

THE *NOMOS* OF CLIMATE CHANGE AND THE SOCIOLOGICAL REFUGEE IN A SINKING CENTURY

CHRISTOPHER R. ROSSI*

“[*N*]omos is a matter of the fundamental process of apportioning space that is essential to every historical epoch.”

—Carl Schmitt¹

ABSTRACT

Disappearing island states present tip-of-the-iceberg problems for international refugee law in the Anthropocene. Coastal recessions and global inundation prospects adumbrate an assortment of environmental challenges that call into question the relevance of the Refugee Convention. Understanding the limitations of refugee law and its inability or unwillingness to confront extant gaps within its regime structure and emergent challenges posed by climate change requires a reconsideration of the telluric underpinnings of sovereignty and the nature of the threat posed by exigent human migration. This Article employs the concept of nomos projected by the problematic but increasingly significant twentieth-century international lawyer, Carl Schmitt. His biogeographic understanding of international law—inextricably tethered to the organic formation of “true law” through land appropriation within the context of European history—explains limitations in international refugee law that the liberal order must first confront in order to fully operationalize the grand scheme to reframe displacement issues projected by the coming 2018 U.N. Global Compact on Migration.

KEYWORDS: Refugee Convention, Small Island Developing States, Climate Change, Migration, Nomos, Carl Schmitt

TABLE OF CONTENTS

I. INTRODUCTION	614
II. SCHMITT’S <i>NOMOS</i> AND ITS BIOGEOGRAPHICAL ORIGINS	624
A. <i>Why the Persecution Emphasis?</i>	626

* Adjunct Faculty Member, University of Iowa College of Law. Ph.D. 1991, The John Hopkins University School of Advanced International Studies; M.A. 1985, The John Hopkins University School of Advanced International Studies; L.L.M. 1983, The University of London; J.D. 1982, The University of Iowa College of Law.

1. CARL SCHMITT, *NOMOS OF THE EARTH IN THE INTERNATIONAL LAW OF THE JUS PUBLICUM EUROPAEUM* 78 (Telos Press 2003) (1950) [hereinafter SCHMITT, *NOMOS*].

B.	<i>Telluric Underpinnings</i>	628
C.	<i>A Variety of Meanings</i>	629
D.	<i>The Dynamics of Biogeography</i>	633
III.	THE COLLAPSING REFUGEE NOMOS	635
A.	<i>New Wrinkles in the Anthropocene and the Nomos of the State</i>	636
1.	Crisis Mentality and the Problem of the Anthropocene's Slow-Onset	638
2.	Numbers, <i>In Situ</i> Masking, and Nihilism	640
B.	<i>Gaps in the Governing Regime</i>	641
1.	The Sociological/Legal Interface between Migrants and Refugees	642
2.	The Definition of Persecution	643
3.	Refugee Law's <i>Ab Initio</i> Doctrine	645
4.	The Present Passive Nominalization of Persecution	646
5.	Non-refoulement	647
IV.	Conclusion	650

I. INTRODUCTION

In 2016, scientists from Australia, using time series aerial and satellite imagery, recorded for the first time the disappearance of five vegetated reef islands belonging to the Solomon Islands.² They attribute these shoreline recessions to sea-level rise caused by climate change,³ and note that the coming century will likely present severe inundation challenges to inhabitants of low-lying coastal areas.⁴ Apocalyptic narratives now attach to discussions about the future for 500,000 Solomon Islanders and neighboring Small Island Developing States (SIDS).⁵ Projected rising sea levels

2. See generally Simon Albert et al., *Interactions Between Sea-Level Rise and Wave Exposure on Reef Island Dynamics in the Solomon Islands*, 11 ENVTL. RES. LETTERS, no. 5, May 2016 (presenting an analysis of the "coastal dynamics" of the Solomon Islands using satellite imagery and local knowledge).

3. *Id.* The United Nations Framework Convention on Climate Change defines climate change as "a change of climate which is attributed directly or indirectly to human activity that alters the composition of the global atmosphere and which is in addition to natural climate variability observed over comparable time periods." United Nations Framework Convention on Climate Change art. 1(2), May 9, 1992, S. TREATY DOC. NO. 102-38, 1771 U.N.T.S., http://unfccc.int/files/essential_background/background_publications_htmlpdf/application/pdf/conveng.pdf [hereinafter United Nations Framework Convention on Climate Change] [<https://perma.cc/ZP5M-XZJV>].

4. Albert et al., *supra* note 2, at 1.

5. Giovanni Bettini, *Climate Barbarians at the Gate? A Critique of Apocalyptic Narratives on 'Climate Refugees'*, 45 GEOFORUM 63 (2013) (noting good reasons for utilizing "strong tones" to forecast drastic climatic change with epochal impact, but arguing such an approach risks

threaten entire atoll island states with permanent inundation by century's end.⁶ A U.N. disaster reduction official noted a 2001 "wake up call" when some SIDS came within a few days of running out of fresh water.⁷ Severe drought, storm surges, tidal forcing, and the complex geologic, topographic, and groundwater dynamics of understudied atoll structures combined to compromise potable water supply.⁸ Emergency and coordinated international relief efforts averted catastrophe but exposed the need for a comprehensive risk reduction plan.⁹ Climate change predictions indicate more acute future problems.¹⁰ Rising sea water permeates the porous coral substratum on which these outcroppings sit, now infiltrating and salinating groundwater wells; damaging indigenous tuber food sources and vegetation; exacerbating coastal erosion¹¹;

being counterproductive); CLIMATE CHANGE SECRETARIAT (UNFCCC), CLIMATE CHANGE: SMALL ISLAND DEVELOPING STATES (2005), http://unfccc.int/resource/docs/publications/cc_sids.pdf (discussing climate change and constraints to developing adaptive capacity for small island developing states, such as Kiribati or Tuvalu) [<https://perma.cc/92DB-74K3>]. The U.N. Office of the High Representative for the Least Developed Countries, Landlocked Developing Countries and Small Island Developing States (UN-OHRLLS) classifies thirty-eight countries and fourteen territories as Small Island Developing States (SIDS). UN-OHRLLS, SMALL ISLAND DEVELOPING STATES: SMALL ISLANDS BIG(GER) STAKES 2 (2011), <http://unohrlls.org/custom-content/uploads/2013/08/SIDS-Small-Islands-Bigger-Stakes.pdf> [<https://perma.cc/4NZH-RK7Z>]. The 1992 U.N. Conference on Environment and Development recognized SIDS as a distinct group facing specific social, economic, and environmental vulnerabilities. *Id.*

6. Ma. Laurice Jameró, Miguel Esteban & Motoharu Onuki, *Potential in-Situ Adaptation Strategies for Climate-Related Sea-Level Rise: Insights from a Small Island in The Philippines Experiencing Earthquake-Induced Land Subsidence*, 4 INT'L J. SUSTAINABLE FUTURE FOR HUM. SECURITY 44, 44 (2016) (referencing the Fifth Assessment Report of the Intergovernmental Panel on Climate Change's (IPCC) century end sea-level rise projections, between 0.28 and 0.98m, and consequences for atoll island states). The IPCC is the leading international body for the assessment of climate change. It was created in 1988 by the U.N. Environment Programme and the World Meteorological Organization. For more information, see IPCC, <https://www.ipcc.ch/organization/organization.shtml> (last visited June 3, 2018) [<https://perma.cc/RR35-RC27>].

7. *Action as Water Runs Out in Tuvalu*, U.N. OFF. FOR DISASTER RISK REDUCTION (UNISDR) (Oct. 10, 2011), <https://www.unisdr.org/archive/22598> (quoting UNISDR's Head of Policy, John Harding) [<https://perma.cc/BE5B-D8UM>].

8. See Satoshi Nakada et al., *Groundwater Dynamics of Fongafale Islet, Funafuti Atoll, Tuvalu*, 50 GROUND WATER 639–44 (2012) (noting atoll structures are highly vulnerable to salinization from anticipated sea-level rise, thus affecting fresh groundwater resources and taro swamps, a food staple).

9. See *supra* note 7 (detailing international emergency responses to critical water crises in Tuvalu, Tokelau, Kiribati, and the Cook Islands provided by the United Nations, the International Red Cross and Red Crescent societies, and the governments of Australia, New Zealand, and the United States).

10. See *id.*

11. See *Kiribati Climate Change: Coastal Erosion*, OFF. PRESIDENT, KIRIBATI, <http://www.climate.gov.ki/category/effects/coastal-erosion/> (last visited June 3, 2018) (noting relationship between sea-level rise and coastal erosion) [<https://perma.cc/2LKL-46DA>].

and prompting an array of adaptation strategies,¹² superintendency schemes,¹³ and proposals for structured migrations.¹⁴

New Zealand's Immigration and Protection Tribunal recognized climate change as a contributing factor in granting a Tuvaluan citizen a residency visa. The heavily qualified ruling considered climate change as one of an array of exceptional circumstances of a humanitarian nature rendering deportation unjust.¹⁵ The case prompted discussion that the new age of the climate refugee has

12. See *Building Capacities for Increased Public Investment in Integrated Climate Change Adaptation and Disaster Risk Reduction*, GLOBAL REGISTRY VOLUNTARY COMMITMENTS & MULTI-STAKEHOLDER PARTNERSHIPS, <https://sustainabledevelopment.un.org/partnership/?p=7351> (last visited June 3, 2018) [<https://perma.cc/SA3B-D5A2>]; G.A. Res. 69/15 (Nov. 14, 2014) (endorsing the outcome of the third International Conference on Small Island Developing States, a document titled "SIDS Accelerated Modalities of Action (SAMOA) Pathway"); Kelly Wyatt, *Escaping a Rising Tide: Sea Level Rise and Migration in Kiribati*, 1 ASIA & PAC. POL'Y STUD. 171, 172 (2013) (noting small-scale donor-funded adaptation projects).

13. Julie Jette, *Not a Pretty Picture: The Climate-Change Threat Faced by a Small Island Nation*, BRANDEISNOW (Mar. 23, 2017), <http://www.brandeis.edu/now/2017/march/tuvalu-sinking.html> (referencing statements by Aunese Makoi Simati, Tuvalu Ambassador to the United States and United Nations, about the population's heavy reliance on rice imports and noting New Zealand's structured immigration policy admitting seventy Tuvaluans annually) [<https://perma.cc/VBW7-KA28>]. Since 1987, Tuvalu has relied partly on income derived from contributions from Australia, Japan, Korea, New Zealand, and the United Kingdom, which created the Tuvalu Trust Fund. See *Tuvalu*, N.Z. FOREIGN AFF. & TRADE, <https://www.mfat.govt.nz/en/countries-and-regions/pacific/tuvalu/> (last visited June 3, 2018) [<https://perma.cc/3Z7E-VLCZ>].

14. See, e.g., *Pacific Quota Registrations Open Tuesday, 21 March 2017*, N.Z. IMMIGRATION, <https://www.immigration.govt.nz/about-us/media-centre/media-releases/pacific-quota-registrations-open> (last visited June 3, 2018) (allowing 1,100 Samoans, 250 Tongans and Fijians, and 75 I-Kiribati and Tuvaluan citizens ballot opportunities to seek residency in New Zealand) [<https://perma.cc/KV92-B7HK>]; see also U.N. UNIV. INST. FOR ENV'T & HUMAN SEC., CLIMATE CHANGE AND MIGRATION IN THE PACIFIC: LINKS, ATTITUDES, AND FUTURE SCENARIOS IN NAURU, TUVALU, AND KIRIBATI, https://i.unu.edu/media/ehs.unu.edu/news/11747/RZ_Pacific_EHS_ESCAP_151201.pdf (last visited June 3, 2018) (noting 1.3% of Kiribati's population moved internationally between 2005 and 2015, with 10% of Nauru's population, and 15% of Tuvalu's population doing the same within the same period) [<https://perma.cc/82EJ-VDHN>]; RICHARD CURTAIN ET AL., PACIFIC POSSIBLE: LABOUR MOBILITY: THE TEN BILLION DOLLAR PRIZE (2016), <http://pubdocs.worldbank.org/en/555421468204932199/pdf/labour-mobility-pacific-possible.pdf> (advocating structured migration for Pacific nations threatened by climate change) [<https://perma.cc/6YSV-8YV8>]; Leon Berkelmans & Jonathan Pryke, *The Development Benefits of Expanding Pacific Access to Australia's Labour Market*, LOWY INST. (Dec. 13, 2016), <https://www.lowyinstitute.org/publications/development-benefits-expanding-pacific-access-australias-labour-market> (noting "bleak" development prospects for Australia's neighboring Pacific Islands and the benefits of implementing structured migration plans) [<https://perma.cc/K4PX-48S7>].

15. *AD (Tuvalu)* [2014] NZIPT 501370-371 (June 4) at [30] (N.Z.). The tribunal specifically ruled that its decision need not be read in conjunction with appellants' legal claim as protected persons with refugee status. Because the ruling did not hinge on domestic or international legal obligations, the complementary protection principle of refugee law did not apply. See *id.* [1], [33].

arrived.¹⁶ However, case law and commentary consistently reject a connection between climate change and refugee status.¹⁷ This jurisprudence makes clear that legal thresholds supporting climate refugees as a protected legal class have not been crossed. The structure of international refugee law may make these thresholds functionally impossible to cross. International law does not legally accommodate border crossings caused by natural disasters, nor displacements caused by development projects, environmental degradation, or climate change.¹⁸ Gaps in the law constrict the identity of climate refugees and make them, at best, sociological refugees.¹⁹

16. See Kenneth R. Weiss, *Exile by Another Name*, 94 FOREIGN POL'Y 48, 51 (Jan./Feb. 2015) (discussing the emergence of the first climate refugees in 2011).

17. See Refugee Appeal No. 72185 [2000] NZRSAA 335 (Aug. 10) at [4], [16] (N.Z.); Refugee Appeal No. 72186 [2000] NZRSAA 336 (Aug. 10) at [4], [16] (N.Z.); Refugee Appeal Nos. 72189–72195 [2000] NZRSAA 355 (Aug. 17) at [4], [13] (N.Z.); Refugee Appeal Nos. 72179–72181 [2000] NZRSAA 385 (Aug. 31) at [14]–[15] (N.Z.); Refugee Appeal No. 72313 [2000] NZRSAA 491 (Oct. 19) at [13] (N.Z.); Refugee Appeal No. 72314 [2000] NZRSAA 492 (Oct. 19) at [13] (N.Z.); Refugee Appeal No. 72315 [2000] NZRSAA 493 (Oct. 19) at [13] (N.Z.); Refugee Appeal No. 72316 [2000] NZRSAA 464 (Oct. 19) at [13] (N.Z.). These cases were dismissed by the New Zealand Refugee Status Appeals Authority, the predecessor of New Zealand's Immigration and Protection Tribunal. For more on these cases and similar cases from Australia's Refugee Review Tribunal, see KELLY BUCHANAN, LAW LIBRARY OF CONGRESS, NEW ZEALAND: "CLIMATE CHANGE REFUGEE" CASE OVERVIEW (2015), <https://www.loc.gov/law/help/climate-change-refugee/new-zealand-climate-change-refugee-case.pdf> [<https://perma.cc/8N3U-FESB>]. To date, seventeen people from the Pacific, including eleven Tuvaluans and five I-Kiribati, have made refugee claims in New Zealand. Thirteen claims have been rejected because the refugee convention does not recognize climate change, and four claims are pending. See Ben Doherty & Eleanor Ainge Roy, *World Bank: Let Climate-Threatened Pacific Islanders Migrate to Australia or NZ*, GUARDIAN (May 8, 2017), <https://www.theguardian.com/environment/2017/may/08/australia-and-nz-should-allow-open-migration-for-pacific-islanders-threatened-by-climate-says-report> [<https://perma.cc/33AD-H7AR>]. For commentary, see Jane McAdam, *No "Climate Refugees" in New Zealand*, BROOKINGS INST. (Aug. 13, 2014), <https://www.brookings.edu/blog/planetpolicy/2014/08/13/no-climate-refugees-in-new-zealand/> (noting that the New Zealand Immigration and Protection Tribunal's decision in the *AD (Tuvalu)* case was not based on obligations stemming from international refugee or human rights law) [<https://perma.cc/X6QX-Y3UN>].

