THE DEVELOPMENT OF INTERNATIONAL LAW BY THE EUROPEAN COURT OF HUMAN RIGHTS. By J.G. Merrills. 1988. Manchester: Manchester University Press; N.Y.: St. Martin's Press. x and 235pp. ISBN 0 7190 2665 2.

It has become popular in recent years for those who comment upon human rights and their status in international law to refer to the *United Nations Bill of Human Rights*, by which they mean the non-binding *Universal Declaration*[1] and the two *Covenants*,[2] neither of which has any enforcement process, although some states parties thereto take seriously criticism from the United Nations Committee and Commission of Human Rights. Far more important than any of these documents is the *European Convention on Human Rights, 1950*,[3] the language of which is, in many ways, similar to that of the *Canadian Charter of Rights and Freedoms*.[4] The importance of the Convention lies in the fact that it creates a Court together with a Commission to which individuals may have recourse even against their own government, though it is only the Commission or another state which may pursue a matter before the Court. Because of the similarities in language it is to be hoped that Canadian judges called upon to interpret our own *Charter* will have greater recourse to the jurisprudence of the European Court than to the Supreme Court of the United States, because the legal character of the American *Bill of Rights*[5] produced in the light of circumstances of an earlier century is radically different from the language and the character of the *Charter*. Any book, therefore, that makes the jurisprudence of the European Court more readily available than does a series of individual law reports, particularly to jurisdictions which are not directly involved in the operations of that Court, is to be welcomed, and this task is well served by Professor Merrills with his *Development of International Law by the European Court of Human Rights*.[6] It enables us to see what the language of the *Convention* really means as a practical manifestation of law.

Experience with international judicial tribunals shows that countries are unwilling to submit to their jurisdiction if there is no judge of their own nationality on the bench. When dealing with so fundamental an issue as individual rights, which traditionally have depended on national ethical and legal approaches, this is even more important. It is not surprising, therefore, that "the size of the [European] Court [of Human Rights] and the election arrangements [of judges] are designed to ensure that the composition of the Court fully reflects

1. *Universal Declaration of Human Rights* (General Assembly Resolution 217 (III).), adopted 10 Dec. 1948.
2. *Covenant on Civil and Political Rights* (6 International Legal Manuals 368), adopted by Gen. Assembly 16 Dec. 1966; and Covenant on Economic, Social and Cultural Rights (6 I.L.M. 360) adopted 16 Dec. 1966.
3. *European Convention on Human Rights and Fundamental Freedoms* (213 United Nations Treaty Senate 221), Nov. 1950.
4. *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982* (U.K.), 1982, c.11.
5. *Constitution of the United States of America* (1789).
6. J.G. Merrills, *The Development of International Law by the European Court of Human Rights*. (Manchester: Manchester University Press; N.Y.: St. Martin's Press, 1988).

the diversity of the States of Western Europe."[7] Be that as it may, we cannot be unaware that the present nominee of Liechtenstein to the Court is a Canadian Professor of International Law, R.St.J. Macdonald, a fact which might serve to indicate how closely to their own the Europeans regard the Canadian system.

Professor Merrills makes a number of comments which are of relevance to our Supreme Court when faced with *Charter* issues. Thus, in so far as matters relating to sex, abortion or pornography are concerned, the decisions of the European Court might serve as a guide. The comments of Judge Walsh in *Dudgeon*[8] concerning homosexuality in Ireland might be drawn to the attention of both Parliament and the bench in Canada: "Sexual morality is only one part of the total area of morality and a question which cannot be avoided is whether sexual morality is 'only private morality' or whether it has an inseparable social dimension. Sexual behaviour is determined more by cultural influences than by instinctive needs. . . . The rule of law itself depends on a moral consensus in the community and in a democracy the law cannot afford to ignore the moral consensus of the community. If the law is out of touch with the moral consensus of the community, whether by being too far below it or too far above it, the law is brought into contempt. Virtue cannot be legislated into existence but non-virtue can be if the legislation renders excessively difficult the struggle after virtue. Such a situation can have an eroding effect on the moral ethics of the community in question. The ultimate justification of law is that it serves moral ends."[9]

Ever since the enactment of the *Canadian Bill of Rights* as well as of the *Charter*, there has been talk of an activist Supreme Court. A comment by Professor Merrills is interesting: "Activism and restraint, like conservatism and liberalism, are useful, but not self-evident categories, and therefore should not be thought of as more precise than they really are. It follows that instead of trying to classify individual judges according to their ideological tendencies, it is more useful to see members of the Court as caught within a field of ideological tensions with positions ranging from extreme activism to extreme restraint on one axis, and from tough conservatism to benevolent liberalism on the other. Looking at the Court's jurisprudence in this way not only brings out the underlying issues in individual cases, but also enables us to see more precisely why the decisions of a court which is dealing with human rights issues are always likely to be controversial."[10]

