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The concept of withdrawal from a conspiracy

Tammy Lopez

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CASE WESTERN RESERVE UNIVERSITY SCHOOL OF LAW
INTERNATIONAL WAR CRIMES PROJECT
(In conjunction with the New England School of Law)

MEMORANDUM FOR THE
OFFICE OF THE PROSECUTOR
INTERNATIONAL TRIBUNAL FOR RWANDA

ISSUE # 5:
THE CONCEPT OF WITHDRAWAL
FROM A CONSPIRACY

Prepared by Tammy Lopez

May 2001

TABLE OF CONTENTS

INDEX TO SUPPLEMENTING DOCUMENTS.....	ii
I. Introduction and Summary of Conclusions.....	1
II. Factual Background.....	2
III. Legal Discussion.....	3
A. International Approaches to Withdrawal From a Conspiracy.....	3
1. The International Criminal Tribunal for Rwanda.....	3
2. The International Criminal Tribunal for the Former Yugoslavia.....	3
3. Nuremberg Tribunal.....	5
B. Domestic Approaches to Withdrawal From a Conspiracy.....	8
1. United States.....	9
2. Great Britain.....	13
3. Australia.....	16
4. Canada.....	19

INDEX

INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA

1. International Criminal Tribunal for Rwanda, Office of the Prosecutor, Research Topic No. 5, e-mail dated 2 February 2001.

2. *Prosecutor v. Nahimana*, Case No: ICTR-96-11-T, Amended Indictment, 12 July 1999.

STATUTES AND CRIMINAL CODES

3. Statute of the International Tribunal for Rwanda, S/RES/955 (1994) (Annex), 8 November 1994, *cited in* 2 Virginia Morris and Michael P. Scharf, THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA 3-5 (1998).

4. Criminal Code (R.S. 1985, c. C-46) § 465(1)(a) *available at* <http://canada.justice.gc.ca/en/lawa/C-46/36036.html>.

5. Criminal Code [R.S., c.C-34,s.1.] § 21.1 *available at* <http://insight.mcmaster.ca/org/efc/pages/law/cc/cc.21.html>.

6. CRIMINAL CODE ACT 1995 No. 12 of 1995 § 11.5(2).

7. PUNITIVE ARTICLES OF THE UNIFORM CODE OF MILITARY JUSTICE Art. 81 § 4.5.2b *available at* <http://www.military.about.com/careers/usmilitary/library/milinfo/mcm/bl81.htm>.

8. MODEL PENAL CODE § 5.03 (1) (Official Draft and Revised Comments 1985).

LAW REVIEW ARTICLES

9. Mia V. Carpinello and Abigail Roberts, *Federal Criminal Conspiracy*, 37 AM. CRIM. L. REV. 495 (2000).

10. Linda Cantoni, Note, *Withdrawal From a Conspiracy: A Constitutional Allocation of Evidentiary Burdens*, 51 FORDHAM L. REV. 438 (1982).

11. Keri C. McGrath and Jennifer L. Pfeiffer, *Federal Criminal Conspiracy*, 36 AM. CRIM. L. REV. 661 (1999).

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NUREMBERG TRIBUNAL

13. International Military Tribunal, Trial of Major German War Criminals 141 [1946] *available at* <http://www.nizkor.org/hweb/imt/tgmwc/judgment/j-dissenting-hess.html>.
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15. 19 International Military Tribunal, Trial of German Major War Criminals 379 [1946] *available at* <http://www.nizkor.org/hweb/imt/tgmwc/tgmwc-19/tgmwc-19-186-09.shtml>.

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CASE LAW

21. Eldredge v. United States, 62 F.2d 449 (10th Cir.) 1932.
22. Hyde and Schneider v. United States, 225 U.S. 347 (1912).
23. Julius Loser v. The Superior Court of Alameda County, 78 Cal. App. 2d 30 (1947).
24. R v. Whitefield, 79 Cr App Rep 36, Crim LR 294 (1984).
25. R v. Rook, 97 Cr App Rep 327, 2 All ER 955, 1 WLR 1005, Crim LR 698 (1993).
26. The Queen v. John Leslie Coombes (1999) BC9902012.
27. Collins and Others v. R (1980) 31 A.L.R. 257.
28. Regina v. Evans Willie Tietie (1988) 1988 NSW LEXIS 9399, BC8801776.
29. R v. Hoffer [1995] SKQB QB95494.

30. Regina v. Richard Arthur Joyce et al [1978] 1978 W.C.B.J. LEXIS 777, 1978 W.C.B.J. 43772, 2 W.C.B. 469, 42 C.C.C. (2d) 141.

31. Rex v. Whitehouse [1940] 75 C.C.C. 65, 1940 C.C.C. LEXIS 480.

32. White v. Ridley (1978) 21 A.L.R. 661.

I. INTRODUCTION AND SUMMARY OF CONCLUSIONS

This research memorandum analyzes the following issue:

What does an accused have to show to prove he withdrew from a conspiracy?¹

This memorandum examines the issue of withdrawal from a conspiracy as it is applied in international law as well as the domestic laws of several different countries. The concept is not widely recognized in international law. The issue did arise, however, before the Nuremberg Tribunal in the case of Rudolf Hess, where the court determined that he was guilty of the common plan or conspiracy despite his flight to England in 1941 because of his participation in the preparation and planning of aggressive war before his flight.²

This memorandum also examines the domestic laws of the United States, Great Britain, Australia and Canada regarding withdrawal from a conspiracy. The courts in all of these countries have ruled that the accused must take some affirmative action to effectuate withdrawal from the conspiracy. He must communicate his desire to withdraw from the conspiracy to his co-conspirators and make an effort to thwart the purpose of the conspiracy.³ Simply fleeing the

¹ See International Criminal Tribunal for Rwanda, Office of the Prosecutor, Research Topic No. 5, e-mail dated 2 February 2001. The e-mail states that one of the directors of RTLM radio incited genocide in 1993 and continued in his role as director in 1994 and that RTLM continued to incite genocide in 1994. The accused claims he fled Rwanda on April 7, 1994 and most of the public incitement occurred after April 7th. The question posed is whether it matters that most of this director's involvement with RTLM took place in 1993. What does he have to show to prove that he withdrew from the conspiracy? The scope of this paper focuses on Ferdinand Nahimana, former Director of RTLM. [Reproduced in the accompanying notebook at Tab 1].

