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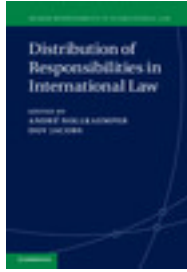

Distribution of Responsibilities in International Law

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Chapter

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Shared Political Responsibility

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1. Introduction

In 2007, the Intergovernmental Panel on Climate Change (IPCC) issued its Fourth Assessment Report on the state of the world's climate. The report stated that '[w]arming of the climate system is unequivocal, as is now evident from observations of increases in global average air and ocean temperatures, widespread melting of snow and ice and rising global average sea level'.[1] The report presents detailed evidence for this claim and further evidence to establish what it calls the 'anthropogenic drivers' of climate change, that is, the actions brought about by human beings as opposed to those resulting from natural processes such as atmospheric changes. The report is clear that the causes attributable to human action, particularly fossil fuel use, have greatly increased climate change over the last 200 years.[2] The consequences of climate change are dire, as the report warns, including potential harm to vast numbers of inhabitants of the planet. The next report of the IPCC appeared in late 2014 and its conclusions reinforce those of previous reports.

While some have questioned the conclusions of the IPCC reports over the years, there is broad scientific consensus concerning the fact of climate change. What is missing is a global consensus about whom or what is responsible for this change. One can argue that human beings are central to this change, but when it comes to determining responsibility more precisely, this point is not helpful. It is unhelpful because the scope of climate change is global and because, in some way, all humans seem responsible for it. But the idea of responsibility is problematic here. Not

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[1] Intergovernmental Panel on Climate Change, Fourth Assessment Report, 'Climate Change 2007: Synthesis Report' (Geneva, 2007), at 30, see www.ipcc.ch (last accessed on 5 June 2014).

[2] Ibid., at 36–41.

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every person consumes the same amount of fossil fuels or food. More-over, individual persons are located in political communities which organise their political and economic activities in ways that those individuals may or may not be able to control. A similar problem exists for states. Not all states have contributed to global climate change in the same way. And, the inherent transboundary nature of climate change has meant that even when states try in their own domestic policies to address climate change, they cannot necessarily control it.

There has been, of course, an international legal response to climate change, one built on a revision to our standard understanding of responsibility, which has come to be known as 'common but differentiated responsibility'. In 1992, at a summit in Rio de Janeiro, a treaty was drafted that entered into force in 1994. This treaty, the United Nations Framework Convention on Climate Change[3] was originally more aspirational than actionable; that is, it had little in the way of obligations and commitments that bound states to act. This changed in 1997 with the passage of the Kyoto Protocol[4] which demanded that states begin a progressive reduction in carbon emissions through a series of mechanisms such as carbon trading, or the ability to 'buy and sell' credits for carbon emissions. The Protocol gave greater specificity to the idea of 'common but differentiated responsibilities', a term in the original treaty, which placed a heavier burden on developed states to lower their carbon emissions more quickly than the developing countries. The Protocol came into effect in 2005.

The proposal for common but differentiated responsibilities has not gone down well with powerful states whose responsibilities under the terms of the Protocol are much greater than other states. The United States, which has not ratified the Kyoto Protocol because of its objections to the idea of common but differentiated responsibilities, has argued, in the words of Secretary of State John Kerry, '[p]lain and simple, all nations have a responsibility to make near-term emissions reductions'.[5] Admittedly, the United States, under the administration of President Barack Obama, has sought to respond to climate change in more active ways

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[3] United Nations Framework Convention on Climate Change, New York, 9 May 1992, in force 21 March 1994, 1771 UNTS 107.

[4] Kyoto Protocol to the United Nations Framework Convention on Climate Change, Kyoto, 10 December 1997, in force 16 February 2005, 2303 UNTS 148 (Kyoto Protocol or Protocol).

[5] J. Kerry, 'Getting the US-China Climate Partnership Right', US Department of State, 19 July 2013, see www.state.gov/secretary/remarks (last accessed on 5 June 2014).

than the preceding US administration. Yet, it is undoubtedly true that the United States does not see its responsibility to respond to climate change through a differentiated lens, but through a simple lens of all states making roughly equivalent contributions.

Climate change, in other words, challenges our ideas about responsibility. Its global scope and complexity make identifying responsible agents very difficult. More importantly, simple causal notions of responsibility do not seem to capture the complexity of the issue. One idea would be to abandon the discourse of responsibility in relation to climate change because it is simply too imprecise to provide any helpful moral, legal, or political frameworks by which to respond to this issue.[6] But perhaps there exists in alternative discourses of responsibility some means by which to rethink this issue at the global level. Holding agents responsible can generate a number of possible outcomes: forcing agents to provide reparations, punishing agents who have violated rights, ensuring the continued viability of a legal order to govern environmental problems, and encouraging new modes of political action.

The proposal of the editors of this volume to explore the idea of shared responsibility in international law[7] provides one alternative that provides some new insights into climate change. This chapter will build on their idea, along with a review of moral philosophers and political theorists, to propose an understanding of responsibility that points toward political action by multiple agents across the international system as the bearers of responsibility in the international order rather than simply powerful states. This idea of political responsibility builds upon more traditional notions of responsibility, but, coupled with the idea of shared responsibility, suggests how this alternative, which I call 'shared political responsibility', provides a means by which the discourse of responsibility surrounding climate change can avoid being bogged down in discussions of causation and blame, and move toward means of action across multiple political realms.

The chapter proceeds as follows: section 2 reviews two important moral philosophers on the question of responsibility, Peter Strawson

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[6] See D.H. Cole, 'The Problem of Shared Irresponsibility in International Climate Law', Chapter 10 of this volume, 290, where he argues that liability approaches to climate change are problematic in that they fail to provide incentives. I would disagree slightly with his interpretation in that the rational choice underlying his claims are not ones that I think capture the full dimensions of international politics.

