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1. FILING AN APPLICATION BEFORE THE ICJ AS A VERY MEANS OF NEGOTIATION ?

Kohler and Paris (France v. Islamic Republic of Iran), Discontinuance, Order of 19 September 2025

1. *Introduction*

On 16 May 2025, France filed an application against Iran before the International Court of Justice (hereafter ICJ or the Court) seeking compliance of the latter with the Vienna Convention on Consular Relations regarding the treatment of Mrs. Kohler and Mr. Paris, two French nationals imprisoned in Teheran and facing criminal charges before Iranian courts. Whereas Mrs. Kohler and Mr. Paris' fate remained unclear, France asked for the withdrawal of its application on 15 September. Since Iran did not oppose, the case was removed from the General List on 19 September in accordance with Article 89 of the Rules of Court. A month and a half later, on 4 November 2025, Mrs. Kohler and Mr. Paris were released from prison and transferred to the French Ambassy of Teheran where they remain as of now for they cannot, yet, leave the Iranian territory.

It is one of the shortest spans that a case spent within the General List, with a total of 132 days. Yet, it is not the first time that discontinuance occurs, nor is it the shortest span spent within the List before withdrawal. The record holder is still Dominica whom, in 2006, had promptly withdrawn its request in the Status vis-à-vis the Host State of a Diplomatic Envoy to the United Nations case against Switzerland – effectively removed only 44 days after its entry. Early removal of application is not a recent phenomenon; the Permanent Court of International Justice (hereafter PCIJ) met similar occurrences. For instance, in the case of the Delimitation of the Territorial Waters between the Island of Castellorizo and the Coast of Anatolia, Italy and Turkey terminated the proceedings by agreement and the Court removed the case from the General List 69 days after its entry.

Regarding the facts leading to the French request, one should acknowledge that, in recent years, Iranian arrests of foreigners has often been a means to engage in negotiations; more specifically to obtain the repatriation of imprisoned Iranian nationals abroad. Belgium, for instance, signed a transfer treaty with Iran in 2022 so to obtain the liberation of one of its unlawfully imprisoned nationals – ending up with a mere exchange of prisoners because the Treaty was suspended due to its challenge before the Belgian Constitutional Court (see Belgian Constitutional Court, Judgement of 8 December 2022, n° 163/2022). With these arrests and

the lack of cooperation between Iran and France, the former could have attempted to negotiate an exchange of prisoners as it did with Belgium. Thus, France may have filed an application with the ICJ to regain a better position in the bilateral negotiations by putting Iran at risk to be condemned by a Court. Iran has recently filed two applications with the Court in the last two years – which is more than any other State – and showed substantial reliance on the Court's judicial function. Hence, France may have assumed that Iran would have hardly challenged the legitimacy of a future judgement. It might have been a prime example of what Guy de Lacharrière (former Directeur des affaires juridiques of the French Ministry of Foreign Affairs and Vice-President of the International Court of Justice) famously called the "politique juridique extérieure", that is to say the use of legal means to pursue one's international relations (see G. DE LACHARRIÈRE, *La politique juridique extérieure*, Paris, Economica, 1983, p. 13; see also, recently, G. LE FLOCH, *L'utilisation politique du juge international*, in *Annuaire Français de Droit Internationa*l, vol. LXIX, 2023, pp. 247-286).

As we will see, this alleged diplomatic use of a request before the ICJ can be inferred from the fact that France did not file a request for provisional measures despite the recent tendency in similar cases (2). Such diplomatic use is, nevertheless, not alien to past State practice, as negotiating in parallel to the proceedings is a common feature of international litigation (3). Yet, what is less common is the discontinuance of the case before any settlement has been officially finalised between the parties (4).

2. *The Absence of Request for Provisional Measures*

France has not initiated any request for provisional measures after filing its application. The French behaviour is uncommon for this kind of dispute, where nationals of one State may be unlawfully imprisoned by another. It is even less ordinary when these nationals may face the death penalty, as it became apparent for Mrs. Kohler and Mr. Paris who were sued in July for espionage.

Usually, States appearing before the Court to obtain redress for violations of the Vienna Convention on Consular Relations tend to ask for provisional measures which have a great rate of success (see for instance, Vienna Convention on Consular Relations (*Paraguay v. United States of America*), Order of 9 April 1998, *ICJ Reports* 1998, p. 248; *LaGrand* (*Germany v. United States of America*), Order of 3 March 1999, *ICJ Reports* 1999, p. 9; *Avena and Other Mexican Nationals* (*Mexico v. United States of America*), Order of 5 February 2003, *ICJ Reports* 2003, p. 77; *Jadhav* (*India v. Pakistan*), Order of 18 May 2017, *ICJ Reports* 2017, p. 231). The need for such measures lied, at least in part, within the fact that the requested remedies sought to obtain a fair trial in accordance with the international consular obligations of the defendant State in a context where there was a strong risk of death penalty – which would have rendered part of the request moot. Asking for and awarding provisional measures is also a means to protect the purpose of the jurisdiction. The Kohler and Paris case would have been a textbook example of a case requiring their adoption.