18. Susan F. Martin, *War, Natural Disasters, and Forced Migration*, in OXFORD HANDBOOK OF THE POLITICS OF INTERNATIONAL MIGRATION 53, 54 (Marc R. Rosenblum & Daniel J. Tichenor eds., 2012).

19. See *Teitiota v. Chief Executive of the Ministry of Business, Innovation & Employment* [2013] NZHC 3125 (Nov. 26) at [54] (N.Z.). In this heavily litigated and intensely observed case, a citizen of Kiribati appealed a ruling by New Zealand's Immigration and Protection Tribunal denying the applicant refugee status under § 129 of New Zealand's Immigration Act (2009). See *id.* [13]–[24]; see also *AF (Kiribati)* [2013] NZIPT 800413 (June 25) at [1]–[2]. The applicant had overstayed his work permit and claimed refugee status because he and his family were forced to leave Kiribati due to rising sea levels and environmental degradation. [2013] NZIPT 800413 [26]–[29]; [2013] NZHC 3125 [19]. The applicant also claimed protected status under the International Covenant on Civil and Political Rights. [2013] NZIPT 800413 [36]; [2013] NZHC 3125 [31]–[32]. New Zealand law incorporates the definition of refugee found in the 1951 Geneva Convention to the

The authoritative *United Nations High Commissioner for Refugees* (UNHCR) *Handbook on Procedures* holds, without exception, that international refugee protections “cannot come into play as long as a person is within the territorial jurisdiction of his home country.”²⁰ Yet, the former High Commissioner described persons uprooted by natural disasters who cross borders as subject to “serious protection gaps” and living “in a legal void.”²¹ Other circum-spect opinions have noted causal and temporal impediments to forging direct links between environmental events and displacement, while recognizing normative gaps in the international protection regime caused by climate-related human mobility.²² The effects of climate disasters often apply indiscriminately and are not based on grounds that trigger discrimination concerns,²³ or politi-

Status of Refugees (Refugee Convention) and its 1967 Protocol. See [2013] NZHC 3125 [4]. The High Court affirmed the Tribunal’s holding that the Refugee Convention could not be interpreted beyond the enumerated grounds conferring refugee status; at best, the applicant was a “sociological refugee.” [2013] NZHC 3125 [54]; [2013] NZIPT 800413 [52]. New Zealand’s Court of Appeal affirmed the High Court’s decision. See *Teitiota v. Chief Executive of the Ministry of Business Innovation & Employment* [2014] NZCA 173 (May 8) at [25] (N.Z.). The Supreme Court of New Zealand rejected the applicant’s leave to appeal against the Court of Appeal decision, affirming that the applicant “does not, if returned, face ‘serious harm’ and there is no evidence that the Government of Kiribati is failing to take steps to protect its citizens from the effects of environmental degradation to the extent that it can.” *Teitiota v. Chief Executive of the Ministry of Business, Innovation & Employment* [2015] NZSC 107 (July 20) [12] (N.Z.). However, the Supreme Court noted and affirmed observations by the Tribunal and the High Court that “their decisions did not mean that environmental degradation resulting from climate change or other natural disasters could never create a pathway into the Refugee Convention or protected person jurisdiction.” *Id.* [13].

20. U.N. REFUGEE AGENCY (UNCR), HANDBOOK AND GUIDELINES ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS UNDER THE 1951 CONVENTION AND THE 1967 PROTOCOL RELATING TO THE STATUS OF REFUGEES ¶ 88 (reissued 2011) (1979) [hereinafter UNHCR HANDBOOK].

21. Statement by Mr. António Guterres, U.N. High Commissioner for Refugees, Intergovernmental Meeting at Ministerial Level to Mark the 60th Anniversary of the 1951 Convention Relating to the Status of Refugees and the 50th Anniversary of the 1961 Convention on the Reduction of Statelessness (Dec. 7, 2011), <http://www.unhcr.org/en-us/admin/hcspeeches/4ecd0cde9/statement-mr-antonio-guterres-united-nations-high-commissioner-refugees.html> [<https://perma.cc/553Z-RDUW>]; see also Paul J. Govind & Robert R.M. Verchick, *Natural Disaster and Climate Change*, in INTERNATIONAL ENVIRONMENTAL LAW AND THE GLOBAL SOUTH 491, 491 (Shawkat Alam et al. eds., 2015) (noting policy-makers have been “slow to align the legal mechanisms confronting climate change and natural disaster.”).

22. See Walter Kälin & Nina Schrepfer, *Protecting People Crossing Borders in the Context of Climate Change Normative Gaps and Possible Approaches*, UNHCR LEGAL & PROTECTION POLICY RESEARCH SERIES 2–6, 31 (2012) (noting normative gaps in the regime of cross-border migration and causal problems establishing links between climate change and particular displacement events).

23. See *AF (Kiribati)* [2013] NZIPT 800413, *supra* note 19, [56].

cal accountability.²⁴ Absent an intentional and specific will to do harm—absent human agency—who is “being persecuted”?²⁵

This language problem calls into question the nomenclature of refugee law. The terms “climate refugee” and “environmental refugee” have been labeled “inaccurate and misleading”²⁶ for, inter alia, the following reasons: (i) pigeonholing environmentally displaced persons into categories that admit no protection; (ii) appropriating inchoate terminology that postdates the principal legal documents to which they anachronistically refer; (iii) simplistically reducing complex factors of migration to mono-causal environmental disruptions; and, (iv) irrationally promoting distinctions between Anthropogenic displacements and other natural disasters that presumably warrant the same need of protection.²⁷ International refugee law contains no agreed definition of climate displaced persons.²⁸ More generically, the term “migrant” remains undefined in international law.²⁹

The U.N. General Assembly convened a high-level plenary meeting to address the question of large movements of refugees and migrants.³⁰ Its recommended work product, the New York Declaration, noted problems of climate change and identified actions needed to ease pressures on host countries, enhance refugee self-reliance, expand access to third-country solutions, and support conditions in countries of origin.³¹ This so-called comprehensive refugee response framework launched a process whereby the High

24. See generally MICHAEL S. NORTHCOTT, A POLITICAL THEOLOGY OF CLIMATE CHANGE (2013) (writing on the faulty denial that politics influences climate).

25. See *AF (Kiribati)* [2013] NZIPT 800413, *supra* note 19, [54]; see also *infra* Part III.B.4.

26. NORWEGIAN REFUGEE COUNCIL, THE NANSEN CONFERENCE: CLIMATE CHANGE AND DISPLACEMENT IN THE 21ST CENTURY 19 (2011) (noting conclusions by Margareta Wahlström, Nansen Conference Chair and U.N. Special Representative of the Secretary-General for Disaster Risk Reduction); see also David Keane, *The Environmental Causes and Consequences of Migration: A Search for the Meaning of “Environmental Refugees”*, 16 GEO. INT’L ENVTL. L. REV. 209, 217 (2004) (noting the term “environmental refugee” has been labeled “meaningless and confusing”).

27. See Rafiqul Islam, *Climate Refugees and International Refugee Law*, in AN INTRODUCTION TO INTERNATIONAL REFUGEE LAW 215, 215–19 (Rafiqul Islam & Jahid Hossain Bhuiyan eds., 2013).

28. *Id.* at 217.

29. Jill I. Goldenziel, *Displaced: A Proposal for an International Agreement to Protect Refugees, Migrants, and States*, 35 BERKELEY J. INT’L L. 47, 49–50 (2017).

30. G.A. A/Res/71/1, New York Declaration for Refugees and Migrants (Sept. 19, 2016), http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/71/1 [<https://perma.cc/DY85-XVBK>].

31. See *id.* Annex I, ¶ 18 (detailing the goals of the so-called comprehensive refugee response framework).

Commissioner will propose a Global Compact on Refugees in his report to the United Nations in 2018,³² but this agreement will fall short of a binding treaty.³³ And, it does not shift focus away from the source of the persecution threat for forced migrations toward an assessment of the seriousness of the danger.³⁴

This Article addresses conceptual gaps in the regime structures governing human climate change dislocations for the sociological refugee. This Article asserts that climate change migration pressures will continue to confront the legal construction of refugee law, which structures the competency of refugee management in accordance with more acute migration concerns due to violence rather than the ultimately more problematic coming migrations due to environment.³⁵ This Article construes the conceptual gaps in refugee law as the product of European interwar thinking. This thinking configured the emerging biogeographics of European settlement along lines that meant to preserve the spatial integrity of states and then reset that same stage following European humanitarian and migration concerns after World War II.

To address these deficiencies, this Article reframes the discussion of gaps in refugee law, connecting the gaps to the less considered geospatial structure of international law. Viewing these problems from outside the regime of refugee law highlights the tensions mounting from within the regime in the Anthropocene.³⁶

This Article borrows from the ancient Greek concept of law or custom, encapsulated in the term *nomos*.³⁷ No usage of this term in international law and relations can avoid its adaptation by Carl Schmitt in his postwar reflection on world order.³⁸ Schmitt's usage of the term derived from the Greek word *nemein*, meaning "to divide" and "to pasture."³⁹ With a clear link to the philosophy of John Locke and Immanuel Kant, who associated cultivation and

32. *Global Compact on Refugees*, UN: REFUGEES & MIGRANTS, <http://refugeesmigrants.un.org/refugees-compact> (last visited June 3, 2018) [<https://perma.cc/8VUR-FSLN>].

33. Goldenziel, *supra* note 29, at 50.

34. See Joseph H. Carens, *Migration and Morality: A Liberal Egalitarian Perspective*, in *FREE MOVEMENT: ETHICAL ISSUES IN THE TRANSNATIONAL MIGRATION OF PEOPLE AND OF MONEY* 25 (Brian Barry & Robert E. Goodin eds., 1992).

35. See NICHOLAS STERN, *THE STERN REVIEW: THE ECONOMICS OF CLIMATE CHANGE* viii (noting insufficient attention to the urgency of climate change).

36. See Paul J. Crutzen, *Geology of Mankind*, 415 *NATURE* 23, 23 (2002) (introducing the term).

37. See *Nomos*, *ENCYC. BRITANNICA*, <https://www.britannica.com/topic/nomos-Greek-philosophy> (last visited June 3, 2018) [<https://perma.cc/488N-ALYB>].

38. See generally SCHMITT, *NOMOS*, *supra* note 1 (explaining the origins of the Eurocentric global order).

39. *Id.* at 70.

provisioning with proprietary entitlement,⁴⁰ Schmitt expounded on a concept of land appropriation (*Landnahme*) that he turned into a narrative on geopolitics and international law.⁴¹ Central to his lament was the breakdown of the great spatial *Jus Publicum Europæum*,⁴² which provided for state equality and relative stability within continental Europe between the sixteenth and twentieth centuries. He viewed its greatest advantage as the bracketing of violence to the competitive open spaces “beyond the lines” of Amity in the colonial world.⁴³ However, the grand early twentieth-century collapse of the *Jus Publicum Europæum* presented different spatial possibilities (*Großräumen*) for Schmitt⁴⁴; perhaps, none more porous than a suspect new form of world order, where, according to Jan-Werner Müller, “morality seemed to have stealthily crossed the border between prudent statecraft and a reckless ‘ethics of conviction.’”⁴⁵ Here, the idea of globalism, detached from territoriality,⁴⁶ could instantiate hegemonic rule in the guise of a disingenuous, even nihilistic liberalism. This liberalism pursued the rhetoric of a free economy, while normalizing the protec-

40. *Id.* at 47–48 (noting Locke’s and Kant’s association of legal order with land as a precondition).

41. See SCHMITT, NOMOS, *supra* note 1, at 42–49, 80–83; see also Anna Jurkevics, *Hannah Arendt Reads Carl Schmitt’s The Nomos of the Earth: A Dialogue on Law and Geopolitics from the Margins*, 16 EUR. J. POL. THEORY 345, 346 (2017) (describing Arendt’s critique that Schmitt’s geopolitics “both embraces conquest and repudiates imperialism”).

42. See SCHMITT, NOMOS, *supra* note 1, at 227 (lamenting the decline of the *Jus Publicum Europæum* “into a universal world law lacking distinctions . . . replaced by an empty normativism of allegedly recognized rules”); see also Martti Koskenniemi, *International Law as Political Theology: How to Read Nomos der Erde?*, 11 CONSTELLATIONS 492, 495 (2004) (“Schmitt did not hide his admiration for the *jus publicum europæum* . . .”).

43. See SCHMITT, NOMOS, *supra* note 1, at 92–94, 97, 99–100 (noting the “rationalization, humanization, and legalization—a bracketing—of war”). Schmitt regarded the bracketing of war as one of the great achievements of European international law. See *id.* at 187 (“The essence of European international law was the bracketing of war. . . . [Such wars] represent the highest form of order within the scope of human power.”); see also CLAUDIO MINCA & RORY ROWAN, ON SCHMITT AND SPACE 222 (2016) (paraphrasing Schmitt’s claim that the bracketing of European wars was “the tremendous achievement” of the *Jus Publicum Europæum*).

44. See SCHMITT, NOMOS, *supra* note 1, at 296 (noting the possibility of a plurality of *Großräumen* or a global claim to world power). In the book’s appendix, added by the translator and written by Schmitt after the completion of the book, Schmitt expounded on three possibilities on “where do we stand today?” Mark Antaki, *Carl Schmitt’s Nomos of the Earth*, 42 OSGOODE HALL L.J. 317, 322 (2004); SCHMITT, NOMOS, *supra* note 1, at 354–55. Those possibilities were a single victor in the dualism of East and West, a balance between the two, or an equilibrium of several independent *Großräume*. See *id.*

45. JAN-WERNER MÜLLER, A DANGEROUS MIND: CARL SCHMITT IN POST-WAR EUROPEAN THOUGHT 224 (2003).

46. Schmitt referred to the prevailing concept of global universalism as “lacking any spatial sense.” See SCHMITT, NOMOS, *supra* note 1, at 235.

tive tariff, most favored nation status, and colonial treaties⁴⁷—each an indirect method of exerting political influence.⁴⁸ To Schmitt, liberalism's *nomos* ignored territorial borders by supporting the rubric of universalism, while portaging the political triumph of the United States' *Großräumen*—expressed as the Monroe Doctrine⁴⁹—into the League of Nations Covenant.⁵⁰ The concrete order and logic of a European international law based on sovereignty and territoriality then gave way to an American *imperium* based on the Open Door policy, which secured for the United States access to the open space and emporium of Asia.⁵¹ Where liberalism had not been uprooted by imperial temptation, guiding principles of refugee law forwarded articulations on alienage (which limited the status of a refugee to an at-risk person who is “outside” of the country of origin). And, they refined the jurisprudence of refugee status based on other common *infra legem* (within the law) themes, such as well-founded fear, serious harm, failure of state protection, nexus to civil or political status, and *non-refoulement*⁵²—which is the bedrock principle preventing the return of lawful refugees to territories that place their life or liberty in jeopardy.⁵³ Adaptations to the status of the refugee underwent intense *praetor legem* (in supplement to the law) consideration, as indicated by protections extending to refugees *sur place* and the promulgation of the U.N. Guiding Principles on Internal Displacement.⁵⁴ While the resulting conventions on refugees omit express reference to displace-

47. *See id.* (discussing economic liberalism).

