A Health-Centric Intersectional Approach to Climate Litigation at the European Court of Human Rights

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ABSTRACT

Climate change affects everyone's health. At the same time, because of specific risk factors, some groups have a greater chance of becoming sick as a result of climate change than others. Evaluating these inequitable impacts through a health-centric intersectional approach—which considers overlapping factors like gender, age, residence, and prior health status—reveals significant health risks often overlooked in current human rights-based cases. While the climate change litigation movement is thriving, evidence-based intersectional health risks remain surprisingly underexposed. This Article argues that a health-centric intersectional approach to climate change cases can enhance accountability for the impacts of climate change. We demonstrate the advantages of this approach in relation to two climate change cases recently decided by the European Court of Human Rights: Verein KlimaSeniorinnen v. Switzerland and Duarte Agostinho v. Portugal and 32 other States. We further show that a health-centric intersectional approach could avoid certain procedural and substantive pitfalls while responding more readily to climate-related health inequity.

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Introduction

Health risks are increasingly linked to climate change. For example, increasing temperature and humidity lead to a surge in transmission of vector-borne diseases such as Lyme disease and dengue,[1] extreme weather events increase the risk of asthma hospital admissions in children and women,[2] and smoke caused by heatwave-triggered wildfires is linked to an increase in cardiovascular diseases.[3] While everybody is vulnerable to the health risks of climate change, these risks are unevenly distributed. The effects of climate change deepen existing inequities while creating new forms of health inequities.[4] Indeed, health impacts caused by climate change are characterized by intersectional factors, such as gender, race, age, sex, and socio-economic status.[5] Multiple interacting risk factors make some groups especially susceptible to becoming sick or dying because of climate change impacts.[6] This paper argues that a *health-centric intersectional approach* would better guarantee accountability for these harms and account for their disparate impacts, especially when used in climate change litigation.

The climate change litigation movement is thriving: the number of cases argued on the basis of human rights is growing steadily.[7] On 9 April 2024, the European Court of Human Rights ("ECtHR") for the first time ever held that climate inaction violates human rights in *Verein KlimaSeniorinnen v.*

1. *See generally* Jan C. Semenza & Shlomit Paz, *Climate Change and Infectious Disease in Europe: Impact, Projection and Adaptation*, 9 Lancet Reg. Health Eur. 1, 1–9 (2021).

2. Firdian Makrufardi et al., *Extreme Weather and Asthma: A Systematic Review and Meta-Analysis*, 32 Eur. Resp. Rev. 1, 1, 7 (2023).

3. Haitham Khraishah et al., *Climate Change and Cardiovascular Disease: Implications for Global Health*, 19 Nature Rev. Cardio. 798, 800 (2022).

4. For example, a mix of factors renders populations in low-income countries more vulnerable to climate change than populations in rich countries. Scholars have pointed to a number of contributing factors, such as the location of many low-income countries in geographical hazard zones; having a (semi-) arid climate, economic reliance on agriculture; and a lesser capacity to adapt to climate change impacts through recourse to abundant institutional, financial, and technological resources. *See generally* Samuel Fankhauser & Thomas K.J. McDermott, *Understanding the Adaptation Deficit: Why Are Poor Countries More Vulnerable to Climate Events than Rich Countries?* 27 Glob. Env't Change 9 (2014).

5. Intergovernmental Panel On Climate Change [hereinafter IPCC], *Climate Change 2022 – Impacts, Adaptation and Vulnerability: Working Group II Contribution to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change*, at 1372 (Hans-Otto Pörtner et al. eds., 2023).

6. For instance, people of advanced age, with pre-existing medical conditions and experiencing social deprivation are likely to experience greater health impacts because of their heightened exposure to climate change effects, increased sensitivity to those effects, and a lower capacity to adapt to the impact of those effects. *See* Jouni Paavola, *Health Impacts of Climate Change and Health and Social Inequalities in the UK*, 16 Env't Health 61, 61–65 (2017).

7. *See* Joana Setzer & Catherine Higham, Grantham Rsch. Inst. Climate Change & Env't, *Global Trends in Climate Change Litigation: 2023 Snapshot*, at 2 (2023). For analyses of the goals and approaches of invoking human rights arguments in climate change cases, see generally Jacqueline Peel & Hari M. Osofsky, *A Rights Turn in Climate Litigation?*, 7 Transnat'l Env't L. 37 (2018); César Rodríguez-Garavito, *Litigating the Climate Emergency: The Global Rise of Human Rights–Based Litigation for Climate Action*, *in* Litigating the Climate Emergency: How Human Rights, Courts, and Legal Mobilization Can Bolster Climate Action (César Rodríguez-Garavito ed., 2022).