² The Trial of German Major War Criminals: Judgment: The Defendants: Hess, *available at* <http://www.nizkor.org/hweb/imt/tgmwc/judgment/j-defendants-hess.html>. [hereinafter Nuremberg Judgment] [Reproduced in the accompanying notebook at Tab 14].

³ The following sources have contributed to this discussion and form the basis for the analysis in this memorandum: Eldredge v. United States, 62 F.2d 449 (10th Cir. 1932); Hyde and Schneider v. United States, 225 U.S. 347 (1912); Mia V. Carpiniello and Abigail Roberts, *Federal Criminal Conspiracy*, 37 AM. CRIM. L. REV. 495 (2000); MODEL PENAL CODE § 5.03 (1) (Official Draft and Revised Comments 1985); Regina v. Richard Arthur Joyce et al. [1978] 2 W.C.B. 469; Rex v. Whitehouse [1940] 75 C.C.C. 65; R v. Hunter [1991] Crim LR 220; R v. Hoffer [1995] SKQB QB5494; R v. Whitefield, 79 Cr App Rep 36 (1983); R v. Rook, 97 Cr App Rep 327 (1993); WAYNE R. LAFAVE

country would not be sufficient to support a defense of withdrawal from the conspiracy unless the accused made his intention to abandon the conspiracy clear to his co-conspirators. Therefore, based on the domestic laws of the United States, Great Britain, Australia and Canada as well as the Nuremberg Tribunal judgment, a defense of withdrawal from the conspiracy should not succeed in the Rwandan context.

II. FACTUAL BACKGROUND

Ferdinand Nahimana, former director of Radio des Milles Collines (“RTLM”), is currently under indictment by the International Criminal Tribunal for Rwanda accused of genocide, conspiracy to commit genocide, direct and public incitement to commit genocide and crimes against humanity.⁴ RTLM was used to broadcast messages designed to incite genocide against the Tutsi population between January 1, 1994 and approximately July 31 1994. Ferdinand Nahimana was instrumental in the creation and planning of RTLM and knew or had reason to know of the broadcasts during the time of the public incitement.⁵ The broadcasts made from RTLM were responsible for instigating the mass murders of hundreds of thousands of Tutsis. In its broadcasts, listeners were encouraged to “fill the half-empty graves.”⁶

AND AUSTIN W. SCOTT, JR., CRIMINAL LAW 547-548 (2nd ed. 1986); Regina v. Evans Willie Tietie 1988 NSW Lexis 9399; White v. Ridley (1978) 21 A.L.R. 661.

⁴ *Prosecutor v. Nahimana*, Case No: ICTR 96-11-T, Amended Indictment, 12 July 1999 [hereinafter Indictment]. [Reproduced in the accompanying notebook at Tab 2].

⁵ *Id.* [Reproduced in the accompanying notebook at Tab 2].

⁶ 1 VIRGINIA MORRIS AND MICHAEL P. SCHARF, THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA 54-55 (1998). [Reproduced in the accompanying notebook at Tab 17].

III. LEGAL DISCUSSION

A. INTERNATIONAL APPROACHES TO THE CONCEPT OF WITHDRAWAL FROM A CONSPIRACY

1. *The International Criminal Tribunal for Rwanda*

Article 2 of the Statute of the International Tribunal for Rwanda provides for criminal liability for “conspiracy to commit genocide.”⁷ Nahimana has been indicted under this provision for actions he took as director of Radio des Mille Collines. The purpose of RTLM was to broadcast messages calculated to accomplish inter-ethnic hatred and encourage people to kill, persecute and commit acts of violence against the Tutsi population.⁸ During the time of the broadcasts, he knew or should have known they were occurring and took no action to prevent them from being made.⁹ Therefore, although he was not present during the period of most of the incitement, he was instrumental in the planning and creation of RTLM and should be liable under article 2 of the statute.¹⁰

2. *The International Criminal Tribunal for the Former Yugoslavia*

⁷ Statute of the International Tribunal for Rwanda, S/RES/955 (1994) (Annex), 8 November 1994, *cited in 2* Virginia Morris and Michael P. Scharf, *THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA 5* (1998) [hereinafter *ICTR Statute*]. [Reproduced in the accompanying notebook at Tab 3].

⁸ Indictment, *supra* note 4. [Reproduced in the accompanying notebook at Tab 2].

⁹ *Id.* [Reproduced in the accompanying notebook at Tab 2].

¹⁰ *ICTR Statute*, *supra* note 7. [Reproduced in the accompanying notebook at Tab 3].

A proposed Definition of Offenses, interpreting the elements of the crimes authorized by Articles 2 through 5 of the Statute of the International Tribunal, was drafted in February 1994.¹¹ It was intended to serve as an official submission of the United States to the International Criminal Tribunal for the Former Yugoslavia after interagency coordination and approval by the Department of State. Although the proposed Definition of Offenses was never formally submitted by the United States, it has been used extensively by an American Bar Association Task Force on War Crimes, the U.S. Delegation to the United Nations ad hoc Committee for an International Criminal Court and the Office of the Prosecutor for the International Criminal Tribunal for the Former Yugoslavia.¹²

Section 1.3 of the proposed Definition of Offenses discusses the concept of conspiracy.¹³ There are two elements of conspiracy under this section. The first element is “that the accused entered into an agreement with one or more persons to commit an offense proscribed by international law and under the jurisdiction of the International Tribunal,” and the second is “that, while the agreement continued to exist, and while the accused remained a party to the agreement, the accused or at least one of the co-conspirators performed an overt act for the purpose of bringing about the object of the conspiracy.”¹⁴ This section also provides for a defense of withdrawal from the conspiracy. If a party to the conspiracy abandons or withdraws from the agreement to commit the offense before the commission of an overt act by any conspirator, he will not be guilty of conspiracy. For the defense to be effective, the withdrawal

¹¹ Walter Gary Sharp, Sr., Article, *The International Criminal Tribunal for the Former Yugoslavia: Defining the Offenses*, 23 MD. J. INT’L L. & TRADE 15 (1999). [Reproduced in the accompanying notebook at Tab 12].