48. *See id.* at 255.

49. *See id.* at 235, 281 (identifying the Monroe Doctrine in terms of the Western Hemisphere and declaring it a *Großraum* in the sense of international law).

50. Article 21 of the League Covenant holds: “Nothing in this Covenant shall be deemed to affect the validity of international engagements, such as . . . regional understandings like the Monroe Doctrine, for securing the maintenance of peace.” League of Nations Covenant art. 21. Schmitt regarded this clause as an abandonment of the spatial relation between Europe and the Western Hemisphere and a nihilistic license for the United States to determine solely its application. *See* SCHMITT, *NOMOS*, *supra* note 1, at 254–55.

51. SCHMITT, *NOMOS*, *supra* note 1, at 292 (noting the “antiquated Monroe Doctrine was replaced by a demand for the ‘open door’ to the wide open spaces of Asia.”).

52. *See generally* JAMES C. HATHAWAY & MICHELLE FOSTER, *THE LAW OF REFUGEE STATUS* (2d ed. 1991) (presenting chapter-by-chapter discussions of refinements to major themes of refugee law).

53. *See* Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Aug. 30, 2005, U.N.Doc. A/60/316, ¶ 30 (referring to the “bedrock” prohibition against refoulement).

54. *See* Guiding Principles on Internal Displacement, UNHCR, U.N. Doc. E/CN.4/1998/53/Add.2 (2001), <http://www.unhcr.org/en-us/protection/idps/43ce1cff2/guiding-principles-internal-displacement.html> [<https://perma.cc/JL2K-ML4X>].

ment, the U.N. Convention on Climate Change addresses the “adverse effects of climate change,” including “deleterious effects . . . on human health and welfare,”⁵⁵ with reference to the “the specific needs and special circumstances of developing” countries,⁵⁶ and small island countries and low-lying coastal areas.⁵⁷ However, these indirect references to climate-induced migration—implicitly suggesting greater developed country responsibility toward areas disproportionately affected by hydrocarbon emissions and temperature-related change⁵⁸—face the challenge of Europe’s current migration crisis. Since 2015, Europe’s migration crisis has placed tremendous pressure on recipient countries’ capacity to accommodate the largest influx of dislocated refugees in the last thirty years.⁵⁹ Contemplation of the structural problem of migration and climate change is forestalled due to international law’s inability to reorient its spatial design away from the *nomos* of a liberal, European-based vision.

Part II discusses Schmitt’s spatial concept of *nomos* and its geopolitical and biogeographical origins. Part III applies Schmittian spatial perspectives to structural impediments facing international refugee law. These impediments include the collapsing *nomos* of statehood and temporal descriptions of the nature of the emergency in the Anthropocene, along with the partitioning (or bracketing) of the sociological refugee in ways that obscure the relationship between migrant and refugee. Schmitt viewed politics as a contingent, sociological category.⁶⁰ The political reduced to the fundamental relationship between friends and enemies,⁶¹ expressed by William Hooker as the “existential confrontation of one group against another.”⁶² Schmitt’s political world gave concrete expression and genuine meaning to this division, noting that the political arises not simply in terms of the actualization of conflict, but, borrowing from Thomas Hobbes’ state of nature, in its

55. United Nations Framework Convention on Climate Change, *supra* note 3, art. 1.1.

56. *Id.* art. 3.2.

57. *Id.* art. 4.8(a)–(b).

58. DANIEL BODANSKY, JUTTA BRUNNÉE & LAVANYA RAJAMANI, INTERNATIONAL CLIMATE CHANGE 314–325 (2017) (discussing displacement, migration, and responsibility).

59. Shekhar Aiyar et al., IMF, *The Refugee Surge in Europe: Economic Challenges*, Staff Discussion Note 4 (Jan. 2016).

60. See WILLIAM HOOKER, CARL SCHMITT’S INTERNATIONAL THOUGHT: ORDER AND ORIENTATION 14 (2009) (describing Schmitt’s politics as a contingent category).

61. See CARL SCHMITT, THE CONCEPT OF THE POLITICAL 26 (2007) (noting that political actions and motives can be reduced to the political distinction between friend and enemy) [hereinafter SCHMITT, CONCEPT].

62. HOOKER, *supra* note 60, at 15.

“ever present possibility.”⁶³ His conception of the state presupposed the concept of the political, which in turn, reduced to maintenance of the friend/enemy distinction as expressed “by an organized people in an enclosed territorial unit.”⁶⁴ Here, it is argued that liberalism’s ambivalence with international refugee law stems from the spatial grip of statehood, which cannot tolerate the broader construction of refugees that climate change necessitates due to the nihilistic consequences that this new *nomos* implies. Part IV references the recent 2015 European influx of refugees from war-torn African and Middle Eastern countries and places that influx in relation to added pressures on international refugee law caused by climate change. This Article concludes with a call for reorienting international refugee law toward a more mindful geospatial framework, not simply as a means of considering responses to the disappearing island state, but as a means of confronting the coming and greater challenges of the Anthropocene.

II. SCHMITT’S NOMOS AND ITS BIOGEOGRAPHICAL ORIGINS

The collapse of the Ottoman, Romanov, Hapsburg and Hohenzollern empires following World War I precipitated tremendous and enduring upheaval,⁶⁵ introducing stateless classifications of *Heimatlosen* or *apatrides* who “would not or could not assume the nationality of a successor state.”⁶⁶ The ensuing response to refugees authenticated this concretized, enclosed spatial ordering through treaties on minorities administered by the League of Nations.⁶⁷ However, with seven new states and two free territories to accommodate Europe’s new interwar map, in addition to “inextricably intermingled” migrations that had taken place with various Slavic, German, and Magyar migrations over the preceding millennium, “it proved impossible [for European framers] to draw any political frontier without creating a minority somewhere.”⁶⁸ Due to a massive spatial reordering of boundaries, Europe’s predictably inadequate response to questions on minorities after the Great War lumped together about thirty percent of its roughly 100 mil-

63. SCHMITT, CONCEPT, *supra* note 61, at 34.

64. *See id.* at 19.

65. *See* MICHAEL R. MARRUS, THE UNWANTED: EUROPEAN REFUGEES IN THE TWENTIETH CENTURY 52 (1985).

66. *Id.* at 70.

67. *See generally* Peter Hilpold, *The League of Nations and the Protection of Minorities—Rediscovering a Great Experiment*, 17 MAX PLANCK Y.B. U.N. L. 87, 124 (2013) (reviewing the imperfect minority protection system created by the League of Nations).

68. JOSEPH B. SCHECHTMAN, EUROPEAN POPULATION TRANSFERS: 1939–1945 4 (1946).

lion inhabitants into the exceptional category of protection afforded by minorities treaties.⁶⁹ Hannah Arendt forcefully connected this response to *The Origins of Totalitarianism* (1951).⁷⁰ Michael Marrus charted in *The Unwanted* (1985) the intersectional crisscrossing of nationalities dislodged by the postwar Versailles line drawing. The implacable duration⁷¹ and scale of normalizing millions of people outside the full scope of statehood's protective shell presented new challenges in the history of Europe.⁷²

Political sociologist Didier Bigo wrote of liberalism's response—the governmentalization of global security networks predicated on the need to manage “emergent unease.”⁷³ Under the watchful eye of a new panopticon, fortified by domestic and international juridical protections of the transversal field, liberalism created a “ban-opticon *dispositif*.”⁷⁴ This *dispositif* contained the spread of unease and spatial disorder through a practice of exceptionalism, acts of profiling and containing foreigners, and a normalization of the idea of free movement within Europe.⁷⁵ Together, these responses created a new logic of free circulation for some, while trapping others in “the local.”⁷⁶ Modern refugee law—which restricted protections to those bracketed persons fleeing persecution (but within the European line of Amity)—was born within this spatial reordering of Europe, as minimally suggested by the widespread introduction and use of passports during the early interwar period.⁷⁷

69. See HANNAH ARENDT, *THE ORIGINS OF TOTALITARIANISM* 270, 271 (1966).

70. See generally *id.*

71. See MARRUS, *supra* note 65, at 5 (noting the extraordinary duration of displacement in the post-1918 period).

72. See ARENDT, *supra* note 69, at 275. Arendt noted, “*de jure* [the minorities] belonged to some political body” but the special treaties and guarantees of displaced peoples set the stage for disputes over secondary rights such as language, culture, residence, and mobility, making stateless persons “the most symptomatic group” in the contemporary politics of her time and the category a relentless European problem that could not be renormalized. *Id.* at 276–77.

73. See generally Didier Bigo, *Globalized (in)Security: The Field and the Ban-Opticon*, in *TERROR, INSECURITY AND LIBERTY: ILLIBERAL PRACTICES OF LIBERAL REGIMES AFTER 9/11*, 10–48 (Didier Bigo & Anastassia Tsoukala eds., 2008).

74. *Id.* at 10 (defining the ban-opticon *dispositif* as the “governmentality of unease”).

75. *Id.*

76. *Id.* at 31–32, 36 (“trapped in the local”).

77. See MARRUS, *supra* note 65, at 92 (noting the widespread introduction of the passport and quoting Paul Fussell's description of the compulsory photograph, a “most egregious little modernism” in the 1920s).

A. *Why the Persecution Emphasis?*

Associating persecution status with the term “refugee” has an engrained European history. While normal human adaptive strategy implies a long history of moving in response to environmental necessity,⁷⁸ an institutional societal response to forced cross-border movements began after World War I.⁷⁹ The disintegration of multiethnic empires created a widespread statelessness problem across Europe,⁸⁰ particularly from Russia,⁸¹ then Armenia, and later Assyria.⁸² Based on appeals from the International Red Cross, organizations such as the High Commission for Refugees under the direction of Fridtjof Nansen arose within the framework of the League of Nations. Its affiliate, the International Labor Organization, also assumed material, legal, and political duties between 1924 and 1929.⁸³

Guarded European responses to human dislocations had already begun to attach individual, juridical, and social constructions to the idea of the refugee.⁸⁴ Situationally specific conceptualizations

78. See JANE McADAM, CLIMATE CHANGE, FORCED MIGRATION, AND INTERNATIONAL LAW 1 (2012) [hereinafter McADAM, CLIMATE CHANGE]. McAdam notes that the notion of an ecological refugee first appeared in 1948 and officially derives from a 1985 U.N. Environment Programme report. *Id.* at 39.

79. Rafiqul Islam, *The Origin and Evolution of International Refugee Law*, in AN INTRODUCTION TO INTERNATIONAL REFUGEE LAW 13, 13 (Rafiqul Islam & Jahid Hossain Bhuiyan eds., 2013) (noting the origins of the institutionalization of refugee protection).

80. *Id.* at 14–15.

81. Luise W. Holborn, *The Legal Status of Political Refugees, 1920–1938*, 32 AM. J. INT'L L. 680, 681 (1938) (noting that Russians formed the largest postwar group of political refugees). In addition to his appointment in 1920 as League of Nations High Commissioner for Prisoners of War, Nansen was appointed as High Commissioner for Russian Refugees in 1921. Nansen renamed the office High Commissioner for Refugees in 1923. *Refugees Mixed Archival Group (Nansen Fonds), 1919–1947 (Fonds)*, U.N. ARCHIVES, <http://biblio-archiv.unog.ch/report.aspx?rpt=1&id=256> (last visited June 3, 2018) [<https://perma.cc/K3Y9-A3DR>].

82. See *Nansen International Office for Refugees – History*, NOBELPRIZE.ORG, http://www.nobelprize.org/nobel_prizes/peace/laureates/1938/nansen-history.html (last visited June 3, 2018) [<https://perma.cc/QD9L-Z2QF>]. Arendt's catalog of interwar refugees included “millions of Russians, hundreds of thousands of Armenians, thousands of Hungarians, hundreds of thousands of Germans, and more than half a million Spaniards—to enumerate only the most important categories.” ARENDT, *supra* note 69, at 278.

83. See *Nansen International Office for Refugees – History*, *supra* note 82.

84. James C. Hathaway, *The Evolution of Refugee Status in International Law: 1920–1950*, 33 INT'L & COMP. L.Q. 348, 348–50 (1984) (defining three distinct trends in refugee definition: the juridical (treating refugees as groups of persons outside their state of origin, 1920–1935), the social (defining refugees as “helpless casualties of broad-based social or political occurrences,” 1935–1939), and the individualist (defined by a person escaping from perceived injustice, 1938–1950)).

of refugees arose.⁸⁵ The discursive construction of refugee law developed in response to the political disenfranchisement from the benefits of nationality. It arose as a form of surrogate protection.⁸⁶ Part of this guardianship stemmed from the reluctance of European powers to adopt nationality law reforms incorporating citizenship as a matter of birthright (*jus soli*).⁸⁷ Biologicistic theories of state and society oriented toward homogeneity and uniformity, identifying the state population as a geno group.⁸⁸ By 1912, nationality law reforms had taken place in France and the United Kingdom, followed by Germany⁸⁹; however, they were increasingly inclined toward protecting the *jus sanguinis*, which established nationality based on the citizenship of the parents and not by birth-place.⁹⁰ Prussian annexations of Polish territory in the late eighteenth century had, by the early twentieth century, dislodged one million Polish nationals within imperial German control.⁹¹ Fortifying the *jus sanguinis* became an important means of segregating the status and impeding the mobility of Polish migrants within Prussia,⁹² and other peoples across Europe.

James Hathaway noted that an emphasis on persecution emerged in the period from 1938 to 1950.⁹³ Described as a departure from narrow national interest,⁹⁴ the 1938 Convention Concerning the Status of Refugees Coming From Germany⁹⁵ framed the idea of the refugee “in terms that judged the government of

85. CATHERINE PHUONG, *THE INTERNATIONAL PROTECTION OF INTERNALLY DISPLACED PERSONS* 16 (2004).

86. David James Cantor, *Defining Refugees: Persecution, Surrogacy and the Human Rights Paradigm*, in *HUMAN RIGHTS AND THE REFUGEE DEFINITION: COMPARATIVE LEGAL PRACTICE AND THEORY* 349, 354 (Bruce Burson & David James Cantor eds., 2016).