Switzerland.[8] At the same time, the ECtHR rejected *Duarte Agostinho v. Portugal and 32 other States* on procedural grounds.[9]

The cases concerned climate change-induced health risks for populations vulnerable to climate change effects. In both cases, the applicants alleged that the states' failure to adequately regulate greenhouse gas emissions contributed to those effects. While the applicants in the Swiss case were elderly women suffering from heat-related health issues, the applicants in the Portuguese case were six children and youth suffering from physical and mental health problems caused by forest fires and extreme heat.[10] In the Swiss case, the applicants claimed standing in two ways: (1) as individual women who suffered particular health harms due to their exposure to climate change and (2) as part of an association that sought protection from climate change harms on behalf of its members.[11] The applicants in both cases based their health-related claims mainly on Articles 8 (right to private life) and 2 (right to life) of the European Convention on Human Rights ("ECHR" or "European Convention").[12] In the *Duarte Agostinho* case, Articles 3 (prohibition of inhuman and degrading treatment, as well as torture) and 14 (prohibition of discrimination) were also at stake.[13]

Despite the centrality of health evidence in these and other cases, *health rights* are surprisingly underexposed in climate change litigation before regional and international human rights bodies.[14] This is striking since most climate change cases bear evidence of health damage,[15] for example, related to heat-induced respiratory diseases.[16] Health experts have called for stronger legal involvement in the climate change-health nexus.[17] However, it is widely

8. Verein KlimaSeniorinnen v. Switzerland, App. No. 53600/20, Judgment, Eur. Ct. H.R. (Apr. 9, 2024) [hereinafter Klima Seniorinnen Judgment]. The Grand Chamber held that Switzerland's legislative framework was insufficiently precise to protect the association from health-related climate risks. *Id.* ¶¶ 567, 573–74.

9. The Grand Chamber dismissed the applicants' case because they had not exhausted domestic remedies in Portugal and there was no jurisdiction with regard to the other thirty-two states. Duarte Agostinho v. Portugal and 32 Other States, App. No. 39371/20, Judgment, Eur. Ct. H.R., ¶¶ 214, 227 (Apr. 9, 2024) [hereinafter Agostinho Judgment].

10. Verein KlimaSeniorinnen v. Switzerland, App. No. 53600/20, Objet de l'affaire, Eur. Ct. H.R. (Mar. 17, 2021) [hereinafter KlimaSeniorinnen Summary]; Duarte Agostinho v. Portugal and 32 other States, App. No. 39371/20, Objet de l'affaire, Eur. Ct. H.R. (Nov. 13, 2020) [hereinafter Duarte Agostinho Objet de l'affaire].

11. Klima Seniorinnen Judgment, 2024 Eur. Ct. H.R. ¶¶ 10–21, 305–11.

12. *Id.* ¶ 227.

13. Duarte Agostinho Summary, 2020 Eur. Ct. H.R.

14. A review of cases catalogued in the Sabin Center Climate Change Litigation Database shows only two "global" cases against governments that explicitly rely on right to health claims: CRC Committee, Sacchi et al. v. Argentina, U.N. Doc. CRC/C/88/D/107/2019 (Sept. 22, 2021); Armando Ferrão Carvalho v. European Parliament and Council, Case T-330/18, CJEU (May 8, 2019). *Climate Change Litigation Database*, Sabin Ctr. For Climate L., https://climatecasechart.com/ [https://perma.cc/5XCM-9NU8] (last visited May 30, 2024).

15. *Health*, Eur. Env't Agency https://www.eea.europa.eu/en/topics/at-a-glance/health (May 23, 2024).