¹² *Id.* [Reproduced in the accompanying notebook at Tab 12].

¹³ *Id.* [Reproduced in the accompanying notebook at Tab 12].

¹⁴ *Id.* [Reproduced in the accompanying notebook at Tab 12].

or abandonment must consist of affirmative conduct which is wholly inconsistent with adherence to the unlawful agreement and which shows that the party has severed all connection with the conspiracy.¹⁵ This provision requires the accused to do more to prove withdrawal than merely physically removing himself from the scene. He must take affirmative action that is inconsistent with the common plan and sever all ties with the co-conspirators. The accused must also withdraw before an overt act occurs. In the case of Nahimana, several overt acts had already occurred before the time he fled the country. He had already created the radio station, along with his co-conspirators, and had been involved in the broadcasts inciting the public to commit genocide. Even if his actions in fleeing the country were enough to be considered an effective withdrawal from the conspiracy, it was too late. Since the overt acts were already taken before his flight, he should remain liable for the conspiracy charge.

3. *Nuremberg Tribunal*

The only international judicial precedent on the question of withdrawal from a conspiracy was the case of Rudolf Hess, who had been indicted by the Nuremberg Tribunal under all four counts – the common plan or conspiracy, crimes against peace, war crimes and crimes against humanity.¹⁶ He joined the Nazi Party in 1920 and became Hitler's closest confidant during their imprisonment together in the Landsberg fortress in 1924. He rose through the ranks of the Party and was appointed Deputy to the Fuehrer. Hitler announced Hess as his successor designate after Goering in 1939.¹⁷ Hess flew from Germany to Scotland on May 10th, 1941.¹⁸

¹⁵ *Id.* [Reproduced in the accompanying notebook at Tab 12].

¹⁶ Nuremberg Judgment, *supra* note 2. [Reproduced in the accompanying notebook at Tab 14].

¹⁷ *Id.* [Reproduced in the accompanying notebook at Tab 14].

The first argument advanced by Hess's defense counsel was that the common plan or conspiracy did not even exist in the first place.¹⁹ However, if the court decided to accept the existence of the common plan, then Hess's liability should be limited to acts occurring before May 10th, 1941.²⁰ Hess's counsel acknowledged that there were no provisions in the Nuremberg Charter as to whether a withdrawal from the common plan was possible, but argued that the possibility existed under the principles of Continental European law. Under Continental law, the responsibility of an accused extends only as far as his actions or omissions are controlled by his will.²¹ The Anglo-American concept of conspiracy was not recognized in continental Europe at that time.²² In Hess's case, his attorney argued, any developments that occurred after his flight to England could not have been controlled by his will.²³

The Tribunal rejected this argument, convicting Hess of the common plan or conspiracy and crimes against peace.²⁴ The Tribunal found the following critical to Hess's criminal liability for conspiracy: In his position as Deputy to the Fuehrer, Hess had responsibility for handling all matters relating to the Nazi Party and had authority to make decisions in Hitler's name on questions regarding Party leadership. Until his flight to England, he was Hitler's closest personal confidant and must have been aware of Hitler's aggressive plans when they came into

¹⁸ *Id.* [Reproduced in the accompanying notebook at Tab 14].

¹⁹ 19 International Military Tribunal, Trial of German Major War Criminals 379 [1946] *available at* <http://www.nizkor.org/hweb/imt/tgmwc/tgmwc-19/tgmwc-19-186-09.shtml>. [hereinafter International Military Tribunal]. [Reproduced in the accompanying notebook at Tab 15].

²⁰ *Id.* [Reproduced in the accompanying notebook at Tab 15].

²¹ *Id.* [Reproduced in the accompanying notebook at Tab 15].

²² MICHAEL P. SCHARF, BALKAN JUSTICE 12 (1997). [Reproduced in the accompanying notebook at Tab 16].

²³ International Military Tribunal, *supra* note 19. [Reproduced in the accompanying notebook at Tab 15].

²⁴ Nuremberg Judgment, *supra* note 2 at 88. [Reproduced in the accompanying notebook at Tab 14].

existence.²⁵ He also had authority through his position as Reichs Minister without Portfolio to approve all legislation suggested by Reichs Ministers before it could become law. Hess actively supported preparations for war in this position.²⁶

Although the Tribunal convicted Hess of conspiracy and crimes against peace, it found Hess not guilty of war crimes and crimes against humanity.²⁷ The Tribunal acknowledged that there was evidence showing the participation of the Party Chancellery, under Hess, in the giving out of orders connected with the commission of war crimes and that Hess may have had knowledge of the crimes that were being committed, even if he did not participate in them. There was also evidence that Hess signed decrees forcing groups of Poles to accept German citizenship. However, the Tribunal did not believe that the evidence was sufficient to connect Hess with particular war crimes to sustain a finding of guilt.²⁸

Although the majority of the Tribunal found Hess not guilty of crimes against humanity, the Soviet Judge took a different view.²⁹ In the dissenting opinion, the Soviet Judge found that Hess's actions up to his flight to England supported a finding of guilt on the charge of crimes against humanity. Even though Hess did not take a direct part in the planning and commission of crimes occurring after his flight to England, he did everything possible in preparing for these crimes.³⁰ He, along with Himmler, created the SS police organizations that committed the most

²⁵ *Id.* at 87. [Reproduced in the accompanying notebook at Tab 14].

²⁶ *Id.* at 86. [Reproduced in the accompanying notebook at Tab 14].

