persons who have violated the law, under the Criminal Code and its supplementary legislation, within the framework set forth in the Code of Criminal Procedure and the standards consecrated in relevant international treaties, particularly articles 9, 10 and 14 of the International Covenant on Civil and Political Rights, articles 12 and 13 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment — ratified under Act No. 1 of 1996 — and the Universal Declaration of Human Rights.

VIII. With reference to the query concerning the legal grounds for the charges brought in the cases in question and the extent to which they are compatible with the provisions of the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights

We would like to make it clear that no judicial proceedings are brought unless the act attributed to the accused person constitutes an offence under the Criminal Code and its supplementary legislation. A report or complaint needs to be made, which is then investigated and examined by the judiciary. That process is accompanied by a series of safeguards including article 31 of the Constitution, concerning the legality of detention; article 32 of the Constitution, concerning the principle of legality, article 33 of the Constitution, which states that punishment must be personal; and article 34 of the Constitution, concerning the presumption of innocence. These principles are further elucidated in the following articles of the Code of Criminal Procedure.

Articles 71, 75, 98 and 99, which cover the requirement to take the accused person's statement on the charges during the course of interrogation, the right to be accompanied by a lawyer during the interrogation, the right to cross-examine witnesses and the right to conduct a free defence.

Articles 59, 60, 60 bis, 63, 66, 70, 70 bis, 212, 224, 226, and 227, which cover the legality of arrest and the right to lodge complaints against a detention order, and article 25 of Prisons Act No. 26 of 1962, which concerns the separation of remand and convicted prisoners.

Other relevant texts include articles 120, 136, 155, 162, 163, 164, 165, 170 (1), 187, 199 and 200 bis of the Code of Criminal Procedure, and Act No. 40 of 1972 concerning appeals to the Court of Cassation. They cover other rights accused persons enjoy at all stages of the judicial proceedings, such as the right to be accompanied by a lawyer, the public nature of trials, the fact that accused persons can hear and respond to the charges against them at the beginning of their trial, their right to be informed of all the evidence in the case, their right to call witnesses for the defence and to cross-examine witnesses for the prosecution, their right to call on the help of experts and to request a review of their case before a higher court.

The Kuwaiti judicial system — i.e., the criminal courts and the Office of the Public Prosecutor — provide these guarantees in all the cases brought before them.

These provisions fulfil the standards set forth in articles 9, 10 and 14 of the International Covenant on Civil and Political Rights.

IX. With reference to the measures taken to guarantee that the right to peaceful assembly can be duly exercised and that journalists and human rights defenders are able to carry out their legitimate work

On the basis of the foregoing, then, we would like to affirm that, the Office of the Kuwaiti Public Prosecutor is convinced that local and international human rights organizations play an important humanitarian role. Acting in accordance with the Kuwaiti Constitution, national criminal law and the international treaties ratified by Kuwait, it is careful to investigate any reports it receives of acts of aggression or unlawful arrest by the police or others against accused persons. Whenever it finds reasonable grounds that an illegal act has occurred, it undertakes prompt and impartial investigations using all the legal powers at its disposal. The Office of the Public Prosecutor also gives both suspects and victims every opportunity to make their statements and to present their defence in accordance with recognized international legal standards.