[7] See P.A. Nollkaemper and D. Jacobs, 'Shared Responsibility in International Law: A Conceptual Framework' (2013) 34 MIJIL 359.

and Marion Smiley. It then moves to two political theorists, William Connolly and Hannah Arendt, as theorists of political responsibility. Building on these four theorists, the chapter then moves to a discussion of the legal theories of responsibility, concluding with Nollkaemper and Jacobs' idea of shared responsibility, which I connect to the idea of political responsibility (section 3). The fourth section of the chapter reviews various proposals for resolving climate change and evaluates them in terms of the idea of shared political responsibility that I develop in this chapter.

2.   Responsibility

Through an engagement with a series of moral and political philosophers, I argue here that legal responsibility can be supplemented by what I call 'political responsibility'.[8] This means that instead of solely tying individual agents to specific actions, this initial act of locating responsibility in specific agents can be used to compel agents to engage in forms of political action that construct new political arrangements, rather than ending in punitive or even restorative consequences. This does not mean that the results of moral and legal responsibility are discarded; rather, they are enfolded into a set of practices that can lead to new actions by not only those held responsible, but by the wider community of agents. In order to develop this point, though, let me begin by exploring the idea of responsibility in moral philosophy.

Responsibility has two interrelated meanings: first, one is responsible for performing or not performing certain actions as a result of an identity or role in which one has been placed or has placed oneself; second, one can be held responsible for acting or failing to act in certain ways. The two senses are obviously interrelated in that one is held responsible after

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[8] This section draws upon various pieces I have written on responsibility and punishment. These include: A.F. Lang, Jr., 'Responsibility in the International System: Reading U.S. Foreign Policy in the Middle East' (1999) 5(1) EJIR 67; A.F. Lang, Jr., 'The United Nations and the Fall of Srebrenica: Meaningful Responsibility and International Society', in T. Erskine (ed.), *Can Institutions Have Responsibilities? Collective Moral Agency and International Relations* (Basingstoke: Palgrave Macmillan, 2003), 183; A.F. Lang, Jr., 'Evil, Agency and Punishment', in R. Jeffery (ed.), *Confronting Evil in International Relations: Ethical Responses to Problems of Moral Agency* (New York: Palgrave Macmillan, 2008), 89; and A.F. Lang, Jr., 'Punishing Genocide: A Critical Reading of the International Court of Justice', in T. Isaacs and R. Vernon (eds.), *Accountability for Collective Wrongdoing* (Cambridge University Press, 2011), 92.

the fact for actions that result from the adoption of a role that creates those responsibilities. Responsibility, in turn, requires that an individual has the agency required to intend, plan, and execute the actions. Generally, we assume that only natural persons have the agency and hence responsibility for the type of action that would constitute such a violation.[9]

More often than not, we use the term responsibility in the second way, that is, we hold agents responsible for actions without specifying in advance a particular role or identity that has created this responsibility. This is because responsibility is first and foremost a moral term. That is, we tend to hold individuals responsible for their actions simply because we assume they are capable, intentional moral agents who should understand broadly conceived moral rules. This assumption about responsibility underlies a famous philosophical paper written by Peter Strawson in 1963, eventually published as 'Freedom and Resentment'.[10] He begins with a debate about the consequences for human behaviour of the thesis of determinism. The thesis of determinism – the belief that all actions are determined prior to their taking place and that human beings have no control over those actions in ways that are morally relevant – impacts our understanding of moral responsibility at its core, because if determinism is true the concept of responsibility makes no sense. Strawson seeks to prove that, even if determinism is true, responsibility still has a role to play in our interpersonal relations. In making this argument, Strawson states that responsibility must be seen in light of

> [t]he very great importance we attach to the attitudes and intentions toward us of other human beings, and the great extent to which our personal feelings and reactions depend upon, or involve, our beliefs about those attitudes and intentions.[11]

Strawson proceeds to argue that these attitudes and intentions toward others depend on the assumption that other human beings can be held responsible for their actions.

To assume that determinism is true is to adopt what Strawson calls an 'objective' rather than a 'participant' attitude toward another human person. And, to do so is

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⁹ See R. Pierik, 'Shared Responsibility in International Law: A Normative-Philosophical Analysis', Chapter 2 of this volume, 36.

¹⁰ P. Strawson, 'Freedom and Resentment', reprinted in J.M. Fischer and M. Ravizza (eds.), *Perspectives on Moral Responsibility* (Ithaca, NY: Cornell University Press, 1993), 45.

¹¹ Ibid., at 48.

to see him, perhaps, as an object of social policy, as a subject for what, in a wide range of senses, might be called treatment; as something certainly to be taken account, perhaps precautionary account, of; to be managed or handled or cured or trained; perhaps simply to be avoided ... But it cannot include the range of reactive feelings and attitudes which belong to involvement and participation with others in inter-personal human relationships.[12]

Strawson's thesis challenges us to consider how interpersonal relations need to be taken into account when thinking about moral concepts. One could analyse the concept of responsibility without even considering these relationships, but to do so would undermine the role of responsibility in many of our relationships – the ability to see others as fellow human beings with whom we have concrete relationships that shape our collective lives, rather than as violators of rules who must be punished or corrected in order to be welcomed back into society. That is, Strawson's notion of responsibility reveals a role of responsibility that is not always obvious; it solidifies our relationships with each other and, in so doing, makes community life more meaningful.

Even more importantly, Strawson is making the interesting claim that without responsibility, communities make no sense. In other words, if the concept of responsibility did not exist, we could not have meaningful interpersonal relationships and, *ipso facto*, we could not have meaningful societies and political communities. In a sense, Strawson is telling us that without some notion of responsibility, social and political interactions could not exist. Strawson, of course, is writing about domestic social and political life. Yet, there is a potential for his ideas to contribute to our understanding of international or global political relations. For instance, Strawson's idea about the centrality of reactive attitudes in the deployment of responsibility could reinforce ideas of international society as theorised by figures such as Hedley Bull.[13] This tradition of thought poses itself against more structural realist arguments that do not see states as having anything other than relations of conflict; the international society idea argues that their relations arise from shared understandings of themselves as part of a community. Responsibility as theorised by Strawson might supplement this account.