The fact that France did not file a request for provisional measures – where they were particularly needed and might have been fairly easy to obtain – may indicate that it did not count solely on the ICJ to resolve this case. The final answer lies confidentially within the walls of the Quai d'Orsay. Nevertheless, one could argue that France intended to leave open recourse to negotiations. For instance, not asking for provisional measures may have been a means to show that France still trusted Iran's commitment to international law despite its application before the Court; it could thus have kept Iran at the negotiations table. As Prof.

G. Le Floch wrote recently, requesting provisional measures «est un moyen commode pour le demandeur de dramatiser encore plus la saisine du juge» (G. LE FLOCH, *op. cit.*, p. 266); *a contrario*, not asking for them may thus be a way to not "dramatize" too much the main application and keep the door open to a future settlement. In that regard, Pakistani practice in the Trial of Pakistani Prisoners of War case against India showed a similar use of the Court. Pakistan initially requested provisional measures but then asked for the postponement of the proceedings to facilitate its parallel negotiations with India (see *Trial of Pakistani Prisoners of War* (*Pakistan v. India*), Order of 13 July 1973, *ICJ Reports* 1973, p. 330, §14). Eventually, Pakistan, «with a view to facilitating further negotiations, requested the Court to make an Order officially recording discontinuance of the proceedings in this case» (*ibid.*, Order of 15 December 1973, p. 348) which the ICJ, indeed, ordered. Hence, with that antecedent in mind, France's behaviour seemed, from the very start, closer to instances where filing an application was a means among others to achieve successful negotiations than to cases where seizing the Court was arguably seen as very last recourse by the applicant, such as the *Breard, LaGrand* and *Avena* cases mentioned above.

3. *Negotiating in Parallel to the Proceedings*

Filing an application before the ICJ does not imply that the parties only rely on judicial settlement to resolve their dispute. The Kohler and Paris case seems to illustrate it. The litigants may usually settle their dispute through any diplomatic manner in parallel to the proceedings for there is no such things as a general *electa una via* principle between interstate negotiations and ICJ proceedings under international procedural law (see *Aegean Sea Continental Shelf* (*Greece v. Turkey*), Judgement of 19 December 1978, *ICJ Reports* 1978, p. 12, §29), although the consent of States appearing before the Court may provide for such admissibility condition. Hence, a State may file a request to the ICJ with the very hope to create a context where it could attain a more favourable settlement than what it could have obtained without the pressure of a judgement. Doing so would be a subtle use of the Court's jurisdiction as a mean of politique juridique extérieure.

If filing a request before the ICJ can be part of a State's politique juridique extérieure, so may be its withdrawal. France should have considered that, on 15 September 2025, it had more to gain from the ending than from the continuation of the proceedings. For an older example, the prompt withdrawal of the Dominican request against Switzerland in the *Status vis-à-vis the Host State of a Diplomatic Envoy to the United Nations* case could be read as an illustration of a State realizing it had diplomatically a lot to lose by continuing the proceedings. Dominica had naturalized and appointed Russian born Mr. Lakschin – a wealthy businessman – as ambassador to Switzerland. The latter withdrew promptly its diplomatic status, stating that Mr. Lakschin was a mere businessman. In such context, filing an application to the ICJ could end up revealing to the world its alleged practice of "selling" diplomatic functions to naturalised businessmen. If the Swiss withdrawal of such an envoy could be, indeed, the object of an application before the Court with fair chances of success; the diplomatic reputation that Dominica could draw from the publicity of its practice – even if it succeeded – would certainly be prejudicial. The case was thus dismissed soon enough for the world not to pay too much attention to it. In the Kohler and Paris case, the French withdrawal is possibly due to the diplomatic situation with Iran which must have been propitious to a settlement as of September. The transfer of the prisoners to the French embassy in early November seems to corroborate it.

