CHAPTER I

METHODOLOGY FOR DETERMINING A UNIFORM SYSTEM OF INTERNATIONAL CRIMINAL LAW DEFENSES

1 INTRODUCTION

The post-World War II prosecutions, particularly the International Military Tribunal for the Far East at Tokyo (IMTFE), constitute a major historic development in the establishment of individual criminal responsibility under international law.¹ Heads of state were no longer given immunity (precedented only by Article 227 of the 1919 Treaty of Versailles, which defined the crime for which the Kaiser of Germany was to stand trial), and the traditional defense of “obedience to superior orders” was eliminated in the Far East. The establishment in 1999 of the International Criminal Court (ICC) is, as Bassiouni observes,² a step in the direction of providing international criminal justice, incorporating a broad concept of legal defenses as an essential part of this fundamental justice. These historic facts reveal the development of the concept of the international criminal defense from an instrument of realpolitik to a general institution of international criminal justice. In order to achieve effective, independent, fair and impartial justice, resort to the rule of law, and not realpolitik, is required.

Under the ICC, the various modalities for achieving international justice in the area of defenses include those arising under customary (military and humanitarian) international law, such as the concepts of command responsibility and superior orders, as well as those evolving from comparative criminal law, such as self-defense. Article 31(3) of the ICC Statute seems to cover these two modalities, although the Statutes of the ICTY, ICTR and ICC show considerable constraints as to the admissibility of the former defenses—influenced by history and its connected realpolitik—whereas the latter defenses are built on a wider institutional legal basis, due to probably the absence of such a historical realpolitik in international criminal law (ICL). A perception of legal defenses, which, due to political considerations, differs in customary interna-

². Id.
tional law and comparative criminal law, undermines the aforementioned goals of international justice and the principle of equal application of the law that should supersede realpolitik. Fortunately, in the Statute of the ICC, pursuant to Article 31(2) “the law of case” prevails with regard to defenses.

The enforcement of a uniform system of international justice, as well as the interrelationships between defenses stemming from customary international law sources and those emerging from comparative criminal law sources, should result in a uniform principle or rule as to the admissibility of defenses in ICL. This chapter focuses on the methodological arguments proposed to achieve and maintain such uniformity.

2 THE RATIONALE OF DEFENSES IN INTERNATIONAL LITIGATION

The first substantive argument for a uniform system of IC defenses can be deduced from the raison d’être of legal defenses. The rationale for the existence of defenses make it imperative not to exclude ab initio defenses in the realm of ICL, more especially to war crimes indictments. There can be no question that the inclusion of defenses in the sphere of ICL constitutes an important stage in the recognition of the principle of fairness in international litigation and therefore the application of human rights standards in international criminal proceedings. This is reinforced by the judgment of the International Court of Justice (ICJ) in 1970, expressed in the so-called Barcelona Traction case, in which the Court explicitly referred to obligations erga omnes in contemporary international law. These obligations were stated to include “the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination.” Accordingly, fundamental principles of human rights set forth by the ICJ form part of customary or general international law and subsequently of ICL, the latter being a sub-discipline of the former. This recognition can also be deduced from the final act of the Helsinki Conference of 1975, enshrining a “Declaration of Principles Guiding Relations between Participating States,” which enhances human rights. This section impresses on the participating states to fulfill “their obligations as set forth in the international declarations and agreements in (the) field (of human rights and fundamental freedoms), including inter alia the International Covenants on Human Rights, by which they may be bound.” The significance of these notions with respect to defenses can be shown by referring to, inter alia, Article 6, paragraphs 1 and 3 of the European Convention on Human Rights and Fundamental Freedoms, ensuring that every defendant in a criminal case has the right to a fair trail and adequate facilities for his defense. It is obvious that this includes the right to invoke defenses.

3. ICJ Reports 1970, at 3, 32.