The more one reads Merrills' work, the more one is reminded of Canadian problems. Neither the *Charter of Rights* nor the *European Convention* purports to cover every aspect nor every right. However, "[o]bligations in the field of human rights . . . concern the most intimate aspects of the relations between the citizen and the State. Since there is no aspect of national affairs which can be said to be without implications for one or other of the rights protected by the *Convention* [and the *Charter*], there is no matter of domestic law and policy

---

7. Merrills, *supra*, note 6 at 6.
8. *Dudgeon Case* (1981) Eur. Court H.R. Ser. A, No. 45, 67 I.L.R. 395.
9. Merrills, *supra*, note 6 at 224.
10. Merrills, *supra*, note 6 at 226.

which may not eventually reach the . . . Court''[11]. Insofar as the Canadian Supreme Court is concerned, such issues as *Operation Dismantle*,[12] and particularly Mme. Justice Wilson's comments, suggest that there is no issue of foreign policy which may be beyond the Court's conception of the scope of the *Charter*. Moreover, as with the *Charter*, the *European Convention* contains a 'necessary in a democratic society' reservation. As may be seen from the decision in *Ireland* v. *United Kingdom*,[13] the European Court will grant a country a great deal of discretion in regard to measures considered necessary in preserving democracy, especially in time of declared emergency.[14] However, ''[t]he width of the margin of appreciation varies a great deal. Since the Court is dealing with different rights, different claims in respect of the same right, by applicants in different situations, and with different justifications advanced by States at different times, such variation is inevitable. Though this sometimes makes it hard to predict a decision accurately, the factors which may influence the Court to adopt a broad or narrow approach are not too difficult to identify''[15]. What has already been quoted with regard to the ideological approaches of individual judges, both in Strasbourg and Ottawa, lends support to this summation, as may be seen in both the *Morgentaler*[16] and *Daigle*[17] decisions.

At first blush it might not appear that 'dirty' books or pictures might constitute a threat to a democratic society, but the European Court held in relation to the Little Red Schoolbook that, at least when seeking to protect children from pornography, one could justify limitations ''prescribed by law . . . and necessary in a democratic society . . . for the protection of morals''[18]. A similar decision was reached on a pornographic art show in Switzerland — a decision that suggests that the European Court has a higher regard for reality, community standards and what is tolerable in a free and democratic society than does the judgment of Shannon J. in *R.* v. *Wagner*[19]. Perhaps when faced with questions concerning the protection of children or the limitations justifiable in a free and democratic society, Canadian courts might do well to pay more attention to the decisions of the European Court of Human Rights and, in due course, of the American Court of Human Rights, than they now appear willing to do. This is particularly desirable if the jurisprudence established by such tribunals is habitually followed, because such jurisprudence will contribute to the development of the international law of human rights, both customary and in the form of general principles of law recognized by civilized nations. Thus the recent decision of the European Court in *Soering*[20], a case involving extradition of

11. Merrills, *supra*, note 6 at 7.
12. *Operation Dismantle Inc.* v. *R.* [1985] 1 S.C.R. 441 (S.C.C.).
13. (1978), Eur. Court H.R. Ser. A. 17 I.L.M. 680, 58 I.L.R. 188.
14. Merrills, *supra*, note 6 at 138-9, 153-4.
15. Merrills, *supra*, note 6 at 144.
16. *Morgentaler* v. *R.* [1976] 1 S.C.R. 616, 20 C.C.C. (2d) 449. (S.C.C.).
17. *Tremblay* v. *Daigle*, (16 November 1989), No. 21533 (S.C.C.) [unreported].
18. Merrills, *supra*, note 6 at 145.
19. *R.* v. *Wagner* (1986), 43 Alta. L.R. (2d) 204 (Alta. C.A.).
20. *Soering Case* (1989), Eur. Court H.R. Ser. A, No. 161.

one sentenced to death in the United States is of relevance to the ultimate Canadian decision in *Ng*. The European Court did not deal with the death penalty *per se* but with what it called the death row syndrome. Interestingly enough, despite the Court's condemnation of this syndrome, the United Kingdom decided to extradite Soering when the charges against him were reduced to non-capital murder.

Both the *Convention* and the *Charter of Rights* contain somewhat similar provisions with regard to fair trial and the rule of law, a subject which receives careful analysis in chapter 8 of the Merrills book. As to the relevance of international law generally, it should be remembered that Canada has ratified the *International Covenants on Human Rights*, may, now that it has become a member of the Organization of American States, ratify the American *Convention*, and in any case tends to regard customary international law as part of the law of the land. In recent *Charter* cases, reference has been made to international decisions on similar points. For these reasons the relation between the *European Convention* and international law is of topical interest, and the discussion in chapter 9 of Merrill's book may well be of wider than just European significance.

Enough has been said to indicate that while Canada is not a party to the *European Convention*, there is ample reason why, in interpreting the *Charter of Rights*, Canadian tribunals should not ignore the jurisprudence flowing from the application of that *Convention*, and might find that some of the discussion in *The Development of International Law by the European Court of Human Rights* is of more than just casual interest.

L.C. Green
LL.B., LL.D., F.R.S.C.
University Professor of Political Science
and Honorary Professor of Law
University of Alberta