87. Charline Becker, *Jus Soli: A Miraculous Solution to Prevent Statelessness?*, EUR. NETWORK ON STATELESSNESS (Apr. 9, 2015), <https://www.statelessness.eu/blog/jus-soli-miraculous-solution-prevent-statelessness> (noting Europe’s historical aversion to the *jus soli* principle) [<https://perma.cc/8TGA-VDRK>].

88. HARALD KLEINSCHMIDT, *PEOPLE ON THE MOVE: ATTITUDES TOWARD AND PERCEPTIONS OF MIGRATION IN MEDIEVAL AND MODERN EUROPE* 226 (2003).

89. *Id.* at 227 (noting nationality law reforms in Western Europe).

90. *See id.* at 228 (noting, specifically, Germany’s legislative acts to protect the *jus sanguinis*).

91. *See id.* at 230 (noting the twentieth-century effects of the Prussian imperial annexation of Poland and other areas of Eastern Europe).

92. *See id.* (noting administrative means to oppose Polish immigrants’ acquisition of German nationality).

93. Jane McAdam, *Rethinking the Origins of ‘Persecution’ in Refugee Law*, 25 INT’L J. REFUGEE L. 667, 670 (2014).

94. Islam, *supra* note 79, at 16.

95. Convention Concerning the Status of Refugees Coming from Germany, Feb. 10, 1938, 4461 L.N.T.S. 59.

the refugee-producing state.”⁹⁶ The refugee concept began to transmute from a group-based understanding to a more personalized, individual concept that brought the refugee into fundamental incompatibility with the persecuting home government.⁹⁷ Jane McAdam argued that an implicit persecution nexus influenced the creation of all international legal instruments regarding refugees from the 1920s onwards.⁹⁸ For her, the idea of persecution became the defining feature of the refugee.⁹⁹ Either assessment bore a dominant European impress. From its inception, the protection regime for refugees displayed Eurocentric design to guard the *nomos* of western territorial sovereignty.¹⁰⁰

B. *Telluric Underpinnings*

Emerging challenges of a new kind, wrought by the tip-of-the-iceberg problem of the *physically* disappearing state, again underscore the unreconciled spatial disorder and juridical unease within refugee law. These components signify a retrenchment of international law, formulated as a *cordon sanitaire*,¹⁰¹ to shield the inadequacies of the liberal state-centric order from its impending climate challenges.¹⁰² Never remediated by interwar birth defects regarding minorities, widening challenges besetting the refugee in the Anthropocene prompt the consideration of latent, telluric underpinnings of sovereignty, which work to maintain the lacunae in international refugee law.

With use of metaphor, analogy, history, and “an abundance of physical inscriptions,”¹⁰³ perhaps no modern theorist of interna-

96. Islam, *supra* note 79, at 16 (“origin and evolution of international refugee law”).

97. Hathaway, *supra* note 84, at 370.

98. McAdam, *supra* note 93, at 667.

99. *Id.* at 668.

100. Islam, *supra* note 79, at 14–15; see also Bonnie Docherty & Tyler Giannini, *Confronting a Rising Tide: A Proposal for a Convention on Climate Change Refugees*, 33 HARV. ENVTL. L. REV. 349, 362 (2009) (noting that the Refugee Convention was drafted in the wake of World War II and that some commentators argue that its definition was oriented toward protecting civil and political rights, not persons forced to relocate for environmental reasons).

101. OXFAM, BEYOND ‘FORTRESS EUROPE’: PRINCIPLES FOR A HUMANE EU MIGRATION POLICY (2017), https://d1tn3vj7xz9fdh.cloudfront.net/s3fs-public/file_attachments/bp-principles-humane-eu-migration-policy-111017-en.pdf (criticizing European migration policy retrenchment) [<https://perma.cc/X2KX-JGC7>].

102. *Should International Refugee Law Accommodate Climate Change?*, U.N. NEWS (July 3, 2014), <http://un.org.au/2014/07/04/un-news-feature-should-international-refugee-law-accommodate-climate-change/> (calling into question the political will to begin climate change discussions in relation to refugees) [<https://perma.cc/U9CA-M98Z>].

103. François Debrix, *The Virtual Nomos?*, in SPATIALITY, SOVEREIGNTY AND CARL SCHMITT: GEOGRAPHIES OF THE NOMOS 220, 220 (Stephen Legg ed., 2011).

tional relations invigorated a closer connection of international law to the earth than Schmitt. He employed the term *nomos* to represent “true law,” which developed in an enclosed location bound to the soil (*Boden*).¹⁰⁴ Law creation was a process of land appropriation, whereby “soil that is cleared and worked by human hands manifests firm lines, whereby definite divisions become apparent. Through the demarcation of fields, pastures, and forests, there lines are engraved and embedded In these lines, the standards and rules of cultivation of the earth become discernable.”¹⁰⁵ *Nomos* was “the immediate form in which the political and social order of a people becomes spatially visible”; he regarded *nomos* as “the *measure* by which the land in a particular order is divided and situated.”¹⁰⁶ If separated from its concrete, telluric character, *nomos* loses its “orientation,” and results in “nihilism.”¹⁰⁷ Nihilism expresses a form of legal normativity that separates *is* and *ought* and relies on abstractions that disregard the spatial structure of a concrete order.¹⁰⁸ As Mark Antaki noted: “Norms without a *nomos* do not constitute law proper. Laws cannot be understood as mere oughts detached from time and place.”¹⁰⁹ As Mika Ojakangas summarized, to Schmitt, law could never be universal as it “exists only in a particular place and consists of what is within its own boundaries.”¹¹⁰ “True and authentic fundamental order [*nomos*] is based, at its essential core, on certain spatial limits and delimitations, on certain measures and a certain partitioning up of the earth.”¹¹¹

C. A Variety of Meanings

Schmitt’s spatial and political writings have generated keen interest among critical scholars,¹¹² particularly critics of liberalism’s value-oriented project, which professes Enlightenment principles

104. Mika Ojakangas, *Carl Schmitt and the Sacred Origins of Law*, 147 *TELOS* 34, 35 (2009).

105. SCHMITT, *NOMOS*, *supra* note 1, at 42.

106. *Id.* at 70.

107. *Id.* at 66.

108. *See id.* at 69.

109. Antaki, *supra* note 44, at 322.

110. Ojakangas, *supra* note 104, at 37.

111. *Id.* at 37 (quoting Schmitt’s *LAND AND SEA*, translation modified).

112. *See* Claudio Minca & Rory Rowan, *The Question of Space in Carl Schmitt*, 39 *PROGRESS HUM. GEOGRAPHY* 268, 269 (2014) (noting the reapportionment of Schmitt’s spatial concepts by the Left and his critique of neoliberal ideology). *But see* Mark Neocleous, *Friend or Enemy? Reading Schmitt Politically*, *RADICAL PHIL.*, Sept/Oct 1996, at 21 (chastising socialist theorists for utilizing Schmitt’s anti-liberalism teachings and turning him into a debating adversary).

of universal citizenship but expresses instead contradictions that promote its own kind of imperialism.¹¹³ German social and political philosopher Jürgen Habermas noted that Schmitt's persona "represents a division in the intellectual world."¹¹⁴ Writing in 1989, Habermas did not think Schmitt's writings would have "a similar power of contagion in the Anglo-Saxon world" as they generated in continental discussions.¹¹⁵ Two decades later, Benno Teschke labeled that prediction "naïve."¹¹⁶ By 2000, Raphael Gross claimed that bibliographic material on Schmitt would "require a book of its own."¹¹⁷ Habermas' lengthy intellectual engagement with Schmitt "would ultimately recognize as meritorious his diagnosis of the interaction of international law and international politics."¹¹⁸ Teschke called Schmitt's principal text on international law, *Nomos of the Earth*, a "modern classic on the executive state," as well as a screed against Kantian liberal universalism.¹¹⁹ Elements of Schmitt's constitutional theory (*Verfassungslehre*) caught the attention of Ernst-Wolfgang Böckenförde, the distinguished constitutional scholar and former judge of Germany's Federal Constitutional Court (*Bundesverfassungsgericht*).¹²⁰ Schmitt's work also has informed Reinhart Koselleck's approach to conceptual history (*Begriffsgeschichte*)¹²¹ and Giorgio Agamben's political thought.¹²² Schmitt's multi-faceted political and spatial theories,

113. See, e.g., Seyla Benhabib, *Carl Schmitt's Critique of Kant: Sovereignty and International Law*, 40 POL. THEORY 688–713 (2012); HOOKER, *supra* note 60; Roland Axtmann, *Humanity or Enmity? Carl Schmitt on International Politics*, 44 INT'L POL. 531, 531–51 (2007); Martti Koskeniemi, *International Law as Political Theology: How to Read Nomos der Erde?*, 11 CONSTELLATIONS 492–511 (2004).

114. Jürgen Habermas, *The Horrors of Autonomy: Carl Schmitt in English*, in THE NEW CONSERVATISM: CULTURAL CRITICISM AND THE HISTORIANS' DEBATE 128 (Shierry Weber Nicholson ed. & trans., 1989).

115. *Id.* at 135.

116. Benno Teschke, *Decisions and Indecisions: Political and Intellectual Receptions of Carl Schmitt*, 67 NEW LEFT REV. 61, 61 (2011).

117. RAPHAEL GROSS, CARL SCHMITT AND THE JEWS: THE "JEWISH QUESTION," THE HOLOCAUST, AND GERMAN LEGAL THEORY 3 (Joel Golb trans., 2007).

118. Roberto Orsi, *Rethinking the Concept of Order in International Politics: Carl Schmitt and Jürgen Habermas*, at 220 (Oct. 2012) (unpublished Ph.D. dissertation, London School of Economics and Political Science), available at http://etheses.lse.ac.uk/750/1/Orsi_rethinking_concept_order.pdf [<https://perma.cc/2NJU-AEPJ>].

119. Teschke, *supra* note 116, at 62.

120. See ERNST-WOLFGANG BÖCKENFÖRDE, STATE, SOCIETY AND LIBERTY: STUDIES IN POLITICAL THEORY AND CONSTITUTIONAL LAW 89 (J.A. Underwood trans., 1991) (outlining Schmitt's constitutional theory separating constitutional and parliamentary monarchy).

121. See, e.g., Niklas Olsen, *Carl Schmitt, Reinhart Koselleck and the Foundations of History and Politics*, 37 HIST. EUR. IDEAS 197, 197 (2011).

122. See generally GIORGIO AGAMBEN, HOMO SACER: SOVEREIGN POWER AND BARE LIFE (Daniel Heller-Roazen trans., 1995).

apart from his abhorrent personal beliefs and Axis-power association, resonate across a wide spectrum.¹²³ Neo-conservatives read him for his embrace of executive authority beyond the bounds of the constitutional order during times of emergency (“Sovereign is he who decides on the [state of exception]”).¹²⁴ Realists read him for his concept of the political, which polemicizes against liberalism’s treatment of concrete threats as competitions or debating adversaries,¹²⁵ as well as for his concrete depiction of the friend/enemy distinction, which rationalizes the public enemy as *hostis* (who must be dealt with as an equal adversary) as distinct from the private “adversary whom one hates” (*inimicus*).¹²⁶ Ethicists and Christian theologians focus on his depoliticized construct of global civil society, technocratic capitalism’s abnegation of personhood, and the “anomic borderlessness” caused by humanity’s displacement from nature.¹²⁷ International relations scholars read him for his reconstruction of grand history.¹²⁸ Geographers read him for his keen sense of spatial vision, noting that his “unique ‘spatial history’ of modernity” and geopolitics have relevance “in light of growing climate crisis.”¹²⁹ This geographical formulation of inter-

123. See Matilda Arvidsson, Leila Brännström & Panu Minkkinen, *Editors’ Introduction*, in *THE CONTEMPORARY RELEVANCE OF CARL SCHMITT: LAW, POLITICS, THEOLOGY* 1, 5 (Matilda Arvidsson et al. eds., 2016) (reviewing Schmitt’s widely divergent academic appeal); Christian J. Emden, *The Brilliant Fascist? Carl Schmitt and the Limits of Liberalism*, *H-NET REVIEWS* 1 (2005), <https://www.h-net.org/reviews/showpdf.php?id=10599> (reviewing scholarship on Schmitt and noting serious questions posed by Schmitt “for any discussion of liberalism and parliamentary democracy” in view of the historical and political distance separating his repulsive personal views) [<https://perma.cc/LUC8-XHQN>]; PAUL EDWARD GOTTFRIED, *CARL SCHMITT: POLITICS AND THEORY* 2 (1990) (referencing “cross-political support” for Schmitt’s scholarship in Spanish and German journals such as *Razón Española* and *Criticon*, his “mark on the political Left as well as on the political Right” in Italy and France, and his impress on influential political theorists such as Norberto Bobbio, Carlo Galli and Frankfurt-styled Marxists, including editors of *Telos*, who began circulating his views of the “decreptitude of bourgeois society” in the late 1980s).

124. CARL SCHMITT, *POLITICAL THEOLOGY: FOUR CHAPTERS ON THE CONCEPT OF SOVEREIGNTY* 5 (George Schwab trans., 1985). This famous expression forms the core of Schmitt’s theory of decisionism, the belief that political action forms a value in itself and that exigent situations create their own legality by obviating normative law. See JEFFREY HERF, *REACTIONARY MODERNISM: TECHNOLOGY, CULTURE, AND POLITICS IN WEIMAR AND THE THIRD REICH* 44 (1984).

125. See SCHMITT, *THE CONCEPT OF THE POLITICAL*, *supra* note 61, at 28.

126. *Id.*

127. See, e.g., NORTHCOTT, *supra* note 24, at 304–05; see also BRUNO LATOUR, *FACING GAIA: EIGHT LECTURES ON THE NEW CLIMATIC REGIME* 228 (Catherine Porter trans., 2017) (especially the seventh lecture section “On the proper dosage of Carl Schmitt”).

128. See, e.g., Benno Gerhard Teschke, *Fatal Attraction: A Critique of Carl Schmitt’s International Political and Legal Theory*, 3 *INT’L THEORY* 179–227 (2011).

129. Minca & Rowan, *supra* note 112, at 271; see also CLAUDIO MINCA & NICK VAUGHAN-WILLIAMS, *Carl Schmitt and the Concept of the Border*, 17 *GEOPOLITICS* 756–72 (2012); Robert

national law will prove significant in the Anthropocene, as it explains liberalism's inability to close gaps in international refugee law.

Schmitt professed that he should be read as a jurist,¹³⁰ ineluctably orienting international law toward the political and spatial. He ascribed "a central place to the geographical and territorial situatedness of law."¹³¹ His spatial vision provides an alternative framework for critiquing the limits of refugee law, which seemingly abides by its own limitations and contradictions involving the *unwanted*. It is here, at the interface of international law and geography, that climate change is reordering the law and politics of space as applied to human migration.