16. IPCC, *Summary for Policy-Makers*, *in* Climate Change 2022: Impacts, Adaptation and Vulnerability. Contribution of Working Group II to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change ¶ B.1.4 (H.-O. Pörtner et al. eds., 2022)

17. *E.g.*, Lawrence Goston et al., *The Legal Determinants of Health: Harnessing the Power of Law for Global Health and Sustainable Development*, 393 The Lancet Comm'n. 1857, 1857 (2023).

recognized that human rights law faces significant challenges in responding to climate change, with obstacles connected to standing, imminence, the connection between the overall emissions of states, climate impacts, and human rights.[18]

We argue that a *health-centric intersectional approach* would better guide climate litigation before the ECtHR and before other human rights bodies. The approach would make several important contributions.[19] First, a health-centric intersectional approach would respond to the challenges of demonstrating direct harms from climate change. The approach would enable individuals to show the concrete injury necessary to meet the procedural requirements of victim status under Article 34 of the European Convention.[20] Second, as an intersectional right to health makes the present day human impact of climate change tangible, it can overcome foundational questions relating to the imminence of future harm.[21] Finally, a health-centric intersectional approach would better highlight the health inequities that are deepened by climate change. The World Health Organization describes health inequities as "unfair, avoidable, and systematic differences in health status or in the distribution of health resources between different population groups."[22]

This Article contributes to the current debate in two ways. First, it introduces an explicit *health* perspective to the existing body of literature on human rights and climate change.[23] Second, it shows how an intersectional approach to health could enhance climate change litigation in human rights courts. In this light, we evaluate two of the first climate change cases that came before the ECtHR: *Verein KlimaSeniorinnen v. Switzerland* and *Duarte Agostinho v. Portugal and 32 other States.* We extrapolate our analysis of the impact of an intersectional approach to human-rights based climate change litigation more

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18. Corina Heri, *Climate Change before the European Court of Human Rights: Capturing Risk, Ill-Treatment and Vulnerability*, 33 Eur. J. Int'l L. 925, 936 (2022).

19. *See generally* Hannah van Kolfschooten & Angela Hefti, *Women's Health Rights Can Guide International Climate Litigation: KlimaSeniorinnen v. Switzerland before the European Court of Human Rights*, Health & Hum. Rts. J. Online (May 15, 2023), https://www.hhrjournal.org/2023/05/womens-health-rights-can-guide-international-climate-litigation-klimaseniorinnen-v-switzerland-before-the-european-court-of-human-rights/ [https://perma.cc/6LHB-RFQF].

20. KlimaSeniorinnen Judgment, 2024 Eur. Ct. H.R. ¶ 487. *See also* Lambert v. France, App. No. 46043/14, Judgment, Eur. Ct. H.R., ¶ 89 (June 5, 2015).

21. *See* Justine Bell-James & Briana Collins, *Human Rights and Climate Change Litigation: Should Temporal Imminence Form Part of Positive Rights Obligations?*, 13 J. Hum. Rts. & Env't 212, 214 (2022) (describing the difficulty of establishing a temporal connection between government action and the harm felt sufficient to succeed in rights-based litigation).

22. *Health Inequities and their Causes*, World Health Org. [hereinafter WHO] (Feb. 22, 2018), https://www.who.int/news-room/facts-in-pictures/detail/health-inequities-and-their-causes [https://perma.cc/GB66-FFC8]. On health inequity, see generally Hannah van Kolfschooten, *The AI Cycle of Health Inequity and Digital Ageism: Mitigating Biases through the EU Regulatory Framework on Medical Devices*, 10 J. L. & Biosciences 1–23 (2023).

23. For literature on climate litigation before the ECtHR, see generally Jacques Hartmann & Marc Willers, *Protecting Rights through Climate Change Litigation before European Courts*, 13 J. Hum. Rts. & Env't 90–113 (2022); Helen Keller & Corina Heri, *The Future is Now: Climate Cases before the European Court of Human Rights*, 40 Nordic J. Hum. Rts. 153–74 (2022); Human Rights and the Planet: The Future of Environmental Human Rights in the European Court of Human Rights (Natalia Kobylarz & Evadne Grant eds., 2020).

generally for two reasons: (1) International human rights law treaty provisions are similar in substance to the provisions in the European Convention on Human Rights, and (2) being the first climate change cases before the ECtHR—an institution that is a standard-setter in the application of human rights norms—these cases are likely to influence future human rights-based climate change cases. While having a background in law, to respond to the interdisciplinary challenges climate change poses, we draw on the fields of public health, medical science, and sociology.