Whereas it is common for the parties to engage in negotiations with respect to disputes that have been already submitted to an international court or tribunal, it is still possible for the imbrication between negotiations and judicial proceedings seldomly to raise difficulties in certain circumstances. One of the rare instances in which such matter rose before the PCIJ was the *Free Zones of Upper Savoy and the District of Gex* case. France and Switzerland had asked the Court to render a judgement which would later become the basis for their common agreement – that is to say, subjected to negotiations between them. Such a use of the Court's decisions to accompanying negotiations could be a breach of the obligatory character of its judgements; as wrote the Court, «it would be incompatible with the Statute, and with its position as a Court of Justice, to give a judgment which would be dependent for its validity on the subsequent approval of the Parties» (*Free Zones of Upper Savoy and the District of Gex* (*France v. Switzerland*), Judgement of 7th June 1932, *PCIJ Series* A/B, n° 46, p. 161). In that case, the negotiations were not really parallel to the proceedings, the States rather wished to use the judgement of the Court on a certain request as a non-mandatory basis for a future agreement. The jurisdictional nature of the PCIJ was thus a clear obstacle to its jurisdiction for such request, although it entertained the other ones which were not subject to subsequent approval by the parties. Yet, this kind of difficulty can be avoided if the parties to a dispute create an ad hoc arbitral tribunal specially given a contentious jurisdiction over certain aspects of a dispute, and keep other aspects of the same dispute for a mere advisory opinion which will be the basis to later negotiations between them (see, for instance, *Air Service Agreement of 27 March 1946 between the United States of America and France*, Arbitral award of 9 December 1978, in *Reports of International Arbitral Awards*, vol. XVIII, p. 455). Nevertheless, such a solution cannot be transposed to the ICJ for its Statute would prevent it for the same reason as the one mentioned in the *Free Zones of Upper Savoy and the District of Gex* case.

4. *Discontinuing the Case before the Finalisation of the Settlement?*

One may suppose that, in most cases, States withdraw promptly their applications as new circumstances occur that render their proceedings vain. Such straightforward hypothesis is not without precedents. One can mention for instance the withdrawal of Paraguay's request following the execution of Mr. Breard in the Vienna Convention on Consular Relations (*Paraguay v. United States of America*) case of 1998 – for his fate was the main object of the proceedings – or the *Question relating to the Seizure and Detention of Certain Documents and Data* (*Timor-Leste v. Australia*) case after the requested seized documents and data had been returned. However, most withdrawals are merely the result of the attainment of an agreement between the parties reached in parallel to the unfolding of jurisdictional proceedings (see for instance *Passage through the Great Belt* (*Finland v. Denmark*), Order of 10 September 1992, *ICJ Reports* 1992, pp. 348-349; *Aerial Herbicide Spraying* (*Ecuador v. Colombia*), Order of 13 September 2013, *ICJ Reports* 2013, p. 279).

If negotiating in parallel to judicial proceedings is a common feature of State practice before the ICJ, it is less common to see a State asking for the discontinuance of the case before any settlement has been confirmed. Usually, States notify the Court that they concluded an agreement, and the Court acknowledges in an order that this agreement has the consequence of removing the case from the List (see e.g. *ibid.*, see also between France and Lebanon in the early days of the ICJ, "*Électricité de Beyrouth*" *Company Case* (*France v. Lebanon*), Order of 29 July 1954, *ICJ Reports* 1954, p. 108; *Compagnie du port, des Quais et des Entrepôts de Beyrouth and the Society Radio-Orient* (*France v. Lebanon*), Order of 31 August 1960, *ICJ Reports* 1960, p. 187).

In terms of politique juridique extérieure, it may seem curious to file an application with the ICJ with the purpose of persuading a State to negotiate in a certain way and subsequently to withdraw such an application before these negotiations officially succeed. In that case, Iran's position within the negotiations may change, since the threat of a condemnation before the ICJ does no longer weight directly on it. Hence, France could find itself in an uncommon situation where it could file a new request to the Court in a few months or years to obtain what it already asked if the negotiations with Iran ultimately fail. In any event, as the ICJ had not rendered any decision on the admissibility of the French claims, the principle of res judicata would not prevent France from coming back before the Court. This hypothesis reminds us the situation between Belgium and Spain in the *Barcelona Traction* cases. Belgium had withdrawn its first request in 1961 so as to promote an interstate settlement (see *Barcelona Traction, Light and Power Company Ltd.* (*New Application: 1962*) (*Belgium v. Spain*), Application instituting proceedings, *ICJ Pleadings*, vol. I, pp. 3-4). But it did so without a formal agreement being concluded with Spain to settle the dispute. Therefore, after realizing that Spain was eventually not willing to negotiate as Belgium intended, it filed a new application before the ICJ in 1962 (*ibid.*) which resulted in two of the most famous judgements of the Court.

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