Care must be taken with the application of Schmittian spatial analyses to climate change. Deplored as the "Crown Jurist" of the Third Reich,¹³² Schmitt's association with National Socialism makes him one of the most controversial figures in twentieth-century legal studies.¹³³ Yet his critique of liberalism and its complicity in the construction of undifferentiated (*raumlose*) universalist values reveals the unreconciled tensions at the base of refugee law.¹³⁴ One need not rehabilitate Schmitt from his problematic views to

Meyer, Conrad Schetter & Janosch Prinz, *Spatial Contestation? The Theological Foundations of Carl Schmitt's Spatial Thought*, 43 *GEOFORUM* 687, 687–96 (2012). Schmitt's spatiality is the subject of an edited collection of essays emerging from the 2009 Annual Meeting of the Association of American Geographers. See *SPATIALITY, SOVEREIGNTY AND CARL SCHMITT: GEOGRAPHIES OF THE NOMOS* xiii (Stephen Legg ed., 2011) (noting the product of the 2009 meeting).

130. Louiza Odysseos & Fabio Petito, *Carl Schmitt*, in *CRITICAL THEORISTS AND INTERNATIONAL RELATIONS* 305, 306 (Jenny Edkins & Nick Vaughan-Williams eds., 2009).

131. WILLIAM E. SCHEUERMAN, *CARL SCHMITT: THE END OF LAW* 164 (1999).

132. See REINHARD MEHRING: *CARL SCHMITT: A BIOGRAPHY* 391 (quoting Ernst Jünger's 1943 diary entry). Schmitt's public association with the Nazi Party was announced on May 1, 1933, with his inaugural lecture at Cologne University. Schmitt moved to Cologne to teach next to his intellectual adversary, Hans Kelsen, but on his arrival, Kelsen had already been placed "on leave." See *id.* 294–95. Kelsen had voted in favor of Schmitt's appointment to the Cologne law faculty in May 1932, based on Schmitt's undeniable brilliance. OONA A. HATHAWAY & SCOTT J. SHAPIRO, *THE INTERNATIONALISTS: HOW A RADICAL PLAN TO OUTLAW WAR REMADE THE WORLD* 230–32 (2017). After Kelsen's dismissal, all members of the faculty signed a protest letter, except Schmitt. *Id.* at 233. Schmitt organized the anti-Semitic conference of jurists calling for the elimination of Jewish influences in German law and was detained, interrogated, and released by American authorities who had considered putting him in the docket at Nuremberg. See HOOKER, *supra* note 60, at xiii.

133. See GROSS, *supra* note 117, at 3 (noting Schmitt's "reputation for brilliance" and calling Schmitt "[p]ossibly the most-discussed German jurist of the twentieth century . . . certainly the most controversial.").

134. See Carl Schmitt, *Großbraun versus Universalism: The International Legal Struggle Over the Monroe Doctrine*, in *SPATIALITY, SOVEREIGNTY AND CARL SCHMITT: GEOGRAPHIES OF THE NOMOS* 47 (Stephen Legg ed., Matthew Hannah trans., 2011).

acknowledge that consideration of his “prescient and perceptive observations . . . speak directly to the ironies” of the post-Cold War world.¹³⁵ Indeed, Schmitt’s trenchant interest in the idea of *Großraum*¹³⁶—defined as a “great space,” but more intended to mean sphere of influence or geopolitical space¹³⁷—continues to inform critical international legal circles. Schmitt forcefully applied geography to international law, admitting (“as every geographer knows”) that cartography, when instrumentalized, can become “highly political.”¹³⁸ He focused on this point in the context of the Monroe Doctrine in the Western hemisphere, and as his critics would assert,¹³⁹ in association with the virulent darker geography of the Nazi idea of *Lebensraum*.¹⁴⁰

D. The Dynamics of Biogeography

The dynamics of biogeography have long been understood to combine biological, geographical, and anthropological environmental conditions that shape the spatial needs of human populations.¹⁴¹ The field developed from the late nineteenth-century

135. Michael Heffernan, *Mapping Schmitt, in* SPATIALITY, SOVEREIGNTY AND CARL SCHMITT: GEOGRAPHIES OF THE NOMOS 234, 234 (Stephen Legg ed., 2011); see also Ernst-Wolfgang Böckenförde, *Carl Schmitt Revisited*, 109 TELOS 81, 83 (1996) (on the separation of Schmitt’s personal views from his scholarship and the objectivity gained and imparted, by no means uncritical, in the examination of his political theology as viewed from a distance); Teschke, *supra* note 116, at 61 (on reasons surrounding “a less restrictive rehabilitation” of Schmitt’s intellectual thought in the Anglosphere); MÜLLER, *supra* note 45, at 2 (calling Schmitt one of the “most notorious modern intellectuals” and investigating “why his thought has meant *so much* and *so many seemingly contradictory things to so many*” (internal quotations omitted)); CARLO GALLI, JANUS’S GAZE: ESSAYS ON CARL SCHMITT (Adam Sitze ed., Amanda Minervini trans., 2015) (assessing his contributions and faults).

136. See generally CARL SCHMITT, VÖLKERRECHTLICHE GROSSRAUMORDNUNG MIT INTERVENTIONSVERBOT FÜR RAUMFREMDE MÄCHTE: EIN BEITRAG ZUM REICHSBEGRIFF IM VÖLKERRECHT (1939).

137. Stuart Elden, *Reading Schmitt Geopolitically: Nomos, Territory and Großraum*, 161 RADICAL PHILOSOPHY 18, 19 (2010); see also MONTSERRAT HERRERO, THE POLITICAL DISCOURSE OF CARL SCHMITT: A MYSTIC OF ORDER 127 (2015) (“sphere of organization”); HOOKER, *supra* note 60, at 4 (regarding the *Grossraumordnung* as “a pluriverse of continental empires”).

138. SCHMITT, NOMOS, *supra* note 1, at 88.

139. *Id.*; see also HERF, *supra* note 124, at 26 (on the politicization of *Le[b]ensphilosophie*, or the “philosophie of life”); *id.* at 44–46 (on Schmitt’s admiration of the authoritarian state and his contributions to reactionary modernism); Richard Wolin, *Carl Schmitt: The Conservative Revolution and the Aesthetics of Horror*, 20 POL. THEORY 424, 424 (1993).

140. See Trevor J. Barnes & Claudio Minca, *Nazi Spatial Theory: The Dark Geographies of Carl Schmitt and Walter Christaller*, 103 ANNALS ASS’N AM. GEOGRAPHERS 669–87 (2013) (noting that many people contributed to the “geographical vision of Nazism” in addition to the concept of *Lebensraum*, including Schmitt).

141. C. Abrahamsson, *On the Genealogy of Lebensraum*, 68 GEOGRAPHICA HELVETICA 37, 39 (2013).

German scholarship of Friedrich Ratzel, who was heavily influenced by Darwin's *On the Origin of Species* (1860),¹⁴² and the earlier, organic structuration of the earth's natural features by geographer, Karl Ritter.¹⁴³ Swedish constitutional lawyer, Rudolf Kjellén—who formalized Ratzel's teachings into the concept of “geopolitics”¹⁴⁴—and Karl Haushofer¹⁴⁵ profoundly shaped early twentieth-century conceptions of sovereignty and state formation by systematizing bio-organic attributes of statehood into “a dualistic view of power determined by geographical position.”¹⁴⁶ Haushofer deeply suspected international law's ability to supplant primordial organicist influences with liberalism's ideological and institutional preference for the League of Nations as a new, institutionalized *Großraumordnung*.¹⁴⁷ Haushofer's *Raum* studies would do virulent disservice to the concept because of his association with biological racism and National Socialism's cooptation of the concept of *Lebensraum* as a justification for territorial aggrandizement.¹⁴⁸ The concept would problematically intrigue Carl Schmitt as a distinctly political idea.¹⁴⁹ Schmitt's lecture on *Großraum*, delivered weeks after the Nazi invasion of Czechoslovakia, contributed to his moniker as *Kronjurist* to the Third Reich.¹⁵⁰ His politicization of *Raum* studies informed his influential attack against liberal cosmopolitanism,¹⁵¹ which drew interest from critical legal circles because of his

142. Friedrich Ratzel, *Über den Lebensraum: Eine biogeographische Skizze*, 21 DIE UMSCHAU 363–67 (1897); FRIEDRICH RATZEL, POLITISCHE GEOGRAPHIE (1897).

143. CARL RITTER, DIE ERDKUNDE IM VERHÄLTNIS ZUR NATUR UND ZURE GESCHICHTE DES MENSCHEN (1817).

144. See also Rudolf Kjellén, *Studier ofver Sveriges politiska gränser*, 19 YMER 183, 331 (1899); RUDOLF KJELLÉN, DER STAAT ALS LEBENSFORM (1917).

145. Benno Teschke, *Geopolitics*, 14 HIST. MATERIALISM 327, 327 (2006); KARL HAUSHOFER ET AL., BAUSTEINE ZUR GEOPOLITIK (1928).

146. Teschke, *supra* note 145, at 327.

147. *Id.*

148. The vulgarization of *Raum* studies also had much to do with Haushofer's mentee, Hitler's Deputy Führer, Rudolf Hess. See JOSEPH J. BENDERSKY, CARL SCHMITT: THEORIST FOR THE REICH 252 (1983).

149. *Id.* at 252–53.

150. Charles E. Frye, *Carl Schmitt's Concept of the Political*, 28 J. POLITICS 818, 818 (1966) (noting Schmitt was “widely known as the Crown Jurist of the Third Reich”).

151. See generally SCHMITT, *NOMOS*, *supra* note 1 (explaining the origins of the Eurocentric global order). Schmitt's English language translator, G.L. Ulmen, and Paul Piccone, the editor of the journal, *Telos*, which principally refigured Schmitt as a thinker of great importance to critical studies, noted that the “ecumenical world order” as embodied by the League of Nations and later world order enthusiasts, attempted to deploy a universalist system after World War I that criminalized enemies, making it impossible to recognize the other side as an equal. See Paul Piccone & G.L. Ulmen, *Schmitt's “Testament” and the Future of Europe*, *TELOS*, Spring 1990, at 5. The destruction of the *Justus Hostis*, the legitimate enemy, destroyed the *Jus Publicum Europaeum's* distinction between just and unjust wars,

association of economic liberalism with a kind of political authoritarianism.¹⁵²

Embedded in the predicament of the sociological refugee are authoritarian-like deficiencies inconveniently pinpointed by Schmittian analysis. The liberal interwar framework that introduced the modern international law of the refugee never confronted, sometimes masked, and continues to avoid gaps into which the coming climate refugees will fall.¹⁵³

III. THE COLLAPSING REFUGEE *NOMOS*

A collapsing refugee *nomos*¹⁵⁴ is beholden to the vocabulary of a bounded spatial order predicated on postwar European circumstances and abetted by Europe's current migration crisis due to war and generalized violence in Muslim-majority countries.¹⁵⁵ This refugee *nomos* links international legal protections for displaced persons to their having a well-founded fear of persecution. Restrictive measures implemented by receiving states, together with innate definitional ambiguities and ambivalence toward the refugee, call into question whether the Refugee Convention is still fit for its pur-

and replaced its world order with an incoherent series of treaties, war guilt assignment, and reparations, thus destroying the concrete order with incoherence. *Id.* For Piccone's and Ulman's explanation of the need to re-read Schmitt, as contained in a special issue of *Telos* devoted to his work, see Paul Piccone & G.L. Ulmen, *Introduction to Carl Schmitt*, *TELOS*, Summer 1987, at 3.

152. See RENATO CRISTI, *CARL SCHMITT AND AUTHORITARIAN LIBERALISM* (1998); I MAUS, *BÜRGERLICHE RECHTSTHEORIE UND FASCHISMUS: ZUR SOZIALEN FUNKTION UND AKTUELLEN WIRKUNG DER THEORIE CARL SCHMITT'S* (1980).

153. The destruction of the *nomos* of the *Jus Publicum Europæum* took place at the turn of the twentieth century when this international law "dissolved into innumerable and indistinguishable relations between fifty to sixty states . . . lacking any spatial concreteness." Carl Schmitt, *The Plight of European Jurisprudence*, 83 *TELOS* 35, 37 (1990).

154. See T. Alexander Aleinikoff, *Rethinking the International Refugee Regime*, 41 *YALE J. INT'L L. ONLINE* 1, 5 (2016) (noting failure in all parts of the international displacement regime).

155. Between January 2015 and January 2016, 1,103,496 migrants and refugees reached Europe through Balkan corridors or Mediterranean Sea crossings, creating massive problems and divisions within the European Union on how best to handle the influx. See Europe/Mediterranean Migration Response, International Organization for Migration Situation Report 2 (Jan. 28, 2016), https://www.iom.int/sites/default/files/situation_reports/file/europe-mediterranean-migration-crisis-response-situation-report-28-january-2016.pdf [<https://perma.cc/9RFZ-DLL9>]. Political conflict in Syria has been identified as the biggest driver of the migration influx, along with violence and poverty in other Muslim-majority countries. See *Migrant Crisis: Migration to Europe Explained in Seven Charts*, BBC NEWS (Mar. 4, 2016), <http://www.bbc.com/news/world-europe-34131911> [<https://perma.cc/P959-N7HV>].

pose.¹⁵⁶ Perhaps it serves its purpose all too well. While promoting the interests of states, the Convention's constructed identity of the refugee restricts the typologies of members to which it applies, constricts the legal space within which it operates, and reveals "little about the micro and macro processes and the political economy which predispose or propel people to leave their homes."¹⁵⁷ With or without a closing of gaps within refugee law, people in distress will continue to move. The problems of the Refugee Convention will abet increasingly narrow interpretations of refugee status, which incompletely accommodates international law's fixation on violence,¹⁵⁸ until pressures at the core of sovereignty's spatiality come to terms with the advent of climate change.¹⁵⁹

A. *New Wrinkles in the Anthropocene and the Nomos of the State*

Climate-induced migration confronts fundamental issues of sovereignty as encased in the shell of statehood. The Anthropocene adds new wrinkles to the "maddening circularity of the law" in this field.¹⁶⁰ Statehood's "best known formulation,"¹⁶¹ the Montevideo Convention (1933), asserts that "a defined territory"¹⁶² frames a

156. Susan Kneebone, Loretta Baldassar & Dallal Stevens, *Conflicting Identities, Protection and the Rule of Law*, in REFUGEE PROTECTION AND THE ROLE OF LAW: CONFLICTING IDENTITIES 1, 4 (Susan Kneebone, Dallal Stevens & Loretta Baldassar eds., 2014) [hereinafter REFUGEE PROTECTION AND THE ROLE OF LAW]; see also Docherty & Giannini, *supra* note 100, at 349–50 (proposing a new legal instrument to deal with the issue of "climate change refugees").

157. Roger Zetter, *Creating Identities, Diminishing Protection and the Securitisation of Asylum in Europe*, in REFUGEE PROTECTION AND THE ROLE OF LAW, *supra* note 156, at 26.

158. As Goldenziel has noted, 60 million people fell within the ambit of concern for the UNHCR in 2015. Goldenziel, *supra* note 29, at 53. Only 13.7 million persons were classified as refugees; "the other 46.3 million people fleeing war and violent conflict—a number larger than the population of 85% of the countries in the world—have little to no protection under international law." *Id.*

159. See Kara K. Moberg, *Extending Refugee Definitions to Cover Environmentally Displaced Persons Displaces Necessary Protection*, 94 IOWA L. REV. 1107, 1115 (2009) (noting the trend of countries to construe the definition of "refugee" more narrowly).