More interestingly, if I turn to the idea of shared responsibility as developed by Nollkaemper and Jacobs, Strawson's argument reveals the

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[12] Ibid., at 51.
[13] H. Bull, *The Anarchical Society* (New York: Columbia University Press, 1977).

potential for how these reactive attitudes toward a multiplicity of agents in the international order might enfold even a larger number of agents into some conception of global community. For instance, if I, as a citizen of the United States, see that a multinational company is polluting the Amazon rainforest, my reactive attitude to this 'finding of responsibility' can strengthen the idea that there is a larger international global or political community of which I am part and which may prompt me to act upon this realisation. Strawson's framework allows us to see how responsibility in this framework of shared responsibility might generate new political responses to global harms.

One element of Strawson's account that is under-theorised, however, is the role of power in the construction of both responsibility and even in our reactive attitudes to those claims of responsibility. One theorist who does highlight the role of power is Marion Smiley, who argues in her book *Moral Responsibility and the Boundaries of Community* that moral responsibility cannot be a function simply of our assumptions about will and intentions.[14] Rather, responsibility arises from two factors: one, the social roles that communities establish for individuals, determining whether or not they should be blamed for particular actions; and, two, the power relations that exist between individuals that allow some to blame others and, in so doing, reinforce or create anew those roles. Individual persons become blameworthy or praiseworthy because of the roles we create for them.

For example, mothers are expected to conform to certain roles in terms of raising children, roles that can mean that they are deemed to be responsible for the faults of their children in ways that fathers are not (at least according to these socially defined roles). Moreover, these roles become part of the public discourse we use to think about and act upon public problems. For instance, when reports appear arguing that children raised by stay-at-home parents tend to have fewer social problems than those who attend day care, various pundits will claim that this 'proves' that working mothers can be blamed for their children's defects. Such an assumption ignores the ways in which the role of 'mother', while certainly physical in part, is also a socially constructed role. Moreover, the ways in which we blame and praise will not simply affect the individuals at that moment, but will also have a long-term influence on how we construct the role of mother. We can meaningfully blame and praise

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[14] M. Smiley, *Moral Responsibility and the Boundaries of Community: Power and Accountability from a Pragmatic Point of View* (University of Chicago Press, 1992).

individual mothers for actions in raising children, but we need to be aware of how such statements of blame and praise rely upon and recreate certain roles that partly determine the ways in which we hold mothers responsible.

Smiley's analysis demonstrates how power structures create roles for individuals that lead to attributions of responsibility. Her argument relates to Strawson's point that there is a relationship between discourses of responsibility and the social and political norms that structure community life. But, Smiley provides more precision to Strawson's account by highlighting that responsibility is not just necessary for our interpersonal relationships to work; it is more than that because it structures and is structured by the power relations that exist within that society. Her critical insight on this point is crucial to understanding the ways in which responsibility can and cannot function in international law and politics. Certainly, Smiley makes her argument in the context of domestic law and politics, and it has, I think, some important implications for international politics and law. Power is often invoked in international law and politics as the only currency. Invocations of responsibility need to be supplemented by this claim to power as well, though not just in the simplistic way that realist theory so often does. So, for instance, we might highlight not only the way in which one powerful state dominates another, but how categories of international criminal law reflect underlying power relations. One obvious example would be the ways in which the International Criminal Court has only examined cases from Africa rather than from other regions, reflecting the longstanding view of Africa as an uncivilised arena that needs to be governed by the West.

Smiley's account, while written from the perspective of moral philosophy, points us toward the political dimension of responsibility (as does Strawson's, though in a more roundabout way). Two political theorists give a different reading of the politics of responsibility, each highlighting a different dimension of the idea. The first is William Connolly. In *Identity/Difference*, Connolly explores the ways in which formulations of responsibility structure the late modern response to political life. He argues that while responsibility has had different resonances across different cultural contexts, a version of it seems to structure much of our reactions to wrongdoing and evil. For Connolly, unlike Strawson, this need for responsibility is not something to be celebrated, but something that may contain within it the 'problem of evil':

> Perhaps standards of responsibility are both indispensable to social prac-
> tice and productive of injustices within it. Perhaps because every society
> demands some such standards, a problem of evil resides within any social
> practice that fulfils this demand relentlessly.[15]

Connolly argues that the demand for responsibility represents a kind of
moral calculus that prevents any act of evil from slipping away
unaccounted for. In our attempts to locate all wrongdoing in structures
of responsibility, Connolly suggests that we force individuals into par-
ticular identities that do not accurately capture them. Put differently, the
multiple levels of causality that exist in the world, and our need as
humans to find clear moral and sometimes legal judgments, results in
situations where the task of 'finding someone responsible' can perhaps
result in outcomes that do more harm than might have been intended.
The 'evil' that results, in other words, is intimately tied to our efforts to
find responsible agents.

I find Connolly's critique of responsibility quite persuasive, for it
reveals how responsibility is a constructed concept and how its construc-
tion does not always lead to justice. At the same time, I do not want to
abandon responsibility because I agree with Strawson that it is too
fundamental to our shared lives, whether at the local, national, or global
levels. Rather than abandon responsibility, perhaps we need to be atten-
tive to the kinds of identities and communities it constructs. Moreover, it
may be that responsibility can generate some unexpected outcomes, ones
that are not the normal moves toward punishment or sanction.[16]

The final theorist to be explored is Hannah Arendt. She develops the
concept of political agency, which is the status of individuals in a
community as being able to participate in the life of that community.
That status sometimes results from an official body conferring it, such as
in determinations of citizenship. At the same time, political agency does
not stop with that official conferment. Rather, it must be continually re-
inscribed by the engagement in the political, by working with and

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[15] W.E. Connolly, *Identity/Difference: Democratic Negotiations of Political Paradox* (Ithaca:
Cornell University Press, 1991), at 96.
[16] I have argued, however, that one of the most important functions of holding an agent
responsible is to punish that agent, a move that Connolly wants to avoid. My view is that
punishment is central to political life and should be one of the results of finding an
individual responsible. But, in this chapter, I am trying to elucidate an alternative to
punishment and sanction that may arise from discourses of responsibility. For my
defence of punishment as a legitimate response to holding agents responsible, see A.F.
Lang Jr., 'Crime and Punishment: Holding States Accountable' (2007) 21(2) EIA 239.

sometimes against others in the political community. Agency then results not just from the actions of others giving one an official status but from one's own political activity.

