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Lost in Translation: Customary International Law in Domestic Law

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I Introduction

In common law countries, the customary international law aspect of the international law-domestic law relationship has generally centred on the incorporation/transformation debate. It is generally accepted that customary international law plays a role in the common law, but there is some question as to whether this role is automatic (the incorporation doctrine) or whether some form of domestic acknowledgement is required to allow these principles to be received (the transformation doctrine). The debate has been, in the main, about *how* customary international law is received into the common law. In my view, this has obscured the real issue behind the debate, which is whether, and if so to what extent, customary international law *ought* to be received domestically. At the heart of this question – the appropriate role for customary international law in domestic law – lies a more fundamental issue. That is, to what extent is it legitimate or desirable for domestic courts to draw on international sources of law more generally? While in many ways the place of customary international law in domestic law is simply part of this wider issue, the debate that persists about the legitimacy of customary international law means that customary law must be examined separately.

The terms of the incorporation/transformation debate are well rehearsed in the literature and it is not my intention to do anything other than sketch the parameters of this debate here. My interest instead lies in the impulses that drive that debate. These are, in my view, an internationalist impulse on the one hand, fuelling the more receptive incorporationist position and a self-governance, or indigenous impulse, lying behind the more cautious transformation approach. I start this chapter by demonstrating how those tendencies lie behind the traditionally framed debate. In developing this observation, I am not offering an alternative framework