²⁷ *Id.* at 88. [Reproduced in the accompanying notebook at Tab 14].

²⁸ *Id.* at 87. [Reproduced in the accompanying notebook at Tab 14].

²⁹ International Military Tribunal, Trial of Major German War Criminals 141 [1946] *available at* <http://www.nizkor.org/hweb/imt/tgmwc/judgment/j-dissenting-hess.html>. [Reproduced in the accompanying notebook at Tab 13].

³⁰ *Id.* at 141. [Reproduced in the accompanying notebook at Tab 13].

merciless crimes against humanity.³¹ Hess issued an ordinance in 1935 under the Reich citizenship law that denied Jews the right to vote in elections or hold public office.³² He also initiated the formation of special “penal laws” for Poles and Jews in occupied Eastern territories. The Soviet Judge found that based on these actions “there can be no doubt that Hess together with the other major war criminals is guilty of crimes against humanity” and recommended a sentence of death.³³

In the present case, although Nahimana fled the country around the time of most of the public incitement, as director of RTLM, he was an active participant in the planning and creation of the station and its broadcasts. From 1990 until 1994, he conspired with others to formulate a plan with the intent to exterminate the Tutsi population and the moderate Hutus.³⁴ The plan consisted of the broadcasting of messages of ethnic hatred and incitement to violence, the training and distribution of weapons to militiamen, and the preparation of lists of people to be eliminated and the broadcasting of their identities.³⁵ Drawing from the analysis of the Nuremberg Tribunal in the Hess case, the Tribunal should not recognize withdrawal from the conspiracy as a legitimate defense.

B. DOMESTIC APPROACHES TO THE CONCEPT OF WITHDRAWAL FROM A CONSPIRACY

³¹ *Id.* [Reproduced in the accompanying notebook at Tab 13].

³² *Id.* at 142. [Reproduced in the accompanying notebook at Tab 13].

³³ *Id.* [Reproduced in the accompanying notebook at Tab 13].

³⁴ Indictment, *supra* note 4. [Reproduced in the accompanying notebook at Tab 2].

³⁵ *Id.* [Reproduced in the accompanying notebook at Tab 2].

The concept of withdrawal from a conspiracy is recognized under the common law systems of the United States, Great Britain, Australia and Canada, among others. The laws of each of these countries require more from an accused than merely physically removing himself from the scene to effectively withdraw from a conspiracy. This section demonstrates why, under the laws of each of the above countries, the concept of withdrawal from a conspiracy would not be a legitimate defense in the case of Nahimana.

1. *United States*

The crime of conspiracy is outlined in the Model Penal Code.³⁶ The most important element of the crime is the agreement to commit an unlawful act. Most states also have a requirement that an overt act performed in furtherance of the plan be proven.³⁷ Some states require that this overt act be a substantial step toward the commission of the crime.³⁸ The overt act itself does not need to be criminal or unlawful.³⁹ Under common law, there are four elements to a conspiracy: “(1) an agreement between at least two parties (2) to achieve an illegal goal (3) with knowledge of the conspiracy and with actual participation in the conspiracy, and (4) at least one conspirator commits an overt act in furtherance of the conspiracy.”⁴⁰

³⁶ MODEL PENAL CODE § 5.03 (1) (Official Draft and Revised Comments 1985). [Reproduced in the accompanying notebook at Tab 8]. Section 5.03 defines conspiracy as: “A person is guilty of conspiracy with another person or persons to commit a crime if with the purpose of promoting or facilitating its commission he: (a) agrees with such other person or persons that they or one or more of them will engage in conduct that constitutes such crime or an attempt or solicitation to commit such crime; or (b) agrees to aid such other person or persons in the planning or commission of such crime or of an attempt or solicitation to commit such crime.”

³⁷ WAYNE R. LAFAVE AND AUSTIN W. SCOTT, JR., *CRIMINAL LAW* 547-548 (2nd ed. 1986). [Reproduced in the accompanying notebook at Tab 20].

³⁸ *Id.* [Reproduced in the accompanying notebook at Tab 20].

³⁹ *Id.* [Reproduced in the accompanying notebook at Tab 20].

⁴⁰ Keri C. McGrath and Jennifer L. Pfeiffer, *Federal Criminal Conspiracy*, 36 AM. CRIM. L. REV. 661 (1999) [hereinafter *Federal Criminal Conspiracy*]. [Reproduced in the accompanying notebook at Tab 11].

According to the Model Penal Code, it is an affirmative defense if the actor thwarts the goal of the conspiracy by a complete and voluntary renunciation of the criminal purpose.⁴¹ If an actor abandons the agreement, the conspiracy is terminated as to him only if he informs his co-conspirators of his withdrawal or he informs the law enforcement authorities of the existence of the conspiracy and of his participation in the conspiracy.⁴² An effective withdrawal requires more than mere cessation of activity. The conspirator must commit “affirmative acts inconsistent with the object of the conspiracy and communicate them in a manner reasonably calculated to reach co-conspirators.”⁴³ Further, the conspirator must unequivocally withdraw before any overt act has been committed in order to escape liability.⁴⁴

The defense of withdrawal from a conspiracy has traditionally been treated as an affirmative defense and the burden of proving the withdrawal generally rests on the defendant.⁴⁵ Withdrawal, by itself, serves only as a partial defense. A defendant will not be relieved of all liability for the conspiracy or for crimes he committed in furtherance of the conspiracy prior to his withdrawal, but he will be exonerated for crimes committed subsequent to his withdrawal.⁴⁶ There are two situations in which withdrawal may operate as a complete defense. The first is when the withdrawal occurs before an overt act has been committed, and the second is when the

⁴¹ MODEL PENAL CODE § 5.03 (6) (Official Draft and Revised Comments 1985). [Reproduced in the accompanying notebook at Tab 8].

⁴² MODEL PENAL CODE § 5.03 (7) (c) (Official Draft and Revised Comments 1985). [Reproduced in the accompanying notebook at Tab 8].