This idea of political agency is developed in Arendt's *The Human Condition*.[17] Political agency in Arendt's understanding relies on a particular understanding of action, which is how human persons reveal themselves in moments of interactions with others. It is the way in which we assert who we are, in which we create ourselves by presenting ourselves in public. Politics, which provides the constructed stage of a parliament or town meeting, provides the paradigmatic instance of moments in which the human person can be revealed. Arendt develops this concept of action in an engagement with Greek and Roman philosophers who sought to define the realm of the political. That realm, combining a Homeric agonal spirit with an Aristotelian notion of speech as the quintessentially human characteristic, results in a public space that allows for competition and conflict.

According to Arendt, the public realm is the place where 'everybody had to constantly distinguish himself from all others, to show through unique deeds or achievements that he was best of all'.[18] Indeed, it is this ability to act publicly that defines the human person:

> A life without speech and without action, on the other hand – and this is the only way of life that in earnest has renounced all appearance and all vanity in the biblical sense of the word – is literally dead to the world; it has ceased to be a human life because it is no longer lived among men. With word and deed we insert ourselves into the human world, and this insertion is like a second birth, in which we confirm and take upon ourselves the naked fact of our original physical appearance.[19]

Public political action puts us into the world and reveals the 'who' of our existence in a way that no other practice can.

Furthermore, since Arendt believes that political action is a public presentation of the self, there must be a community to whom this presentation is made. She notes that action occurs within a 'web of human relationships', a place composed both of other people acting and speaking and of the 'common world' that surrounds and anchors human interaction: 'most words and deeds are *about* some worldly objective reality in addition to being a disclosure of the acting and

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[17] H. Arendt, *The Human Condition* (University of Chicago Press, 1958).
[18] Ibid., at 41. [19] Ibid., at 176–177.

speaking agent.'[20] Politics thus requires a public realm, one composed of fellow humans with an agreed upon equality, not one of merit but one of agency.

This connects to Arendt's idea of political responsibility. In her essay, 'Collective Responsibility', she distinguishes between guilt and responsibility: 'Guilt, unlike responsibility, always singles out; it is strictly personal.'[21] But while guilt is individual, responsibility can be corporate. She notes that for collective responsibility to make sense two conditions must apply:

> I must be held responsible for something I have not done, and the reason for my responsibility must be my membership in a group (a collective), which no voluntary act of mine can dissolve, that is, a membership which is utterly unlike a business partnership which I can dissolve at will.[22]

Collective responsibility applies most clearly, according to this conception, in cases where individuals are held responsible for what their governments do. The context of her argument seems to be an attempt to locate the responsibility of individuals who do not support the actions of their government but who are being held responsible for that government's actions.

Arendt takes this point even further, however. Rather than simply stating that collective responsibility is possible in these situations, she argues that simply by living in the current world, one in which we are automatically bound up in a community, we can never avoid responsibility for the actions of our states. To clarify this, she notes that only refugees are innocent of this collective responsibility, precisely because they are outside the boundaries of any community. Arendt claims that political nonparticipation, as a sign of political protest, does not alleviate this responsibility. Simply by the fact that we live in a community, we are responsible for its collective actions:

> This vicarious responsibility for things we have not done, this taking upon ourselves the consequences for things we are entirely innocent of, is the price we pay for the fact that we live our lives not by ourselves but among our fellow men, and that the faculty of action which, after all, is the political faculty par excellence, can be actualized only in one of the many and manifold forms of human community.[23]

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[20] Ibid., at 182 (emphasis in the original).
[21] H. Arendt, 'Collective Responsibility', in H. Arendt, *Responsibility and Judgment* (edited and with an introduction by J. Kohn) (New York: Schocken Books, 2003), at 147.
[22] Ibid., at 149.   [23] Ibid., at 157–158.

Political responsibility here connects with political agency. Rather than moral agency that seeks to connect the agent with the will, political agency and responsibility connect the individual to a wider realm, one in which the human person is celebrated in all her individuality. While it may seem strange to create a collective notion of responsibility when Arendt is so concerned with individuality, her concept of responsibility is about agency not about an internal will producing morally or legally correct outcomes. Instead, it is a responsibility that arises from an understanding that each action produces the political sphere anew. Because of the emphasis she places on the ways in which agency constructs the public sphere, Arendt's conception of responsibility arises from that participation. If the public sphere is that place where no person is made superfluous, but every person has the opportunity to enact themselves and contribute to the creation of that sphere through their deeds, acts that destroy that space will redound on all of us who have acted and continue to act in that space.[24] Constructing and sustaining the public sphere is a joint exercise, and when that sphere is closed down or parts of it are destroyed permanently, we all become responsible.

There are, of course, other versions of collective responsibility, ones that go by a variety of terms, including shared responsibility and corporate responsibility. There is an important body of literature on collective responsibility in international relations (IR) theory. One of the leading theorists here is Toni Erskine, who provides the following definition of collective moral agency:

> A collectivity is a candidate for moral agency if it has the following: an identity that is more than the sum of the identities of its constitutive parts and, therefore, does not rely on a determinate membership; a decision-making structure; an identity over time; and a conception of itself as a unit.[25]

This definition, like others that address responsibility, focuses primarily on the internal characteristics of the agent. In this account, Erskine

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[24] For an argument about Arendt and her concern with the dangers of individuals becoming superfluous, see P. Hayden, 'Superfluous Humanity: An Arendtian Perspective on the Political Evil of Global Poverty' (2007) 35(2) MJIS 279.

[25] T. Erskine, 'Assigning Responsibilities to Institutional Moral Agents: The Case of States and "Quasi-States"' (2001) 15(2) EIA 67, at 72; and T. Erskine (ed.), *Can Institutions Have Responsibilities? Collective Moral Agency and International Relations* (Basingstoke: Palgrave Macmillan, 2003). See also her chapter in this volume, T. Erskine '"Coalitions of the Willing" and the Shared Responsibility to Protect', Chapter 8, 227.

focuses on the individual's will and/or knowledge in ascribing responsibility to her for past actions. Translating that approach to collective moral agents, however, requires more careful consideration, which Erskine and others provide.[26] For individuals, internal characteristics include the mind, the will, and the emotions. For collective agents, however, internal characteristics must include things like bureaucracy, constitutional structure, and/or social arrangements.