160. Cait Storr, *Islands and the South: Framing the Relationship between International Law and Environmental Crisis*, 27 EUR. J. INT'L L. 519, 520 (2016); see also Thomas D. Grant, *Defining Statehood: The Montevideo Convention and Its Discontents*, 37 COLUM. J. TRANSNAT'L L. 403–57 (1998–99) (noting formal tensions in definitions of the state).

161. JAMES CRAWFORD, *THE CREATION OF STATES IN INTERNATIONAL LAW* 45 (2d ed. 2006).

162. Convention on the Rights and Duties of States Adopted by the Seventh International Conference of American States art. 1(b), Dec. 26, 1933, 49 Stat. 3097, 165 L.N.T.S. 19 [hereinafter Montevideo Convention] (other listed qualifications of statehood include: (a) a permanent population; (b) government; and (c) capacity to enter into relations with other states).

state. The 1954 and 1961 statelessness conventions,¹⁶³ promulgated to promote the Universal Declaration of Human Rights' respect for nationality,¹⁶⁴ safeguard persons against deprivations of nationality caused by problems of state succession or conflicts of law.¹⁶⁵ However, this logic of statelessness protection takes for granted the primordial *nomos* of the state—the quality of geographic rootedness that connects it to and informs the identity of its people.¹⁶⁶ The disappearing state conceptually challenges the closed circuit of rationality and the quality of rootedness that had made statelessness, according to Arendt in her time, “the newest mass phenomenon in contemporary history.”¹⁶⁷

While transformations in international law are understood historically in terms of decolonization and expressed conventionally in terms of the replacement of one state by another, the transformation process revolves more around territory,¹⁶⁸ less so its inhabitability, and certainly not its governance. The disappearing island state—presaged by what could amount to a considerable prodromal period of increasing un-inhabitability of vulnerable, low-lying islets—poses new conceptual problems. It introduces the idea of “statehood *sans* territory,”¹⁶⁹ and nationality minus statehood. These emerging conceptual problems present *de facto* problems lacking *de jure* solutions.¹⁷⁰ They not only invite a threshold temporal question—when do states disappear?¹⁷¹—but they also underscore the challenges of a liberal solution that brackets protections for a class of refugees that presumptively has a place to return to.

The physically disappearing state challenges the border logic of international law, which is heavily influenced by the rapid onset of

163. Convention Relating to the Status of Stateless Persons, Sept. 28, 1954, 360 U.N.T.S. 117 (entered into force June 6, 1960); Convention on the Reduction of Statelessness, Aug. 30, 1961, 989 U.N.T.S. 175 (entered into force Dec. 13, 1975).

164. See G.A. Res. 217 (III) A, Universal Declaration of Human Rights, art. 15 (Dec. 10, 1948) (“Everyone has the right to a nationality.”).

165. BODANSKY ET AL., *supra* note 58, at 322.

166. LASSA OPPENHEIM, INTERNATIONAL LAW: A TREATISE, VOL. 1, 100 (1st ed. 1905) (noting as a necessary condition that a country must have a settled population).

167. ARENDT, *supra* note 69, at 277.

168. See Vienna Convention on Succession of States in Respect of Treaties art. 2(b), Nov. 6, 1996, 1946 U.N.T.S. 3.

169. Abhimanyu George Jain, *The 21st Century Atlantis: The International Law of Statehood and Climate Change-Induced Loss of Territory*, 50 STAN. J. INT'L L. 1, 3, 49 (2014).

170. See Docherty & Giannini, *supra* note 100, at 357 (noting also that “[n]o legal instrument specifically speaks to the issue of climate change refugees”).

171. JENNY GROTE STOUTENBURG, DISAPPEARING ISLAND STATES IN INTERNATIONAL LAW 239 (2015).

migratory disruptions at statehood's spatial peripheries. Additionally, it recycles, if not introduces, the Justice Paradox as applied to state responsibility. That is, peoples marginalized by degradations to the global environment must turn for assistance, perhaps even safe haven, to the actors principally thought to have created the underlying problem.¹⁷²

1. Crisis Mentality and the Problem of the Anthropocene's Slow-Onset

The disappearing island state falls prey to a type of crisis thinking in international law that has been critiqued for truncating understanding and diverting attention from deeper structural issues.¹⁷³ The projected climate-induced human displacement problem appears worldwide,¹⁷⁴ and is not restricted to coastal environments,¹⁷⁵ but is not necessarily acute. The International Organization for Migration (IMO) deliberately broadened its definition of environmental migrants to include persons adversely affected by "sudden or progressive changes in the environment" principally because the "multidirectional associations between environmental change" and human security included a complex mix of political, economic, and social factors that reshape the temporal framework.¹⁷⁶ Climate change dislocations encompass disasters beyond

172. See Maxine Burkett, *A Justice Paradox: Climate Change, Small Island Developing States, and the Absence of International Legal Remedy*, in INTERNATIONAL ENVIRONMENTAL LAW AND THE GLOBAL SOUTH 435, 435 (Shawkat Alam et al. eds., 2015) (noting that the current international legal regime forecloses remedies for the most vulnerable and least responsible creators of climate change). On the Justice Paradox, which projects as a dilemma "present justice" schemes regulating current conduct with "future justice" schemes that attempt to regulate the misfortune befalling others from current misconduct, see Robert E. Scott, *Chaos Theory and the Justice Paradox*, 35 WM. & MARY L. REV. 329, 330 (1993).

173. Hilary Charlesworth, *International Law: A Discipline of Crisis*, 65 MOD. L.R. 377, 382 (2002).

174. See Robert J. Nicholls et al., *Sea-Level Rise and Its Possible Impacts Given a 'Beyond 4 C World' in the Twenty-First Century*, 369 PHIL. TRANSACTIONS ROYAL SOC. A 161, 161 (2011) (projecting an unlikely but possible forced displacement of up to 187 million people, or 2.4% of the global population); *Is Sea Level Rising?: Yes, Sea Level Is Rising at an Increasing Rate*, NAT'L OCEANIC & ATMOSPHERIC ADMIN., <http://oceanservice.noaa.gov/facts/sealevel.html> (last visited June 3, 2018) (noting that the global sea level continues to rise and that eight of the world's ten largest cities are near a coast) [<https://perma.cc/MH94Y3UR>].

175. Angela Williams, *Turning the Tide: Recognizing Climate Change Refugees in International Law*, 30 LAW & POL'Y 502, 505–06 (2008) (noting glacial lake flooding in the Himalayan region).

176. Int'l Org. for Migration (IMO), Discussion Note: Migration and the Environment, MC/INF/288, ¶¶ 5–7 (Nov. 1, 2007); see also Michelle Leighton, *Migration and Slow-Onset Disasters: Desertification and Drought*, in MIGRATION, ENVIRONMENT AND CLIMATE CHANGE: ASSESSING THE EVIDENCE 322 (Frank Laczko & Christine Aghazarm eds., 2009) (specifically discussing migration and slow-onset disasters).

the “Atlantis-style predictions of whole countries disappearing beneath the waves.”¹⁷⁷ For instance, *climigration* is now of concern to indigenous circumpolar populations, who face threats to infrastructure, food security, and traditional ways due to higher Arctic temperatures, receding ice, and flooding associated with thawing permafrost.¹⁷⁸ Weather-related displacements comprised the majority of internal disaster displacements in 2016, affecting 24.2 million persons.¹⁷⁹ This number is more than three times the number of persons displaced by conflict.¹⁸⁰ “Sinking islands in the Pacific, drowning deltas in the South and Southeast Asia, desertification across the West African Sahel and Mexico” combine to produce the greatest effects of climate change—those changes affecting human migration.¹⁸¹ However, few if any of these threats stimulate the crisis sensitivity of the bracketed liberal mindset. New Zealand’s High Court recognized that a material change to the international regime governing refugees and their international civil and political rights would “at a stroke [entitle] millions of people who are facing medium-term economic deprivation, or the immediate consequences of natural disasters or warfare, or indeed presumptive hardships caused by climate change” to pro-

177. Jane McAdam, *Disappearing States?*, BROOKINGS (Mar. 30, 2013), <https://www.brookings.edu/opinions/disappearing-states/> [<https://perma.cc/Q9D9-DJEM>]. McAdam noted that land loss in Bangladesh, with a current population of 165,000,000, may subsume thirty percent of its coastal land by 2080 and that current flooding of low-lying Bangladesh already displaces between 500,000 and one million Bangladeshis yearly. McADAM, CLIMATE CHANGE, *supra* note 78, at 163–64; *Bangladesh Population*, WORLDOMETERS, <http://www.worldometers.info/world-population/bangladesh-population/#> (last visited June 3, 2018) [<https://perma.cc/8BMW-D7R2>].

178. See generally Lawrence C. Hamilton et al., *Climigration? Population and Climate Change in Arctic Alaska*, 38 POPULATION & ENV’T 115–33 (2016) (addressing concerns of indigenous populations on “the front line of climate change”); see also SHEILA WATT-CLOUTIER, INUIT CIRCUMPOLAR COUNCIL CANADA, PETITION TO THE INTER AMERICAN COMMISSION ON HUMAN RIGHTS SEEKING RELIEF FROM VIOLATIONS RESULTING FROM GLOBAL WARMING CAUSED BY ACTS AND OMISSIONS OF THE UNITED STATES (2005), <http://www.inuitcircumpolar.com/inuit-petition-inter-american-commission-on-human-rights-to-oppose-climate-change-caused-by-the-united-states-of-america.html> (writing a petition to the Inter-American Commission on Human Rights, seeking relief from “violations of the human rights of Inuit resulting from global warming caused by greenhouse gas emissions from the United States of America.”) [<https://perma.cc/LKZ4-HYMY>].

179. See INT’L DISPLACEMENT MONITORING CTR. & NORWEGIAN REFUGEE COUNCIL, MINI GLOBAL REPORT ON INTERNAL DISPLACEMENT 9 (2017), <http://www.internal-displacement.org/global-report/grid2017/pdfs/2017-IDMC-mini-Global-Report.pdf> [<https://perma.cc/6NDG-8P53>].

180. *Id.* (noting 6.9 million displacements in 2016 due to conflict and violence).

181. See Xing-Yin Ni, *A Nation Going Under: Legal Protection for “Climate Change Refugees”*, 38 B.C. INT’L & COMP. L. REV. 329, 329 (2015).

tection.¹⁸² Projections of persons affected by such a shift in international legal thinking would overwhelm refugee law.

2. Numbers, *In Situ* Masking, and Nihilism

Estimates of climatically displaced people vary from 50 million to 200 million by 2050,¹⁸³ causing, for instance, projected relocations of perhaps as many as 15 million Bangladeshis,¹⁸⁴ 73 million Chinese,¹⁸⁵ and 13.1 million U.S. coastal dwellers by the end of the century.¹⁸⁶ Drowning state predictions may overly dramatize the problem, fixating responses on an unapt metaphor. Climate change may actually produce slower, more gradual migratory displacements than Atlantis submersion imagery suggests.¹⁸⁷ Adaptations within borders, or *in situ*, will result in the most likely form of relief. As evidence, temporary and domestic migratory management efforts accommodated 11 million Pakistanis following floods in 2010, 4 million Filipinos in the 2013 aftermath of Typhoon Haiyan,¹⁸⁸ more than 1 million Gulf Coast residents devastated by Hurricane Katrina in 2005,¹⁸⁹ 203,000 households damaged by the 2017 inundation of Houston by Hurricane Harvey,¹⁹⁰ and the mas-

182. *Teitiota v. Chief Executive of the Ministry of Business, Innovation & Employment* [2013] NZHC 3125 (Nov. 26) at [51] (N.Z.).

183. Dominic Kniveton, *Questioning Inevitable Migration*, 7 NATURE CLIMATE CHANGE 548, 548 (2017).

184. Abul Kalam Md. Iqbal Faruk, *Climate Change Induced Migration in Bangladesh*, IUCN (Oct. 5, 2015), <https://www.iucn.org/content/climate-change-induced-migration-bangladesh> [<https://perma.cc/3C2M-3MRC>].

185. See Docherty & Giannini, *supra* note 100, at 353 (internal citation omitted).

186. Ann M. Simmons, *13.1 Million U.S. Coastal Residents Could Face Flooding from Rising Sea Levels, Study Says*, L.A. TIMES (Mar. 15, 2016), <http://www.latimes.com/world/global-development/la-na-global-sea-levels-story.html> (referencing higher end projections by the National Oceanic and Atmospheric Administration by the year 2100) [<https://perma.cc/2ZPW-U82G>].

187. See Jamero et al., *supra* note 6, at 44–45 (noting human adaptation strategies and social factors).

188. See Kimberly Curtis, “Climate Refugees,” *Explained*, U.N. DISPATCH, <https://www.undispatch.com/climate-refugees-explained/> (noting major temporary in-situ displacements linked to climate change) (last visited June 3, 2018) [<https://perma.cc/4M8Z-DXM6>].

189. See Allison Plyer, *Facts for Features: Katrina Impact*, DATA CTR. (Aug. 26, 2016), <http://www.datacenterresearch.org/data-resources/katrina/facts-for-impact/> [<https://perma.cc/W2UM-HUCM>].

190. See Kimberly Amadeo, *Hurricane Harvey Facts, Damage and Costs*, BALANCE (Feb. 13, 2018), <https://www.thebalance.com/hurricane-harvey-facts-damage-costs-4150087> (detailing damage of the category four hurricane) [<https://perma.cc/JE79-BBZ9>].

sive internal dislocations prompted across the Caribbean and Florida by Hurricane Irma and Hurricane Maria.¹⁹¹

With most migration expected to occur within national borders,¹⁹² international legal solutions may have more limited impact.¹⁹³ Regardless of domestic accommodations, and the crisis mentality that conforms refugee issues to matters of sudden-onset, human vulnerability to climate change appears significant,¹⁹⁴ and climate-induced biogeographical migration questions await the world's coming climate refugees.¹⁹⁵ Concern is rising that the plight of Pacific islanders presents a new temporal framework that could lead to a nihilistic washing over of migration law.¹⁹⁶

B. *Gaps in the Governing Regime*

Identifying gaps in the governing refugee regime begins with definitions. However, it is first important to emphasize sociological factors that shape constructions of migrants and refugees. These sociological factors help explain why the professional search for new thinking involving climate refugees produces rearrangements of pre-existing ambivalences.¹⁹⁷

191. See Eric Levenson, *3 Storms, 3 Responses: Comparing Harvey, Irma and Maria*, CNN (Sept. 27, 2017), <http://www.cnn.com/2017/09/26/us/response-harvey-irma-maria/index.html> (comparing damage caused by the three hurricanes) [<https://perma.cc/T6XM-YCRD>].

192. See BODANSKY ET AL., *supra* note 58, at 314–15 (noting that internal displacement likely will “far outstrip cross-border displacement”).

193. Sheila C. McAnaney, Note, *Sinking Islands? Formulating a Realistic Solution to Climate Change Displacement*, 87 N.Y.U. L. Rev. 1172, 1174 (2012).

194. See INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, CLIMATE CHANGE 2014: SYNTHESIS REPORT 6 (2015), https://www.ipcc.ch/pdf/assessment-report/ar5/syr/SYR_AR5_FINAL_full_wcover.pdf [<https://perma.cc/PPR3-KLLJ>].