⁴³ Mia V. Carpiniello and Abigail Roberts, *Federal Criminal Conspiracy*, 37 AM. CRIM. L. REV. 495, 514 (2000). [Reproduced in the accompanying notebook at Tab 9].

⁴⁴ *Id.* [Reproduced in the accompanying notebook at Tab 8].

⁴⁵ Linda Cantoni, Note, *Withdrawal from a Conspiracy: A Constitutional Allocation of Evidentiary Burdens*, 51 FORDHAM L. REV. 438, 439 (1982). [Reproduced in the accompanying notebook at Tab 10].

⁴⁶ *Id.* at 441. [Reproduced in the accompanying notebook at Tab 10].

withdrawal is coupled with the statute of limitations.⁴⁷ The statute of limitations begins to run from the time of the withdrawal from the conspiracy.⁴⁸

The concept of withdrawal from a conspiracy has long been recognized at common law. The leading case on this issue is *Eldredge v. United States*.⁴⁹ This case has been cited by courts in several common law countries. In this case, Eldredge and three of his fellow employees were involved in embezzling funds from the bank where they were employed and falsifying the books. Eldredge left his job at the bank after a couple of years, but continued to participate in the conspiracy. He later took a job as a bookkeeper with a building and loan company. He only ended his participation when he was promoted in his new position and was unable to continue falsifying statements.⁵⁰ He informed his co-conspirators that he would no longer be able to participate and would have nothing further to do with covering up the shortage at the bank. When the shortage was discovered and Eldredge was indicted, he claimed that he had withdrawn from the conspiracy.⁵¹

The court found that although Eldredge removed himself from the conspiracy, he did not intend to withdraw his assent to the continued concealment of the shortages by his co-conspirators. A withdrawal cannot be effective by intent alone. There must also be some affirmative action taken.⁵² In the court's frequently quoted words, "a declared intent to withdraw from a conspiracy to dynamite a building is not enough, if the fuse has been set; he must step on

⁴⁷ *Id.* [Reproduced in the accompanying notebook at Tab 10].

⁴⁸ Federal Criminal Conspiracy, *supra* note 40, at 680. [Reproduced at Tab 11].

⁴⁹ *Eldredge v. United States*, 62 F.2d 449 (10th Cir. 1932). [Reproduced in the accompanying notebook at Tab21].

⁵⁰ *Id.* [Reproduced in the accompanying notebook at Tab 21].

⁵¹ *Id.* [Reproduced in the accompanying notebook at Tab 21].

⁵² *Id.* at 451. [Reproduced in the accompanying notebook at Tab 21].

the fuse.”⁵³ The court held that the actions Eldredge took were insufficient to effectively withdraw from the conspiracy and he was still liable for the crime.⁵⁴

In the case of *Hyde and Schneider v. United States*, a case where the defendants were convicted of conspiracy to defraud the United States, Schneider claimed that he should not be liable because he had not committed any overt acts during the three year statute of limitations and had previously made a partial disclosure of the conspiracy to the government.⁵⁵ The court determined that although he did not take any action in furtherance of the conspiracy during that period, he “remained acquiescent, expecting and understanding” that additional acts should be performed and that he might be playing his part by keeping still as much as he did by his previous actions.⁵⁶ The court stated, “as he has started evil forces he must withdraw his support from them or incur the guilt of their continuance.”⁵⁷ This idea was reaffirmed in *Loser v. Superior Court*.⁵⁸ The court in this case declared “some affirmative act bringing home the withdrawal to the knowledge of his confederates is necessary, otherwise the conspiracy once established will be presumed to continue until the ends are accomplished or its abandonment established.”⁵⁹

⁵³ *Id.* [Reproduced in the accompanying notebook at Tab 21].

⁵⁴ *Id.* at 452. [Reproduced in the accompanying notebook at Tab 21].

⁵⁵ *Hyde and Schneider v. United States*, 225 U.S. 347, 368 (1912). [Reproduced in the accompanying notebook at Tab 22].

⁵⁶ *Id.* [Reproduced in the accompanying notebook at Tab 22].

⁵⁷ *Id.* at 369-370. [Reproduced in the accompanying notebook at Tab 22].

⁵⁸ *Julius Loser v. The Superior Court of Alameda County*, 78 Cal. App. 2d 30 (1947). [Reproduced in the accompanying notebook at Tab 23].

⁵⁹ *Id.* at 32. [Reproduced in the accompanying notebook at Tab 23].

The concept of withdrawal from a conspiracy is also addressed in United States military law. The elements of the crime of conspiracy are basically the same as under American common law.⁶⁰ The requirements for an effective withdrawal are also the same as those provided by common law. The Uniform Code of Military Justice (“UCMJ”) provides:

A party to the conspiracy who abandons or withdraws from the agreement to commit the offense before the commission of an overt act by any conspirator is not guilty of conspiracy. An effective withdrawal or abandonment must consist of affirmative conduct which is wholly inconsistent with adherence to the unlawful agreement and which shows that the party has severed all connection with the conspiracy. A conspirator who effectively abandons or withdraws from the conspiracy after the performance of an overt act by one of the conspirators remains guilty of conspiracy and of any offenses committed pursuant to the conspiracy up to the time of the abandonment or withdrawal. However, a person who has abandoned or withdrawn from the conspiracy is not liable for offenses committed thereafter by the remaining conspirators. The withdrawal of a conspirator from the conspiracy does not affect the status of the remaining members.⁶¹

The affirmative act is the essential element in the defense of withdrawal from the conspiracy under both the common law and UCMJ. Without taking some affirmative action sufficient to give notice of the intent to withdraw, a defendant has not effectively withdrawn and will remain liable for the conspiracy.