Before turning to the idea of responsibility in international law, one final distinction needs to be made. As a result of this last point, I would suggest that corporate agents are more relevant in understanding responsibility than collective ones. By this, I do not mean corporations in the purely economic sense of the term. Rather, I understand a corporation as a more formalised group structure than a collective. A collective is a group of persons, who may or may not be organised and capable of acting with intention. A corporation, on the other hand, is a group that is recognised through a formal process and has a particular structure that allows it to intend, plan, and execute actions. Holding collectives responsible is not justified, but holding corporations responsible is justified and, as Sarah Seck demonstrates, an important part of most legal systems.[27] Richard Vernon's argument that states and not nations can be held responsible and punished, an argument he poses in contrast to the famous attempt by Karl Jaspers to hold Germany responsible as a nation, could be fit into this distinction, if he called a nation a 'collective' and a state a 'corporation'.[28]

Businesses that are incorporated are designed to locate agency and responsibility in a particular structure and the wider legal order in order to avoid having any individuals within them held responsible for wrongs the corporation might commit. So, the suffering that individuals experience when a corporation is punished can be justified because the

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[26] The work of Larry May is exemplary here; see L. May, *The Morality of Groups* (University of Notre Dame Press, 1987) and L. May, *Sharing Responsibility* (University of Chicago Press, 1992). For a range of debates about collective responsibility, see L. May and S. Hoffman (eds.), *Collective Responsibility: Five Decades of Debate in Theoretical and Applied Ethics* (Lanham, MD: Rowman and Littlefield, 1991).

[27] S.L. Seck, 'Collective Responsibility and Transnational Corporate Conduct', in T. Isaacs and R. Vernon (eds.), *Accountability for Collective Wrongdoing* (Cambridge University Press, 2011), at 140. While Seck provides evidence of how the law deals with corporate crime, the title of her chapter elides this important distinction between collectives and corporations.

[28] R. Vernon, 'Punishing Collectives: States or Nations?', in T. Isaacs and R. Vernon (eds.), *Accountability for Collective Wrongdoing* (Cambridge University Press, 2011), 287.

individuals involved understand that they are acting as a corporate entity recognised as such. In Seck's review of corporations as subjects of liability for global harms, such as climate change, they are on one level certainly responsible. But, at a deeper level, it is the legal and political order that creates corporations that should also be responsible for the harms they commit. In other words, if states create corporations without regulatory frameworks or limits on their profit making, then the state should be considered somehow responsible. The idea that corporate agents exist within political, legal, and even social orders points us back to the ideas developed earlier; that is, our notions of responsibility are constitutive of, and constituted by, the communities within which we live (Strawson); that these communities function through the exercise of power (Smiley); that our desire to find responsible agents results in practices that generate more harm than good (Connolly); and that one solution to these tensions is to develop ways of reconstructing the communities within which agents – corporate and personal – function by engaging in forms of new political actions (Arendt). Through these steps, we can see, then, how we might use responsibility in new ways, primarily as a political practice that might generate new political and even legal institutions and orders.

These arguments point to how wider political and legal orders create responsible agents, which I would call a 'constitutional system'. At the end of this chapter, I will demonstrate that while the global constitutional order has created states that seemingly escape liability, that order can be restructured in such a way that it places more regulatory limits on what states can do. One way to do that is to create a legal order in which states are not only held responsible but perhaps punished, something I have argued for elsewhere.[29] But in this chapter I point to some alternatives to punishment and sanction. For perhaps a better response when we hold agents responsible is to look toward alternative political forms by which the problems agents have created can be resolved. That is, following Arendt, I would like to point more toward responsibility that is not simply a legalistic move toward punishment, but is a political move toward alternative forms of action that might generate new structures and institutions. In pursuit of this objective, though, let me review one more body of literature concerning responsibility, the discourse of international legal responsibility.

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[29] Lang, 'Crime and Punishment: Holding States Accountable', n. 16. See also, A.F. Lang, Jr. *Punishment, Justice and International Relations: Ethics and Order after the Cold War* (London: Routledge, 2008).

3.   Responsibility in international law

In one sense, a legal discourse on responsibility is surprising, for responsibility is more of a moral or political term than a legal one. The more accurate term in the law would be 'obligation' or 'duty'. For instance, in a contractual relationship, the two parties do not have responsibilities toward each other but have obligations. Alternatively, when one has violated a law, one is considered liable rather than responsible for the harms committed. Responsibility has, one might say, a 'softer' meaning than the more precise legal terms such as 'obligation' or 'liability'.

Yet in international law there is, in fact, a robust literature on responsibility. In 2001, the International Law Commission drafted the Articles on Responsibility of States for Internationally Wrongful Acts (Articles on State Responsibility)[30] and in 2011 they passed the Articles on the Responsibility of International Organizations.[31] While these are relatively recent pieces of international law, the notion of responsibility has long been part of the international legal discourse. As Alain Pellet reminds us, responsibility is intimately tied to the central idea of the international legal order that all sovereign states are equal.[32] Pellet also points out that the fact that the French word *responsibilité* conflates the two distinct meanings of responsibility and liability;[33] perhaps a reason international law draws on the term responsibility rather than liability is because of the use of French as the diplomatic and legal language of nineteenth-century international law.

Although the term is common in international legal discourse, it includes a diversity of different meanings. Its use in traditional international law reflects something closer to 'private' or 'civil' law meanings; that is, a violation of the rights of one state by another gives rise to a need for reparations. This meaning can be found in nineteenth-century legal

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[30] Articles on Responsibility of States for Internationally Wrongful Acts, ILC *Yearbook* 2001/II(2) (Articles on State Responsibility); see J. Crawford (ed.), *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (Cambridge University Press, 2003).