I. The Health-Centric Intersectional Approach to Climate Change

A. Climate Change as a Health Risk

The World Health Organization ("WHO") recognizes climate change as "the single biggest health threat facing humanity,"[24] and the U.N.'s expert body on climate change, the Intergovernmental Panel on Climate Change ("IPCC"), has "very high confidence" that climate change is a key driver of certain diseases.[25] Generally, climate change leads to rising temperatures, extreme weather events, rising sea levels, and increasing carbon dioxide levels. These effects impact water and food supplies, air quality, and the weather, which in turn affect human health directly and indirectly.[26] For example, increasing allergens in the environment can cause and worsen asthma and other respiratory diseases, and impacts on water quality can cause diseases such as cholera, leptospirosis, and harmful algal blooms.[27] Extreme heat increases the chance of heatstroke and cardiovascular collapse. Indirectly, extreme heat can lead to reduced capacity to perform manual labor, which has financial effects on individuals' ability to access healthcare and food. Heat can also increase the occurrence of foodborne gastrointestinal infections. Flooding increases the chance of drowning and the occurrence of gastrointestinal infections due to the disruption of sanitation systems.[28] Climate change can also aggravate over half of known infectious diseases.[29] For example, increases in temperature and rainfall contribute to more widespread outbreaks of mosquito-transmitted diseases such

24. *Climate Change and Health*, WHO (Oct. 12, 2023), https://www.who.int/news-room/fact-sheets/detail/climate-change-and-health [https://perma.cc/XX9U-V7VR].

25. IPCC, Climate Change 2022 – Impacts, Adaptation and Vulnerability, *supra* note 16, ¶ B.1.4.

26. Kristie L. Ebi, Jeremy J. Hess & Paul Watkiss, *Health Risks and Costs of Climate Variability and Change*, *in* Injury Prevention and Environmental Health 153, 154 (Charles N. Mock et al. eds., 3d ed. 2017).

27. *See generally* Gennaro D'Amato et al., *The Effects of Climate Change on Respiratory Allergy and Asthma Induced by Pollen and Mold Allergens*, 9 Allergy 2219 (2020).

28. Anna Jones, *The Health Impacts of Climate Change: Why Climate Action Is Essential to Protect Health' (2022) 36 Orthopaedics and Trauma*, 36 Ortho. & Trauma 248, 250 (2022).

29. Camilo Mora et al., *Over Half of Known Human Pathogenic Diseases Can Be Aggravated by Climate Change*, 12 Nature Climate Change 869, 872 (2022).

as dengue fever and malaria.[30] Climate change-induced extreme weather events (e.g., floods, storms) can also impact access to health care because of disrupted transport, weakened health systems, or loss of electricity.[31] Climate change also affects mental health. Children who feel powerless, sad, and afraid in the face of the climate crisis in particular experience eco-anxiety, as they worry about the continuous degradation of our planet.[32] For these reasons, climate change should be seen as a *health risk*.

B. An Intersectional Approach to Climate-Induced Health Risks

The individual health impact of climate change depends on certain variables. We argue that the determinants of health—the factors that contribute to a person's state of health, such as the availability of clean drinking water, healthy food, and clean air—are factors that influence climate change impact as well.[33] Factors can be medical or biological (e.g., pre-existing diseases or genetic profile), but also non-medical or social.[34] These determinants of health shape individual and collective experiences of climate change impacts. A key example is the disproportionate health impact of climate change on women and girls. Because of gender roles that assign women the tasks of collecting food, water, and fuel in different societies, women are often more exposed to intense heat, floods, and other extreme weather events. Increasing drought puts women at a heightened risk of sexual violence because of greater exposure to aggressors during longer searches for water.[35] Further, the health of pregnant women is especially at risk: heat increases the chance of miscarriages and stillbirth, and can cause anemia, hypertension, and exhaustion.[36]

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30. *Id.*

31. Paavola, *supra* note 6, at 64–65.

32. Caroline Hickmann et al., *Climate anxiety in children and young people and their beliefs about government responses to climate change: a global survey*, 5 LANCET, PLANETARY HEALTH 863, 863 (2021) (eighty-four percent of children surveyed reported that they were moderately worried about climate change, whereas fifty-nine percent of the children were extremely or very worried).

33. *Social Determinants of Health*, WHO, https://www.who.int/health-topics/social-determinants-of-health#tab=tab_1 [https://perma.cc/D7N5-8HFJ] (last visited June 6, 2024) ("The social determinants of health . . . are the conditions in which people are born, grow, work, live, and age, and the wider set of forces and systems shaping the conditions of daily life.").