2. *Great Britain*

The laws of Great Britain regarding conspiracy are similar to the laws of the United States. Conspiracy is defined as: “(a) it is a statutory offence to agree with any other person or person

⁶⁰ PUNITIVE ARTICLES OF THE UNIFORM CODE OF MILITARY JUSTICE Art. 81 § 4.5.2 b *available at* <http://www.military.about.com/careers/usmilitary/library/milinfo/mcm/bl81.htm>. [Reproduced in the accompanying notebook at Tab 7]. The elements of conspiracy are: “(1) that the accused entered into an agreement with one or more person to commit an offense under the code; and (2) that, while the agreement continued to exist, and while the accused remained a party to the agreement, the accused or at least one of the co-conspirators performed an overt act for the purpose of bringing about the object of the conspiracy.

⁶¹ *Id.* at § 4.5.3 c.(6). [Reproduced in the accompanying notebook at Tab 7].

for the commission of an offence or offences,” and “(b) it is a common law offence to agree with any person or persons to defraud or, possibly, to corrupt public morals or to outrage public decency.”⁶² The agreement is the gist of the crime of conspiracy. There cannot be a conspiracy unless there has been a concluded agreement.⁶³ Once the parties agree to the plan, the offense is complete and it makes no difference if they never put the plan into action.⁶⁴ A defendant who has incited a crime can generally escape liability if he expressly and clearly countermands the crime or withdraws his assent before the crime is committed as long as he has done no more than encouraging or inciting the commission of the crime.⁶⁵ He will still remain liable for any previous incitement or conspiracy charges, as inchoate offenses. He can likely also avoid liability by going to the police and confessing his part in the conspiracy or warning the intended victim in time to stop the crime from occurring.⁶⁶

This premise was applied in the case of *R v. Whitefield*.⁶⁷ The court stated that if a person has counseled someone else to commit a crime, he may be able to escape liability by withdrawing before the crime has been committed.⁶⁸ However, “it is not sufficient that he should merely repent or change his mind. If his participation is confined to advice or encouragement, he must

⁶² RICHARD CARD, LL.M., INTRODUCTION TO CRIMINAL LAW §21.11 (11th ed. 1988). [Reproduced in the accompanying notebook at Tab 19].

⁶³ *Id.* at § 21.12 [Reproduced in the accompanying notebook at Tab 19].

⁶⁴ *Id.* [Reproduced in the accompanying notebook at Tab 19].

⁶⁵ GLANVILLE WILLIAMS, Q.C., LL.D., F.B.A., TEXTBOOK OF CRIMINAL LAW 363 (2nd ed. 1983). [Reproduced in the accompanying notebook at Tab 18].

⁶⁶ *Id.* [Reproduced in the accompanying notebook at Tab 18].

⁶⁷ *R v. Whitefield*, 79 Cr App Rep 36, Crim LR 294 (1984). [Reproduced in the accompanying notebook at Tab 24].

⁶⁸ *Id.* [Reproduced in the accompanying notebook at Tab 24].

at least communicate his change of mind to the other.”⁶⁹ If the accused has taken positive steps in assisting the crime, he must do everything possible to prevent the commission of the crime in order to effectively withdraw from the conspiracy.⁷⁰

In the case of *R v. Rook*, the appellant agreed with three other men to carry out a contract killing on another man’s wife.⁷¹ The four men met to make plans for the murder, but the appellant did not meet the other two on the day of the killing as arranged and the other men carried out the killing. He never gave any indication to his co-defendants that he would not be present at the murder. His defense was that he never intended to carry out the murder and that he thought the other two men would not go through with it if he were not there.⁷² He said he was merely hoping to get some money in advance from the intended victim’s husband and then disappear.⁷³ The court stated that one essential element must be established to avoid liability in this type of case: “where practicable and reasonable there must be timely communication of the intention to abandon the common purpose from those who wish to disassociate themselves from the contemplated crime to those who desire to continue in it.”⁷⁴ What constitutes timely communication is determined by the facts of each individual case but the communication needs to “serve unequivocal notice upon the other party to the common unlawful cause that if he proceeds upon it he does so without the further aid and assistance of those who withdraw.”⁷⁵

⁶⁹ *Id.* [Reproduced in the accompanying notebook at Tab 24].

⁷⁰ Textbook of Criminal Law, *supra* note 65. [Reproduced in the accompanying notebook at Tab 18].

⁷¹ *R v. Rook*, 97 Cr App Rep 327, 2 All ER 955, 1 WLR 1005, Crim LR 698 (1993). [Reproduced in the accompanying notebook at Tab 25].

⁷² *Id.* [Reproduced in the accompanying notebook at Tab 25].

⁷³ *Id.* [Reproduced in the accompanying notebook at Tab 25].

⁷⁴ *Id.* [Reproduced in the accompanying notebook at Tab 25].

The court held that although the appellant intended to withdraw from the conspiracy, he never communicated his intention to the other members of the conspiracy, so the minimum necessary for withdrawal was not established.⁷⁶

3. *Australia*

The concept of conspiracy in Australia is quite similar to that of the United States. Under the Australian Criminal Code Act (“the Code”), the elements of conspiracy are: “(a) the person must have entered into an agreement with one or more other persons; and (b) must have intended that an offence would be committed pursuant to the agreement; and (c) the person or at least one other party to the agreement must have committed an overt act pursuant to the agreement.”⁷⁷

The Code provides for a defense of withdrawal from the conspiracy before an overt act has been committed if the person “(a) withdrew from the agreement; and (b) took all reasonable steps to prevent the commission of the offence.”⁷⁸ The trial judge in the case of *Collins and Others v. R* explained the law as it applies to the common plan.⁷⁹ If two or more people come to an agreement that they will commit a crime together and then at least one of them commits the act to which they agreed, they are all equally guilty of the crime regardless of each person’s role in the crime.⁸⁰ The judge in this case also emphasized that the burden in a case of withdrawal rests

⁷⁵ *Id.* [Reproduced in the accompanying notebook at Tab 25].

⁷⁶ *Id.* [Reproduced in the accompanying notebook at Tab 25].

⁷⁷ CRIMINAL CODE ACT 1995 No. 12 of 1995 § 11.5 (2). [Reproduced in the accompanying notebook at Tab 6].