[31] Articles on the Responsibility of International Organizations, ILC Report on the work of its sixty-third session, UNGAOR 66th Sess., Supp. No. 10, UN Doc. A/66/10 (2011); see M. Ragazzi (ed.), *Responsibility of International Organizations* (Leiden: Brill Publishing, 2013).

[32] A. Pellet, 'The Definition of Responsibility in International Law', in J. Crawford, A. Pellet, and S. Olleson (eds.), *The Law of International Responsibility* (Oxford University Press, 2011), 3.

[33] Ibid., at 11.

discourse when the legal equality of states was emerging.[34] States were in something like a contractual relationship with each other, so a violation was a breach of that contract. But the meaning of responsibility also includes a 'public law' dimension, in which states are understood to be 'responsible' to the international community as a whole. One can see this change in the debates and discussions that surrounded the drafting of the Articles on State Responsibility. The Articles establish that a state can invoke damages by one state against it, and hence make a claim of responsibility. Yet, as James Crawford notes, this is not the only way responsibility can be invoked:

> The Articles also make provision for the invocation of responsibility in the absence of any direct form of injury, where the obligation breached is one protecting the collective interests of a group of states or the interests of the international community as a whole.[35]

In other words, built into the concept of international legal responsibility is a bifurcated understanding of the term, one that is 'private' and one that is 'public'.[36]

The other complicating element of international responsibility is that it is used in reference to both people and states. This is a recent change, one that arose as a result of the creation of international tribunals and culminating in the creation of the International Criminal Court. The ability of the international community to hold individuals responsible for war crimes, crimes against humanity, and genocide has generated two sorts of responsibility. As I have argued elsewhere, this has resulted in something like two competing constitutional orders, one where individual persons are agents and the other in which states are agents.[37]

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[34] Martti Koskenniemi argues that this 'private' nature of international legal responsibility can be traced to the natural law theories of Grotius and Pufendorf. I think he is incorrect on this point, as Grotius argued from a natural law foundation in which a violation of the laws of nature was a violation of the order as a whole rather than a violation of the rights of individuals. Of course, Grotius did help create the idea of natural rights, but I am not convinced that his understanding of responsibility derives from rights rather than law. See M. Koskenniemi, 'Doctrines of State Responsibility', in J. Crawford, A. Pellet, and S. Olleson (eds.), *The Law of International Responsibility* (Oxford University Press, 2011), 45, at 47.

[35] J. Crawford, 'The System of International Responsibility', in J. Crawford, A. Pellet and S. Olleson (eds.), *The Law of International Responsibility* (Oxford University Press, 2011), 17, at 24.

[36] Nollkaemper and Jacobs, 'Shared Responsibility in International Law: A Conceptual Framework', n. 7, at 400–403.

[37] A.F. Lang, Jr., 'Conflicting Rules: Global Constitutionalism and the Kosovo Intervention' (2009) 3(2) JIS 185.

So, within the idea of international legal responsibility, there are a range of conflicting notions. André Nollkaemper and Dov Jacobs try to negotiate some of these tensions with their idea of 'shared responsibility'.[38] They propose a slightly altered understanding of the corporate/collective distinction, one that focuses less on the collective nature of the state itself and more on the range of agents in the international order who may or may not contribute to various harms. In one passage, they highlight what they see as the two possible purposes of responsibility, purposes which correspond to the distinction between the 'private' and 'public' nature of this concept: first, to protect the rights of individual agents in the international order; or second, to reinforce the centrality of law in the international political order. Further, they propose that a modified version of the idea of 'joint and several responsibility' might provide some means by which alternative uses of international responsibility can be deployed. They note that there are difficulties with applying this idea, one drawn from civil law contexts, to the public international legal order. As such, they propose some substantive and procedural variations on the international legal order that might address these tensions.

Nollkaemper and Jacobs open up the concept of responsibility through their thorough development of the idea of a 'shared responsibility'. In so doing, they widen our scope to include a range of agents in the international legal and political order whose consent and control need to be better understood as playing a crucial role in the creation of harms at the global level. Their concept is ideally placed to build upon the idea of political responsibility proposed in the previous section. Certainly, the idea of political responsibility I have developed here does not correspond with most international legal notions. But, what makes Nollkaemper and Jacobs' account helpful is that it reveals one of the obvious tensions within the international order, that is, that there are multiplicity of agents not only who can be held responsible, but who can act in order to achieve outcomes. This includes individual people, local governments, non-governmental organisations (NGOs), states, and supranational and international organisations. As suggested in the next section, there may well be agents that currently do not exist but which might need to be created in order to tackle climate change, a type of political action that Arendt would call 'natality' or the practice of creating anew. A political project

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[38] See Nollkaemper and Jacobs, 'Shared Responsibility in International Law: A Conceptual Framework', n. 7 for a similar point.

arising from attributions of responsibility, such as explained by Arendt in the previous section, would certainly protect rights and reinforce the importance of the rule of law; but, I want to argue, it should also give the opportunity to a range of agents to create new ideas and visions for tackling problems such as climate change. So, prompted by the idea of shared responsibility, I want to conclude this chapter with some suggestions for how a notion of 'shared responsibility' can lead to forms of 'shared political action' in order to move forward on the problems of climate change.

4. Climate change, responsibility, and politics

There is obviously a wealth of scholarship on climate change, including the international and domestic legal dimensions. The focus of this chapter is less on the detailed analyses of the law surrounding climate change policy but instead the ways in which the idea of political responsibility might be deployed in responding to the dilemmas raised by it.

It is worth highlighting that responsibility plays a central part in discussions of climate change. As noted in the introduction, most scientific analyses point to the role that human action has played in bringing about climate change. Rather than legal, moral, or political responsibility, this point is really something closer to causal responsibility. That is, no one individual or group of individuals 'intended' to bring about climate change. Rather, it is the result of the cumulative actions of the entire human race.[39] One might argue, then, that there is no moral or legal responsibility for climate change since no agent intended it, and no agent was in any particular role that generates the responsibility to resolve the problem. Here, though, the idea of shared responsibility becomes helpful. One might go so far as to say that there is a universally shared responsibility for climate change, one that has moral and political implications. International politics and law have tried to turn this into a single multilateral treaty regime, the Kyoto Protocol, as a way to share that responsibility. But, as the political debate highlights, this responsibility is differentiated, which means that those states or companies generating more carbon dioxide (CO^2) than others will be responsible for different forms of action. This has led to debates about developing world

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[39] Nollkaemper and Jacobs identity cumulative responsibility as a subgroup of shared responsibility, see 'Shared Responsibility in International Law: A Conceptual Framework', n. 7, at 368.

responsibilities in relation to developed world states, debates which have been highly contentious and which feed into the colonial legacy of the global system.