195. Carol Farbotko & Heather Lazrus, *The First Climate Refugees? Contesting Global Narratives of Climate Change in Tuvalu*, 22 GLOBAL ENVTL. CHANGE 382, 382 (2012) (projecting climate change migration among Pacific islanders (and others) as likely, but warning of the importance of considering the perspective of those living in areas affected by climate change).

196. Brian Palmer, *There's No Such Thing as a Climate Change Refugee: But There Ought to Be*, NRDC (Nov. 16, 2015), <https://www.nrdc.org/onearth/theres-no-such-thing-climate-change-refugee> [<https://perma.cc/2SSV-9AK5>].

197. David Kennedy has critiqued the mapping of international law's vocabulary as contributing to a kind of stasis, where problems are not solved, but rather re-phrased within the blind spots and biases of the disciplinary vocabulary. See David Kennedy, *When Renewal Repeats: Thinking against the Box*, 32 N.Y.U. J. INT'L L. & POL. 335, 406–07 (2000).

1. The Sociological/Legal Interface between Migrants and Refugees

Lester Brown of the World Watch Institute first invoked the term “environmental refugee” in the 1970s and Essam El-Hinnawi popularized its expression in the mid-1980s.¹⁹⁸ Astri Suhrke wrote that the idea of an environmental refugee arose in academic literature in the early 1990s, stimulating “widely diverging definitions” predicated on “waves of environmental refugees” expected by Africa’s deepening desertification problem.¹⁹⁹ She noted that sociological reasoning, not legal reasoning, pegged an association of the term “refugee” to environmentally related population flows.²⁰⁰ Ironically, part of her research depended on ethnologist Raymond Firth’s study of labor patterns in the now sinking Solomon Islands.²⁰¹ Where the central issue was not protection from the state “or the violence caused by its anarchic absence,” the term “displaced person” became more appropriate than “environmental refugee,”²⁰² separating through nomenclature potential protections for the affected person by disassociating the terms “environment” and “refugee.”

Moreover, depictions of refugee status depended on involuntary “push” factors that afforded less volition or control over the timing and direction of migration than the “pull” factors motivating migrants to engage in remunerated activity²⁰³ or voluntarily seek a better life.²⁰⁴ The binary contraposition of refugee status and migrant status hinged on the involuntary or compulsory need to

198. James Morrissey, *Rethinking the ‘Debate on Environmental Refugees’: From ‘Maximalists and Minimalists’ to ‘Proponents and Critics’*, 19 J. POL. ECOLOGY 36, 36 (2012); see also ESSAM EL-HINNAWI, ENVIRONMENTAL REFUGEES (1985).

199. Astri Suhrke, *Environmental Degradation and Population Flows*, 47 J. INT’L AFF. 473, 473 (1994).

200. See *id.* at 482.

201. *Id.* at 483.

202. *Id.* at 488.

203. International law defines migrants in terms of persons engaged in or seeking remunerated activity. International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families art. 2(1), Dec. 18, 1990, 2220 U.N.T.S. 93. For a discussion of the voluntary/involuntary combination of push/pull factors, see Anthony H. Richmond, *Reactive Migration: Sociological Perspectives on Refugee Movements*, 6 J. REFUGEE STUD. 7, 7–24 (1993).

204. Suhrke, *supra* note 199, at 482; see also Lori M. Hunter, Jessie K. Luna & Rachel M. Norton, *Environmental Dimensions of Migration*, 41 ANN. REV. SOC. 377, 377 (2015) (detailing developments beyond environmental “push” theories); STEPHEN CASTLES & MARK J. MILLER, THE AGE OF MIGRATION: INTERNATIONAL POPULATION MOVEMENTS IN THE MODERN WORLD 22–23 (4th ed., 2009) (discussing combined push-pull theories of migration).

flee,²⁰⁵ which again emphasized distinctions based on sudden-onset crises. However, climate-related migration replays across a sociological spectrum of human movement calculations involving slow-onset problems of deforestation, rising sea levels, desertification, and drought,²⁰⁶ but by no means can be expressed exclusively using the emotive language of floods, tides, and influxes. “[F]orced migration is not a migration flow separate from all other types of migration,”²⁰⁷ but it is treated as such by international refugee law. Migration systems and network theory broaden the context of migration, incorporating motivations that avoid one-dimensional and static analyses²⁰⁸ based on persecution.

2. The Definition of Persecution

International law imperfectly addresses the coming crisis of climate refugees through “the world’s most powerful international human rights mechanism,” refugee law.²⁰⁹ However, conceptual and definitional obstacles arise within the Refugee Convention that make it difficult to apply to persons displaced by climate change.²¹⁰ The problem of climate-induced migration hinges on the absence of an agreed definition of persecution.²¹¹ Without the “ever present possibility of conflict,” as Schmitt noted in his articulation of his friend/enemy thesis,²¹² there can be no concrete dialectic. Without persecution, there can be no rightful, concrete identification of the enemy, which remains the key component for identifying and testing refugee status.²¹³ Common and civil law jurisdictions have interpreted categories of persecution specified in the Refugee Convention as connected to widely accepted standards found in international human rights law.²¹⁴ However, human rights laws fail to recognize a cause of action for generalized claims

205. Suhrke, *supra* note 199, at 482.

206. *Id.* at 485.

207. KAREN O’REILLY, INTERNATIONAL MIGRATION AND SOCIAL THEORY 127 (2012).

208. See CASTLES & MILLER, *supra* note 204, at 188 (noting that most forced migrants flee for reasons not recognized by international refugee law).

209. HATHAWAY & FOSTER, *supra* note 52, at 1; see also UNHCR, *Guidance Note on Extradition and International Refugee Protection* (Apr. 2008), <http://www.refworld.org/docid/481ec7d92.html> [<https://perma.cc/NK3Q-6B7Y>].

210. MCADAM, CLIMATE CHANGE, *supra* note 78, at 42–48.

211. UNHCR HANDBOOK, *supra* note 20, ¶ 51.

212. SCHMITT, CONCEPT, *supra* note 61, at 32.

213. UNHCR, *The International Protection of Refugees: Interpreting Article 1 of the 1951 Convention Relating to the Status of Refugees*, ¶ 7 (Apr. 2001).

214. Linda J. Kirk, *Island Nation: The Impact of International Human Rights Law on Australian Refugee Law*, in HUMAN RIGHTS AND THE REFUGEE DEFINITION: COMPARATIVE LEGAL PRACTICE AND THEORY 49, 61 (Bruce Burson & David James Cantor eds., 2016).

of displacement, and include extensive reservations or lack specific protocols that allow for individual complaints to monitoring bodies.²¹⁵ They have been described as “ineffective and inapt” mechanisms for climate refugees.²¹⁶ Various and unsuccessful remediation theories have been contemplated under the law of tort, the U.N. Convention on the Law of the Sea, and state responsibility transboundary harm.²¹⁷ Tuvalu and Palau explored bringing a claim of greenhouse gas damages against the United States and/or Australia to the International Court of Justice.²¹⁸ Critics note that states are left free to develop their own definitions of persecution, compromising attempts at universal or “holistic” application,²¹⁹ while relegating “persecution’s” juridical expression to ad hoc national court rulings.²²⁰ The UNHCR concluded, “the fact that the Convention does not legally define persecution is a strong indication that . . . the drafters intended that all future types of persecution should be encompassed by the term.”²²¹ Overbroad as that opinion may appear, the Refugee Convention holds that a refugee is a person who:

owing to [a] well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail him-

215. Moberg, *supra* note 159, at 1116–17.

216. *Id.* at 1116.

217. See Burkett, *supra* note 172, at 440–41 (noting unsuccessful efforts in pursuit of remediation); see also United Nations Convention on the Law of the Sea art. 194(2), Dec. 10, 1982, 1833 U.N.T.S. 3 (“[S]tates shall take all measures necessary to ensure that activities under their jurisdiction or control are so conducted as not to cause damage by pollution to other states . . . and that pollution arising from incidents or activities under their jurisdiction or control does not spread beyond the areas where they exercise sovereign rights.”).

218. See RODA VERHEYEN, CLIMATE CHANGE DAMAGE AND INTERNATIONAL LAW: PREVENTION DUTIES AND STATE RESPONSIBILITY 313 (2005); *Palau Seeks UN World Court Opinion on Damage Caused by Greenhouse Gases*, U.N. NEWS CTR. (Sept. 22, 2011), <http://www.un.org/apps/news/story.asp?NewsID=39710#.WZSTfIWGPb0> [<https://perma.cc/34T5-Y7AV>]; YALE CTR. FOR ENVTL. LAW & POLICY, CLIMATE CHANGE AND THE INTERNATIONAL COURT OF JUSTICE: SEEKING AN ADVISORY OPINION ON TRANSBOUNDARY HARM FROM THE COURT (Aug. 14, 2013).

219. “Holistic” approaches to refugee status treat persecution and protection as inter-related elements, suggesting that persecution may apply to situations of internal flight or relocation within borders due to internal strife. See UNHCR, *Guidelines on Internal Protection: “Internal Flight or Relocation Alternative” within the Context of Article 1A(2) of the 1951 Convention and/or 1967 Protocol Relating to the Status of Refugees*, 1–2, U.N. Doc. HCR/GIP/03/04 (July 23, 2003).

220. See, e.g., Hugo Storey, *What Constitutes Persecution? Towards a Working Definition*, 26 INT’L J. REFUGEE L. 272, 274–75 (2014).

221. *The International Protection of Refugees: Interpreting Article 1 of the 1951 Convention Relating to the Status of Refugees*, *supra* note 213, ¶ 16.

self of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable, or owing to such fear, is unwilling to return to it.²²²

3. Refugee Law's *Ab Initio* Doctrine

Conceptually, refugee law subscribes to its own *ab initio* doctrine. States do not initially confer refugee status. Persons assume this status by voting for displacement with their feet.²²³ Similar to the declaratory school of state secession,²²⁴ refugee status inheres, at the outset, from the facts of displacement, not the formalities of recognition.²²⁵ The facts of displacement need not be conflict-induced because the Refugee Convention applies regardless of the existence of an armed conflict.²²⁶ However, the person claiming refugee status must demonstrate a “well-founded” fear of persecution, which implicitly speaks to the person’s subjective mental state,²²⁷ and requires a showing of a sufficient degree of harm.²²⁸ This fear has been interpreted as a personal fear owing to affiliation to a particular race, religion, nationality, or membership appertaining to a social group or political opinion.²²⁹ Because climate change effects are generally diffuse or indiscriminate, reasons of race, religion, nationality, or membership in a social group, and divergent political opinion disqualify as identifiable bases for perse-

222. Convention Relating to the States of Refugees art. 1(A)(2), July 28, 1951, 189 U.N.T.S. 137 [hereinafter Refugee Convention].

223. See HATHAWAY & FOSTER, *supra* note 52, at 1 (quoting the UNHCR HANDBOOK).

224. See generally Cedric Ryngaert & Sven Sobrie, *Recognition of States: International Law or Realpolitik? The Practice of Recognition in the Wake of Kosovo, South Ossetia, and Abkhazia*, 24 LEIDEN J. INT’L L. 467–90 (2011) (discussing normative frameworks for state recognition).

225. HATHAWAY & FOSTER, *supra* note 52, at 1.

226. Vanessa Holzer, *Persecution and the Nexus to a Refugee Convention Ground in Non-International Armed Conflict, in REFUGEE FROM INHUMANITY? WAR REFUGEES AND INTERNATIONAL HUMANITARIAN LAW* 101, 101 (David James Cantor & Jean-François Durieux eds., 2014) (noting that the Refugee Convention “applies irrespective of whether the country of origin is in peace or experiencing an armed conflict.”).

227. See *INS v. Cardoza-Fonseca*, 480 U.S. 421, 431 (1987) (noting that the reference to “fear” obviously turns on subjective mental state).

228. Refugee Act of 1980, 8 U.S.C. § 1101(a)(42)(A) (2000). Hathaway and Foster refer to the subjective element of fearfulness and the objective validation of that fear as representative of the UNHCR’s bipartite approach to the idea of “well-founded fear.” See HATHAWAY & FOSTER, *supra* note 52, at 91–92.

229. Islam, *supra* note 27, at 223. The UNHCR Handbook defines “particular social group” as “persons of similar background, habits or social status.” UNHCR HANDBOOK, *supra* note 20, ¶ 77. Holding political opinions different from those of the government is not itself a ground for claiming refugee status. *Id.* ¶ 80. The applicant must hold opinions “not tolerated by the authorities.” *Id.*

cution. Furthermore, the term “displacement” itself is elusive²³⁰ and may combine factors such as environment and economics, making causal identification of displacement difficult, if not impossible, to determine.²³¹ The law of state responsibility imposes a duty for one state to protect within its territory the rights of other states.²³² It maintains (somewhat tenuously) through application of the community of interest and good neighborliness standards²³³ a rejection of the statist view,²³⁴ holding, instead, that “no State has the right to use or permit the use of its territory in such a manner as to cause injury . . . to the territory of another.”²³⁵ Extending this standard of care to matters of climate change encounters a diffusion of proof problem. While requiring causation, the Justice Paradox allows developed countries to sit in judgment of their greenhouse gas-producing emissions while mediating interim solutions that restrict the bracketed legal classification of refugee status for newly dispossessed “sociological” refugees.

4. The Present Passive Nominalization of Persecution

The causal link to race, religion, nationality, social group, or political opinion specifically addresses the applicant’s predicament, not state of mind,²³⁶ and the predicament must relate to one of these specified grounds. The Refugee Convention’s inclusion of the present passive tense (*being persecuted*) temporalizes the objective fear of persecution, requiring consideration of current circumstance as opposed to historical treatment or future concern.²³⁷

230. MICHÈLE MOREL, *THE RIGHT NOT TO BE DISPLACED IN INTERNATIONAL LAW* 13–19 (2014) (noting numerous definitions, forms, and causes of displacement, including expulsion, deportation, flight, evacuation, resettlement, and more). The African Refugee Convention broadens the U.N. Refugee Convention’s definition by recognizing causes of displacement due to external aggression, occupation, foreign domination, or events seriously disturbing public order. OAU Convention Governing the Specific Aspects of Refugee Problems in Africa art. I(2), Sept. 10, 1969, 1001 U.N.T.S. 45 (entered into force June 20, 1974).

231. See McADAM, *CLIMATE CHANGE*, *supra* note 78, at 15.

232. *Island of Palmas Case* (Neth. v. U.S.), 2 R.I.A.A. 829, 839 (1928).

233. *Territorial Jurisdiction of the International Commission of the River Oder* (U.K. v. Pol.), Judgment, 1929 P.C.I.J. (ser. A) No. 23, at 5 (Sept. 10).

234. NAHID ISLAM, *THE LAW OF NON-NAVIGATIONAL USES OF INTERNATIONAL WATERCOURSES: OPTIONS FOR REGIONAL REGIME-BUILDING IN ASIA* 106 (2010); see also *Gaběřkovo-Nagyymaros Project* (Hung./Slov.), Judgment, 1997 I.C.J. Rep. 7 (Sept. 25) (argument of Hungary vis-à-vis Slovakia).

235. *Trail Smelter Case* (U.S. v. Can.), 3 R.I.A.A. 1905, 1965 (1941).