⁷⁸ *Id.* at § 11.5 (5). [Reproduced in the accompanying notebook at Tab 6].

⁷⁹ *Collins and Others v. R* (1980) 31 A.L.R. 257. [Reproduced in the accompanying notebook at Tab 27].

⁸⁰ *Id.* [Reproduced in the accompanying notebook at Tab 27].

on the prosecution to prove the existence of the common plan and that the defendant was a member of the conspiracy through the commission of the crime in question.⁸¹

In the case of *White v. Ridley*, the defendant used an innocent agent, an airline, to airfreight a box containing cannabis from Singapore to Australia.⁸² He used a false name to ship the box to a fictitious person in Australia. He traveled to Australia ahead of the box and then tried to stop the box from being shipped, after the consignment note was found during a Customs search, but the airline shipped the box anyway. The defendant was convicted of importation of prohibited goods.⁸³ The question raised before the court was whether he had effectively countermanded the commission of the crime. The court stated that it is not unreasonable “to insist that a person who has counseled or procured another to commit a crime, or has conspired with others to commit a crime, should accompany his countermand or withdrawal with such action as he can reasonably take to undo the effect of his previous encouragement or participation.”⁸⁴ The accused must have accompanied the countermand with words or conduct that made it clear to the agent that the accused no longer wanted the agent to perform the action previously requested. The accused must have done as much as was reasonably possible to counteract his earlier request. “The countermand will not have been timely if it was given when it was too late to stop the train of events which was started by his request.”⁸⁵

⁸¹ *Id.* [Reproduced in the accompanying notebook at Tab 27].

⁸² *White v. Ridley* (1978) 21 A.L.R. 661. [Reproduced in the accompanying notebook at Tab 32].

⁸³ *Id.* [Reproduced in the accompanying notebook at Tab 32].

⁸⁴ *Id.* [Reproduced in the accompanying notebook at Tab 32].

⁸⁵ *Id.* [Reproduced in the accompanying notebook at Tab 32].

The case of *Regina v. Tietie*⁸⁶ followed the reasoning of *White v. Ridley*.⁸⁷ The appellant, along with two other men, was involved in the beating death of another man. He claimed that he hit and kicked the victim until he thought the victim had had enough and then ran away, calling to the others to stop also.⁸⁸ The question raised was whether the appellant had effectively withdrawn by running away. The trial judge stated:

To effectively withdraw from a common enterprise upon which he has embarked he must withdraw completely. It must be timely. He must make it known to the others that he was withdrawing and he must, by such act and words as may be appropriate, do what he reasonably can to dissuade the others from continuing with the unlawful purpose.⁸⁹

The trial judge went on to say that if an accused has encouraged another to commit a crime by his presence and actions, then he should accompany his withdrawal and countermand with whatever action he can reasonably take to undo the effect of his previous encouragement and participation to escape further criminal liability.⁹⁰ The Supreme Court of New South Wales upheld this ruling.⁹¹

In the case of *The Queen v. Coombes*, the appellant was convicted of murder.⁹² He and a co-conspirator, Conlan, took the victim aboard a boat with the intention of assaulting him because of an alleged sexual assault on Conlan's sister. The appellant participated in the beating of the victim. When Conlan pulled out a knife to stab the victim, the appellant claimed he screamed at

⁸⁶ *Regina v. Evans Willie Tietie* (1988) 1988 NSW LEXIS 9399, BC8801776. [Reproduced in the accompanying notebook at Tab 28].

⁸⁷ *White v. Ridley* *supra* note 82. [Reproduced in the accompanying notebook at Tab 32].

⁸⁸ *Regina v. Tietie* *supra* note 86. [Reproduced in the accompanying notebook at Tab 28].

⁸⁹ *Id.* [Reproduced in the accompanying notebook at Tab 28].

⁹⁰ *Id.* [Reproduced in the accompanying notebook at Tab 28].

⁹¹ *Id.* [Reproduced in the accompanying notebook at Tab 28].

⁹² *The Queen v. John Leslie Coombes* (1999) BC9902012. [Reproduced in the accompanying notebook at Tab 26].

Conlan to stop and tried to push the victim out of the way of the knife.⁹³ Conlan then pushed the victim overboard and stabbed him again when he was reaching up for help back into the boat. The appellant claimed that he again screamed at Conlan to stop.⁹⁴ The appellant's ex-wife contradicted his claims with her testimony that he told her he and Conlan hit the victim a couple of times and they threw him overboard. They then ran over him with the propeller and cut him up so that the fish would finish him off, according to her testimony.⁹⁵

In his instructions to the jury, the trial judge directed them as to the requirements for withdrawing from a planned crime if they believed the appellant's version of the events. He stated that it was insufficient "to feel qualms or wish to stop the plan being put into action."⁹⁶ He said, "There must be action taken and that action must be such as may reasonably be taken to undo the effect of the previous participation."⁹⁷ The jury found that the appellant had not effectively withdrawn from the planned crime and convicted him of murder. On appeal, the court upheld the trial judge's jury instruction and the appellant's conviction.⁹⁸

4. *Canada*

The concept of withdrawal from a conspiracy in Canada is a common law principle. The statutory guidelines in the Criminal Code as to conspiracy in murder cases are: "every one who conspires with any one to commit murder or to cause another person to be murdered, whether in

⁹³ *Id.* [Reproduced in the accompanying notebook at Tab 26].

⁹⁴ *Id.* [Reproduced in the accompanying notebook at Tab 26].

⁹⁵ *Id.* [Reproduced in the accompanying notebook at Tab 26].

⁹⁶ *Id.* [Reproduced in the accompanying notebook at Tab 26].

⁹⁷ *Id.* [Reproduced in the accompanying notebook at Tab 26].

⁹⁸ *Id.* [Reproduced in the accompanying notebook at Tab 26].