Rather than engage directly in this legal debate or try to parse out exactly which responsibilities are to be attributed to which agents, I want to highlight some alternative responses that build on the idea of responsibility for climate change but turn toward political action. Each of these actions will be located in terms of the idea of responsibility on which they rely and will be evaluated in terms of the concept of shared political responsibility that I have developed in the previous section.

4.1   Liberal individuals and climate change

Political philosophers have approached the problem of climate change in terms of the liberal individual, especially in terms of the individual's moral responsibilities. There is a large body of literature that seeks to address these themes, but a recent work provides one possible political response worth considering. Elizabeth Cripps argues that climate change generates a set of moral responsibilities, but the ability to fulfil these responsibilities is severely hampered by the practical problems of collective action. But Cripps does not abandon her notion of responsibility, but explores the nature of the choices that individuals have when it comes to this issue. Her argument makes an interesting move in that she suggests our failure to act will 'mar' us as individuals, resulting in a stunted conception of ourselves and our place in the world if we fail to act. In addition, because climate change requires collective action Cripps suggests that for us to reconcile the potential tensions that arise from our inability to reconcile our responsibilities we must engage in some form of collective action to address climate change.[40]

Cripps' account provides us with a morally grounded reason to act, one that moves away from the liberal account of rights toward something like a republican account of active citizenship. Yet, she does not provide any details about how that responsibility might be fulfilled, instead providing moral reasons for why we should feel responsible and how individuals should be able to translate their internal feelings of responsibility into some form of political action.

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[40] E. Cripps, *Climate Change and the Moral Agent: Individual Duties in an Interdependent World* (Oxford University Press, 2013).

Some who write from within the tradition of liberal political philosophy suggest ways that we might turn this internal responsibility into concrete political actions. One political response comes from those who argue that there are a set of environmental rights that generate obligations or responsibilities in association with those rights. There are two versions of this argument. The first argues that states need to make concrete the right to a clean environment through changes to their constitutions. The clearest position along these lines comes from Tim Hayward who argues that there is a universal right to a clean environment which ought to be made part of each state's constitution.[41] Hayward adopts a Hohfeldian set of assumptions about rights and obligations, which means that any right generates a set of corresponding duties or obligations. This is the stronger notion of responsibility identified earlier, one that is not moral but strongly legal. In fact, Hayward does not use the idea of responsibility in his analysis. Moreover, his account proposes that such rights must be justiciable in order for them to be meaningful. This state-based conception of constitutional responsibility is an important move from Cripps' account of the need to act into a practical and political outcome. Yet, precisely because it is focused on national constitutions, Hayward's account does not quite correspond to the idea of shared political responsibility developed in this chapter. The idea of shared responsibility proposed by Nollkaemper and Jacobs highlights the essentially international character of certain issues, and proposes a way in which different agents, not just states, can contribute to how we might respond to this. At the same time, Hayward's idea about how states can act by changing their constitutions is an important part of the construction of this shared response.

A different but related political account comes from Andrew Dobson who proposes a form of 'environmental citizenship'.[42] Dobson's account of citizenship moves beyond the state and even beyond a liberal focus on rights. Instead, he argues for a more republican inspired notion of citizenship, one that prompts new forms of political action that transcend obligations to a single community and instead seek to formulate response to the global problems of the environment. He argues for a form of 'ecological' citizenship rather than merely environmental, the distinction being one that draws on an understanding of the human relation to the environment that goes beyond merely protecting the human race and

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[41] T. Hayward, *Constitutional Environmental Rights* (Oxford University Press, 2005).
[42] A. Dobson, *Citizenship and the Environment* (Oxford University Press, 2003).

moves toward a deeper engagement with the natural world. Dobson
focuses his practical responses on education, arguing that even in trad-
itional liberal societies there is a responsibility to teach future generations
about the environment in ways that go beyond their own communities.

These three accounts build on the idea of the individual agent, but take
that agency in different directions. Cripps, by turning inward, suggests
how the individual's moral responsibility can generate collective actions.
Hayward makes concrete how that action can be turned into constitution
making. And Dobson points us to how we can move beyond the liberal
individual state. The modes of action proposed here do point us toward
different ways we might engage in the global order, which can contribute
to the idea of shared political responsibility developed in the preceding
section. The ideas developed here should be read as how we might
construct some actionable responses to climate change.

4.2   Responding to international legal responsibility

The preceding accounts focused on themes arising from the state, rights,
and citizenship, although they seek to transcend them. Other efforts to
deal with climate change and environmental issues begin with inter-
national elements but turn those into local action. The first comes from
an innovative book by Walter Baber and Robert Bartlett, *Global Democ-
racy and Sustainable Jurisprudence*, who address head on one of the
problems of environmental politics – the debate surrounding the scien-
tific evidence about various issues, which leaves many individuals around
the world unwilling or unable to act politically to change it.[43] They argue
that there is a responsibility not only to act, but to understand more
clearly what is happening in the environment, something that they do
not believe can be left only to the scientific community. As such, they
propose the use of deliberative democracy as a means to generate polit-
ical change. Importantly, writing from the perspective of international
law, they suggest that there needs to be communities created around the
world that can play a role in translating environmental science and
political action into various forms of law making. These communities
of deliberation can be structured around specific problems in commu-
nities but then translate those problems to a global scope and begin
linking them together. Such groups would include scientists, political

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[43] W.F. Baber and R.V. Bartlett, *Global Democracy and Sustainable Jurisprudence: Delibera-
tive Environmental Law* (Boston, MA: MIT Press, 2009).

activists, and lawyers in an effort to create materials that could be turned into national, regional, or even international law.