236. Holzer, *supra* note 226, at 117.

237. Cf. Storey, *supra* note 220, at 272 (“[T]he use of the present passive tense/gerund is critical because it demonstrates that we are concerned with current fear (rather than historic fear) and with the interaction between persecutor and persecuted.”).

Additionally, the displacement must cross a border of origin or habitual residence, problematizing and excluding the phenomenon of *in situ* dislocations,²³⁸ or limbo-like “international transit zones.”²³⁹ Even as modified by the 1967 Protocol,²⁴⁰ which removed temporal and geographical limitations, internally displaced persons could not satisfy a precondition for classification as a refugee because they cross no border.²⁴¹ These considerations construct intended barriers, making inapplicable the Refugee Convention to the problem of the climate refugee.

5. *Non-Refoulement*

A dramatic influx of more than one million migrants and refugees crossing into Western Europe from war-torn countries in the Middle East and Africa in 2015 alone emphasizes the persecution and cross-border connection to refugee status.²⁴² Absent a connection to persecution, refugee law transposes into border fortification striations²⁴³ and “build-a-wall” political platforms.²⁴⁴ Refugee law tends to center on politically-induced, involuntary, mass migrations. For those persons bracketed into such a category, the greatest advantage of refugee classification applies—*non-refoulement*.

Described as a “guiding principle” of international refugee law, *non-refoulement* first appeared in the 1933 Convention relating to the International Status of Refugees.²⁴⁵ Its more recent expression derives from the 1951 Refugee Convention, which provides: “no contracting State shall expel or return (“*refouler*”) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political

238. See generally PHUONG, *supra* note 85.

239. HATHAWAY & FOSTER, *supra* note 52, at 3.

240. Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267.

241. PHUONG, *supra* note 85, at 1.

242. See Theodora Dragostinova, *Refugees or Immigrants? The Migration Crisis in Europe in Historical Perspective*, ORIGINS (Jan. 2016), <http://origins.osu.edu/article/refugees-or-immigrants-migration-crisis-europe-historical-perspective> [<https://perma.cc/4XDW-4MZT>].

243. WENDY BROWN, *WALLED STATES, WANING SOVEREIGNTY* 8 (2010).

244. COMMITTEE ON ARRANGEMENTS FOR THE 2016 REPUBLICAN NATIONAL CONVENTION, *REPUBLICAN PLATFORM 2016*, at 26 (2016) (“Our highest priority . . . must be to . . . enforce our immigration laws. . . . [W]e support building a wall along our southern border and protecting all ports of entry.”).

245. Aoife Duffy, *Expulsion to Face Torture? Non-refoulement in International Law*, 20 INT’L J. REFUGEE L. 373, 373 (2008).

opinion.”²⁴⁶ Constitutive documents for Africa,²⁴⁷ America,²⁴⁸ Europe,²⁴⁹ and the United Nations,²⁵⁰ embrace the principle, as do many bilateral extradition treaties, leading to the conclusion that it is a cornerstone principle of human rights and refugee law, and customary international law. Some scholars hold *non-refoulement* has achieved the character of *jus cogens*,²⁵¹ as has also been expressed in the 1985 Cartagena Declaration on Refugees.²⁵²

However, problems of mass migration and security threats posed by terrorism have complicated consistent interpretations of the Convention. Narrow interpretations seek to limit the principle to refugees who have already entered the territory of the receiving state; absolutist positions maintain that the duty of *non-refoulement* is limited only to the affirmative classification of refugee status.²⁵³

Non-refoulement obligations prohibit the forcible removal of persecuted persons to areas that endanger their lives or freedoms.²⁵⁴ Absent persecution but nevertheless facing a real threat, how will

246. Refugee Convention, *supra* note 222, art. 33(1).

247. Organization of African Unity: Banjul Charter on Human and Peoples' Rights, 21 I.L.M. 58 (1981); OAU Convention Governing Specific Aspects of Refugee Problems in Africa, *supra* note 230, art. II(3).

248. American Convention on Human Rights art. 22(8), Nov. 22, 1969, 1144 U.N.T.S. 143 (entered into force July 18, 1978); *see also* Cartagena Declaration on Refugees ¶ 5 (Nov. 22, 1984).

249. Charter of Fundamental Rights of the European Union art. 19, Oct. 12, 2012, 2012 O.J. (C 202) 59; Convention for the Protection of Human Rights and Fundamental Freedoms art. 2, 213 U.N.T.S. 222 (entered into force Sept. 3, 1953).

250. *See, e.g.*, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 3, Dec. 10, 1984, S. TREATY DOC. NO. 100-20, 1465 U.N.T.S. 85 (entered into force June 26, 1987); International Convention for the Protection of All Persons from Enforced Disappearance art. 16, Dec. 20, 2006, 2716 U.N.T.S. 3 (entered into force Dec. 23, 2010); 1966 International Covenant on Civil and Political Rights art. 13, Dec. 19, 1966, S. TREATY DOC. NO. 95-20, 999 U.N.T.S. 171 (entered into force March 23, 1976). While *non-refoulement* protections for children are not explicitly contained in the U.N. Convention on the Rights of the Child, authoritative comments interpreting the treaty mandate that a child shall not be returned to a country where substantial grounds of risk or harm present a real risk to the child. Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3 (entered into force Sept. 2, 1990); *see* U.N. Comm. on the Rights of the Child, General Comment No. 6: Treatment of Unaccompanied and Separated Children Outside Their Country of Origin, ¶ 27, U.N. Doc. CRC/GC/2005/6 (Sept. 1, 2005).

251. *See* Jean Allain, *The Jus Cogens Nature of Non-refoulement*, 13 INT'L J. REFUGEE L. 533 (2001). Allain noted that the Executive Committee of the Programme of the United Nations High Commissioner for Refugees concluded in 1996 that the “principle of *non-refoulement* [was] not subject to derogation.” *Id.* at 539.

252. Cartagena Declaration on Refugees, *supra* note 248, ¶ 5 (concluding that *non-refoulement* “should be acknowledged and observed as a rule of *jus cogens*.”).

253. *See generally* Ellen F. D'Angelo, Note, *Non-Refoulement: The Search for a Consistent Interpretation of Article 33*, 42 VAND. J. TRANSNAT'L L. 279, 279 (2009).

254. UNHCR, *Guidance Note*, *supra* note 209, at 6; Refugee Convention, *supra* note 222, art. 33(1).

extant migration law reform, or “update,”²⁵⁵ to the extent that it must, to deal with forced internal or cross-border migration changes in the Anthropocene? Recent challenges at the borders of industrialized receiving states now generate restrictive practices that reinforce the post-World War II practices involving forced migrants. International law “recognizes a very small class of forced migrants as people whom other countries have an obligation to protect: ‘refugees’, ‘stateless persons’, and those eligible for complementary protection.”²⁵⁶ Complementary protection derives from generic obligations of human rights law that operate beyond refugee status and include protections of life and against inhuman treatment.²⁵⁷ Hathaway noted in the 1990s that these practices externalize border controls, creating “non-entrée mechanisms,” which effectively preclude refugees from claiming, much less receiving, refugee status.²⁵⁸ These non-entrée measures include interception, interdiction,²⁵⁹ offshore processing, restrictive operational definitions, and use of “safe third country” concepts,²⁶⁰ euphemistically referred to as “protracted situations.”²⁶¹ The politics of non-entrée attempt to disrupt the *ab initio* characterization that entitles refugees to arrive of their own initiative.²⁶² The border logic of Europe has reordered its spatial periphery, and now

255. Islam, *supra* note 79, at 14 (noting the “out-dated notion of refugee retained in the [international] regime”).

256. JANE McADAM, INTERNATIONAL DIALOGUE ON MIGRATION 2011, CLIMATE CHANGE DISPLACEMENT AND THE ROLE OF INTERNATIONAL LAW AND POLICY 1 (2011), <https://www.iom.int/jahia/webdav/shared/shared/mainsite/microsites/IDM/workshops/climate-change-2011/SessionIII-Paper-McAdam-Session.pdf> [<https://perma.cc/G2M8-LXNP>]. A stateless person “means a person who is not considered as a national by any State under the operation of its law.” Convention Relating to the Status of Stateless Persons, *supra* note 163, art. 1.

257. See generally JANE McADAM, COMPLEMENTARY PROTECTION IN INTERNATIONAL REFUGEE LAW (2007).

258. James C. Hathaway, *Preface: Can International Refugee Law Be Made Relevant Again?*, in RECONCEIVING INTERNATIONAL REFUGEE LAW xx (James C. Hathaway ed., 1997).

259. See, e.g., Sara K. McGuire, *Offshore Interdiction Operations and the Refugee Rights of Irregular Migrants*, E-INTERNATIONAL RELATIONS (Apr. 12, 2015), <http://www.e-ir.info/2015/04/12/offshore-interdiction-operations-and-the-refugee-rights-of-irregular-migrants/> [<https://perma.cc/GH7T-KQ5A>].

260. See, e.g., *Canada-U.S. Safe Third Country Agreement*, GOV’T CAN., <http://www.cic.gc.ca/english/department/laws-policy/menu-safethird.asp> (last visited June 3, 2018) [<https://perma.cc/GA86-9QRB>].

261. According to Aleinikoff: “A majority of the world’s refugees now reside in what are called ‘protracted situations’—defined by UNHCR as a stay of longer than five years for a population of 25,000 or more refugees. There are more than two-dozen protracted situations around the world.” Aleinikoff, *supra* note 154, at 3.

262. Thomas Gammeltoft-Hansen & James C. Hathaway, *Non-Refoulement in a World of Cooperative Deterrence*, 53 COLUM. J. TRANSNAT’L L. 235, 237 (2014).

makes that space a central component of its retracting refugee regime. This logic has reshaped protected classes into hybrid forms of irregular international migrants.²⁶³ A similar containment policy arose in contemplation of the internally displaced person (IDP). Attempts to provide assistance and protection to such persons appeared in the 1990s, first with a working definition of the IDP proffered by the U.N. Secretary-General in 1992,²⁶⁴ and then in 1998 with the articulation of Guiding Principles, which defined the IDP as:

Persons or groups of persons who have been forced or obliged to flee or to leave their homes or places of habitual residence, in particular as a result of or in order to avoid the effects of armed conflict, situations of generalized violence, violations of human rights or natural or human-made disasters, and who have not crossed an internationally recognized state border.²⁶⁵

IV. CONCLUSION

The Anthropocene will challenge international law to broaden its spatial perspective in ways recently suggested by geographers²⁶⁶ and the adumbrated writings of Carl Schmitt. Schmitt construed *nomos* as pertaining to “the fundamental process of apportioning space that is essential to every historical epoch.”²⁶⁷ He emphasized the geospatial context of law, which is perhaps his most deeply textured and undervalued idea, with great relevance to climate change. Mindful of *Raum* studies, and its virulent adulteration during the interwar period, along with Schmitt’s unrepentant theoretical emphasis on authoritarian order, his configuration of international law within a spatial framework nevertheless presents an essential critique of the post-*Jus Europæum*. The emergent unease facing liberalism’s refugee panopticon, owing to the 2015 tidal wave of migration to Europe from war-torn African and Middle Eastern countries, presents illiberal challenges to the European

263. Kneebone, Baldassar & Stevens, *supra* note 156, at 3–4.

264. See *Analytical Report of the Secretary-General on Internally Displaced Persons*, U.N. Doc. E/CN.4/1992/23, ¶ 17 (Feb. 14, 1992).

265. Comm’n on Hum. Rights, *Guiding Principles on Internal Displacement*, U.N. Doc. E/CN.4/1998/53/Add.2, Annex, ¶ 2 (Feb. 11, 1998), <http://www.un-documents.net/gpid.htm> [<https://perma.cc/2USE-QBE5>].

266. See generally SPATIALITY, SOVEREIGNTY AND CARL SCHMITT: GEOGRAPHIES OF THE NOMOS (Stephen Legg ed., 2011) (presenting geographers’ critical essays on Schmitt’s contributions to international law and relations). The rejuvenation of this field doubtless credits the classic work of J. E. LOVELOCK, *GAEA: A NEW LOOK AT LIFE ON EARTH* (1979) (introducing the Gaia Hypothesis, which reframed the spatial study of the planet as a singular, self-regulating meta-organism).

267. SCHMITT, *NOMOS*, *supra* note 1, at 78.

nomos. Schmitt's unveiling contribution takes this unease to a new level, a level that specifically arises in the Anthropocene, which appears as the next historical epoch in the arc of history's great wheel.

Climate change presents serious challenges to the porous regime of international refugee law, which, in the hands of its liberal minders, restricts the migration *nomos* to the telluric underpinnings of statehood that may be incapable of rising to meet coming migration challenges. International law's treatment of the relationship between the migrant and the refugee, increasingly scrutinized for inadequacies dating to the interwar period, suggests a pessimistic retrenchment during the coming challenges of the Anthropocene.

International refugee law developed in the twentieth century due to the collapse of empires following World War I and in response to Nazi atrocity and forced displacements from World War II. A critical attachment of refugee status to the idea of persecution necessarily bounded the status of the refugee and bracketed such displaced persons within the international legal protection of *non-refoulement*, distinguishing their protected status from the peripatetic and more numerous sociological refugees. The prohibition against returning such legally-classified persons may now constitute a norm of *jus cogens*. However, challenges of the Anthropocene, as preliminarily suggested by the onset of the drowning nation state, will test the spatial peripheries and temporal orientation of international refugee law. Expanding the boundaries in ways that accommodate *climigration* threaten to denude refugee law of its acute and special character and specific humanitarian appeal. Taken to an extreme, labeling every displaced person a refugee deprives bona fide protections to all.²⁶⁸ Little evidence suggests that the porosity of the liberal refugee regime will allow this abnegation of its regime structure. To the contrary, the sinking island nation and the coming age of climate change suggest that the cosmopolitan framework will further restrict non-entrée measures to secure the liberal state from the global impact of the earth's changing climate.

The U.N. Global Compact on Migration report awaits, and it will doubtless highlight the cross-cutting and interdependent call for a broad-based solution,²⁶⁹ perhaps even include a call for the

268. Goldenziel, *supra* note 29, at 89.

269. See Faye Leone, *UN Prepares for Migration, Refugee Negotiations*, IISD (Nov. 11, 2016), <http://sdg.iisd.org/news/un-prepares-for-migration-refugee-negotiations/> (“[T]he com-

replacement of the Refugee Conventions with a Displaced Persons Convention.²⁷⁰ However, the constructed legal responses to human migration have imperfectly facilitated protections against affected (non-persecuted) persons, making a remedial solution from within international law problematic. Non-entrée and interim processing measures, intended to further restrict the protected classification of the refugee, suggest that Schmitt's critique of liberalism and its masking of sovereignty's telluric strength requires a prioritized re-assessment of the panopticon of border security that refugee law supports. The narrow classification of refugee and asylum laws secured under international law casts a myopic pall over the sociology of displacement, revealing the sustaining power while masking the potential shortcomings of biogeographic defenses of the liberal state.

pact will include principles, commitments and understandings regarding international migration in all its dimensions") [<https://perma.cc/9AS9-4JCS>].

270. Goldenziel, *supra* note 29, at 75.