Canada or not, is guilty of an indictable offence and liable to a maximum term of imprisonment for life.”⁹⁹ Under § 21.1, the law as to the common intention states that anyone is a party to an offence if he “(a) actually commits it; (b) does or omits to do anything for the purpose of aiding any person to commit it; (c) abets any person in committing it.”¹⁰⁰ The basic premise as to withdrawal is where several persons join in a common plan to commit a crime and participate in the acts leading up to the crime, the fact that some of the members change their minds and leave the scene before the crime is actually committed does not constitute a withdrawal from the conspiracy to relieve them from liability. There must also be a timely communication to the other members of the conspiracy of the intent to withdraw or abandon the common plan.¹⁰¹ The court in *Rex v. Whitehouse* stated that,

After a crime has been committed and before a prior abandonment of the common enterprise may be found by a jury there must be ... in the absence of exceptional circumstances, something more than a mere mental change of intention and physical change of place by those associates who wish to dissociate themselves from the consequences attendant upon their willing assistance up to the moment of the actual commission of that crime.¹⁰²

The essential element of the withdrawal is the timely communication, where practicable and reasonable, of the intention to abandon the common purpose. The communication must be such

⁹⁹ Criminal Code (R.S. 1985, c. C-46) § 465(1)(a) available at <http://canada.justice.gc.ca/en/laws/C-46/36036.html>. [Reproduced in the accompanying notebook at Tab 4].

¹⁰⁰ Criminal Code [R.S.,c.C-34,s.1.] § 21.1 available at <http://insight.mcmaster.ca/org/efc/pages/law/cc/cc.21.html>. [Reproduced in the accompanying notebook at Tab 5].

¹⁰¹ *Rex v. Whitehouse* [1940] 75 C.C.C. 65, 1940 C.C.C. LEXIS 480. [Reproduced in the accompanying notebook at Tab 31].

¹⁰² *Id.* [Reproduced in the accompanying notebook at Tab 31].

that it serves unequivocal notice upon the other party to the conspiracy that if he proceeds upon the unlawful purpose, he does so without any further assistance from those who withdraw.¹⁰³

In the case of *Regina v. Joyce et al*, the appellants were part of a conspiracy to rob two stores simultaneously.¹⁰⁴ The appellants were to rob one store in Vancouver while the other two members were to rob another store in Burnaby to confuse the police. At the appointed time, the appellants decided not to rob the store in Vancouver because too many employees were present.¹⁰⁵ The other robbery took place anyway and an employee was shot and killed. The appellants claimed they had withdrawn from the conspiracy by deciding not to go through with the robbery of the store in Vancouver.¹⁰⁶ The evidence showed that throughout the planning of the scheme, the conspirators recognized that it might be impossible to rob one or the other of the two stores. Therefore, even when they decided to abandon the Vancouver robbery, they did not withdraw from the common plan.¹⁰⁷ Moreover, even if they did plan to withdraw from the scheme, they failed to communicate the withdrawal to the co-conspirators. The court found that a communication may have had a significant impact. If the co-conspirators had known that the appellants were not going to fulfill their part, they might have abandoned their own part of the scheme.¹⁰⁸ The court drew on the logic in *Rex v. Whitehouse*¹⁰⁹ and stated that timely communication to serve unequivocal notice of the withdrawal on the co-conspirators is an

¹⁰³ *Id.* [Reproduced in the accompanying notebook at Tab 31].

¹⁰⁴ *Regina v. Richard Arthur Joyce et al* [1978] 1978 W.C.B.J. LEXIS 777, 1978 W.C.B.J. 43772, 2 W.C.B. 469, 42 C.C.C. (2d) 141. [Reproduced in the accompanying notebook at Tab 30].

¹⁰⁵ *Id.* [Reproduced in the accompanying notebook at Tab 30].

¹⁰⁶ *Id.* [Reproduced in the accompanying notebook at Tab 30].

¹⁰⁷ *Id.* [Reproduced in the accompanying notebook at Tab 30].

¹⁰⁸ *Id.* [Reproduced in the accompanying notebook at Tab 30].

¹⁰⁹ *Rex v. Whitehouse supra* note 101. [Reproduced in the accompanying notebook at Tab 31].

essential element of the defense of withdrawal.¹¹⁰ Since they did not communicate their intent to withdraw to the co-conspirators, the appellants did not effectively withdraw from the conspiracy.¹¹¹

Even if an accused is able to prove that he effectively withdrew from a conspiracy to be relieved from liability for the underlying offense, he may still be found guilty of the conspiracy charge.¹¹² As the court in *R v. Hoffer* stated, the agreement is the most important of the conspiracy. The court, citing numerous sources, said that the agreement is the gist of the charge of conspiracy and that a person's participation in a conspiracy may consist of nothing more than coming to an agreement with another party that a crime be committed.¹¹³ The important question is not what acts were taken in furtherance of the conspiracy, but whether there was a common agreement to carry out a crime in which all of the co-conspirators were involved. The court went on to say that a person may be guilty of a conspiracy by merely assenting to the common design even though no action may have been intended to be taken by him personally.¹¹⁴

The laws of the United States, Great Britain, Australia and Canada all require a defendant to take some action in order to effectively withdraw from a conspiracy. A mere change of heart or physical withdrawal from the scene would not be enough under the laws of any of these countries. The withdrawal must be accompanied by a communication to the co-conspirators sufficient to put them on notice that the party withdrawing no longer desires to participate in the common plan. In the present case, absent evidence showing that he communicated his desire to

¹¹⁰ *Regina v. Joyce et al supra* note 104. [Reproduced in the accompanying notebook at Tab 30].

¹¹¹ *Id.* [Reproduced in the accompanying notebook at Tab 30].

¹¹² *R v. Hoffer* [1995] SKQB QB95494. [Reproduced in the accompanying notebook at Tab 29].

¹¹³ *Id.* [Reproduced in the accompanying notebook at Tab 29].

¹¹⁴ *Id.* [Reproduced in the accompanying notebook at Tab 29].

withdraw or took steps to try to thwart the common plan, the defendant did not effectively withdraw and the Tribunal should not accept withdrawal from the conspiracy as a legitimate defense.