This proposal maps on well with the idea of shared political responsibility developed in this chapter. Multiple sites of agency with different forms of representation might contribute to a new political movement. With both political and educative dimensions, these small councils can be part of a wider discursive structure that shares the responsibilities of climate change, but turns those shared needs into actions. It builds on the ideas of Cripps, Hayward, and Dobson in that it allows individuals to act, can contribute to national and even global constitutions, and provides a means to better educate the wider global public.

Matthew Hoffman provides evidence for how activism around climate change has emerged at a range of levels, often in response to the failure of international legal efforts to create multilateral treaties. His argument is less a normative one and more of a descriptive or explanatory one, in which he explores various 'experiments' at dealing with climate change that have arisen since the passage of the Kyoto Protocol.[44] Hoffman's account points to the ways in which schemes such as regional cap and trade agreements in North America, ones which cross the US-Canadian border, or municipal efforts to limit carbon emissions have been emerged in the fact of national failures to act. The US Congress, for instance, has failed to act on its commitments to the Kyoto Protocol which has resulted in US governors and mayors acting in their place. Additionally, Hoffman points to how multinational companies like Cisco Corporation have worked with NGOs such as the Clinton Foundation to encourage greater internet connectivity in cities to lessen the carbon impact of commuting. These efforts are prompted by the idea of responsibility, and an acknowledgement that the international legal responsibilities of states has not been translated into action. As such, actors at a number of different levels have moved responsibility from the state, to state treaty making processes, to forms of political action.

This account suggests some ways in which existing government structures, as opposed to Baber and Bartlett's proposed structures, are acting in the face of failed efforts of states. Hoffman's suggestions are useful in allowing us to see how shared political responsibility can emerge from diverse levels of government. Here we find actual descriptions of political action that can generate new insights and policies on climate change. As

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[44] M.J. Hoffman, *Climate Governance at the Crossroads: Experimenting with a Global Response after Kyoto* (Oxford University Press, 2011).

Hoffman notes, these are experiments, so there is no guarantee of their success. But, as Arendt and others have argued, at times we need to engage in efforts to create new structures without full knowledge of what the outcome will be.

4.3 Radical responsibility

The previous examples point to ways in which political action can arise from discourses of responsibility. The last example I wish to highlight is a more radical one, drawing on a deeper ecological sentiment than the previous analyses which, as a result, challenges our accepted meanings of agency and responsibility. Jane Bennet argues in *Vibrant Matter* that an anthropocentric approach to political life fails to appreciate the complexities of agency. She argues that distinguishing between matter and life, as much of philosophical and political discourse does without thinking, ignores various ways in which political life is shaped by non-human materiality. For instance, she looks to an essay by Charles Darwin whose study of worms ended with the pithy observation that they 'make history'.[45] She acknowledges that this is a form of anthropomorphism but she embraces this accusation rather than defend against it. Using Jacques Ranciere's notion of democracy as a form of irruption, she argues that such irruptions in political life need not come from intentional human persons but can come from various forces in the wider world. Darwin's point was that worms keep in place certain artefacts and destroy others, making them authors of a kind of history. This agency is vital to how history evolves and how humans understand themselves.

How does this relate to the questions of responsibility for climate change in this chapter? Bennett only briefly refers to climate change, but her argument is directly relevant to the claims I am making. Early in her text, she highlights how responsibility assumes an intentional agent who we can identify and reward or punish if necessary. Drawing here on Connolly's critique of the politics of responsibility,[46] Bennett suggests that if we relax our assumptions about human agency and allow other forms of agency to develop, our ideas about responsibility will also evolve. Using the idea of an assemblage (from Deleuze and Guatarri), Bennett argues that responsibility is better located in 'human-nonhuman

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[45] J. Bennett, *Vibrant Matter: A Political Ecology of Things* (Durham: Duke University Press, 2010), at 94–109.

[46] W. Connolly, *Identity/Difference*, n. 15, at 16–35.

assemblages'.[47] Rather than a resignation that no one is to blame, however, Bennett encourages us to consider how to respond as persons to this situation of political responsibility. She argues that we must resist a politics of blame and instead consider how we should relate to the human-nonhuman assemblages in which we are enmeshed.

This is, admittedly, a more radical response to environmental problems and is less concrete than some of the suggestions listed earlier. What it does, however, is highlight the ways in which the very concepts of agency and responsibility might be limiting our ability to respond to the environment. Bennet is a political theorist, so she argues for a politics of change. But it is a politics of change and action that force us to confront some of our ingrained assumptions about what responsibility means. And, interestingly, with her focus on the idea of assemblages, Bennet suggests a slightly different idea of 'shared politics', though perhaps without the element of responsibility. That is, her argument is one that brings together not just individual people, but a wider range of 'agents' in our understanding of the problems of climate change and our possible responses to it.

5.   Conclusion

In conclusion, this chapter has built on the idea of shared responsibility in the international legal framework of Nollkaemper and Jacobs to develop an idea of shared political responsibility. In so doing, I am not trying to argue that we need to put aside legal responsibility or the international legal context. Indeed, some of what I consider to be the most innovate ideas reviewed here can take up the theme of shared responsibility and develop it in new ways. For instance, the notion of shared legal responsibility might be one way to interpret the modes of mixed political action that Hoffman describes, or the locations of deliberative action that Baber and Bartlett propose. More radically, Bennett's ideas about assemblages suggest a sharing of responsibility not only with persons but with a wider ambit of the natural world.

The primary point I wish to make is that our discourse of responsibility, while viewed through moral and legal frames, can also be seen through a political one. Arendt's idea that collective responsibility means we must accept that being part of a community generates responsibilities

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[47] Bennett, *Vibrant Matter*, n. 45, at 36.

to act is one that permeates this chapter. If we expand Arendt's frame to see that we are part of the 'human' community or, in accordance with Bennett, a 'natural' community, then perhaps our modes of action will turn to new and different frames. The nature of shared political responsibility provides a possible way to act in the current global order. The problems of climate change demand nothing less.