34. *Id.*

35. *Climate Change Exacerbates Violence against Women and Girls*, U.N. OHCHR (July 12, 2022), https://www.ohchr.org/en/stories/2022/07/climate-change-exacerbates-violence-against-women-and-girls [https://perma.cc/25CX-KT98]. For further analysis regarding the intersection of water scarcity and its discriminatory effect on women, see Shreya Atrey, *The Inequality of Climate Change and the Difference it Makes*, *in* FEMINIST FRONTIERS IN CLIMATE CHANGE 17, 21 (Cathi Albertyn et al. eds., 2023); Amanda Clark, *Cause and Effect: Climate Change and Gender-Based Violence in East Africa*, WILSON CTR. (Mar. 6, 2023), https://www.wilsoncenter.org/blog-post/climate-change-gbv-east-africa [https://perma.cc/WP6T-ZMKQ]; Harv. L. Schl. Int'l Hum. Rts. Clinic & Ctr. for Econ. & Soc. Rts., *When the Water Runs Dry: Human Rights, Climate Change & Deepening Water Inequality in Delhi, India*, 23–24 (2023).

36. Zalak Desai & Ying Zhang, *Climate Change and Women's Health: A Scoping Review*, 5 GEOHEALTH 1, 6 (2021).

Additional factors can change the severity or the nature of the risk. While children are generally more susceptible to the detrimental health effects of climate change, Black children in the United States have particular risks because of their race. For example, Black children are more at risk from the effects of extreme heat and more likely to live in areas without tree canopy that would help absorb the heat.[37] The histories of residential segregation and redlining in the United States have also exposed Black communities to sources of air pollution, which are disproportionately located in areas where people of color live.[38] In this sense, we can expect Black children's health to be especially impacted by climate change.

After increasing certain groups' exposure to climate change effects, determinants of health likewise exacerbate the susceptibility of those groups to climate change damages. Determinants of health also affect recovery from health-related climate change harms.[39] For example, the generally lower levels of health insurance coverage and lower quality healthcare received by Black Americans would likely affect how well Black children recover once exposed to climate change damages.[40] The combined impact of these aspects create future, additional health risks.[41] As a result, climate change exacerbates existing health threats while creating new health hazards.[42]

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37. Pamela Jackson et al., *Heat Islands and Chronic Disease: Could African Americans Be More Vulnerable to Heat-Related Health Impacts?* 33 J. Nat'l Black Nurses Assoc. 1, 4 (2022) ("Heat-related health impacts are not only a risk for older adults. The health risks associated with elevated heat may also disproportionately impact African American children."). *See* Bill Jesdalde, Rachel Morello-Frosch & Lara Cushing, *The Racial/Ethnic Distribution of Heat Risk–Related Land Cover in Relation to Residential Segregation*, 121 Env't Health Persp. 811, 814 (2013). ("Overall, racial/ethnic minority groups were more likely to live in areas with HRRLC [heat risk-related land cover] than whites, particularly Hispanics and Asians. For example, 29% of whites lived in block groups with no tree canopy and mostly covered with impervious surface, as did 31% of blacks, 50% of Hispanics, and 54% of Asians.")

38. Jesdalde et al., *supra* note 37, at 811–13.

39. Scholars have identified these three factors—greater exposure to climate change effects, higher susceptibility to climate change damages, and reduced recovery potential—as the avenues by which climate change exacerbates social inequality. *See* S. Nazryk Islam & John Winkel, U.N. Dept. Econ. & Soc. Aff., *Climate Change and Social Inequality*, at 10, U.N. Doc. ST/ESA/2017/DWP/152 (2017). Researchers in the field of public health have identified similar factors linking determinants of health to individuals' health outcomes. *See, e.g.*, David R. Williams et al., *Race, Socioeconomic Status, and Health: Complexities, Ongoing Challenges, and Research Opportunities*, 1186 Annals N.Y. Acad. Sci. 69, 71 (2010) (attributing the poorer health of minority groups in the United States to the onset of illness, to the severity of the illness once it occurs, and to chances of survival).

40. According to U.S. census data, Black Americans are uninsured at higher rates than White and Asian Americans. U.S. Dept. of Health & Hum. Serv., Assist. Sec'y for Planning & Eval., Off. of Health Pol'y, *Health Insurance Coverage and Access to Care among Black Americans: Recent Trends and Key Challenges*, at 3–4 (Feb. 22, 2022). Racial differences in the quality and intensity of health care received also affect Black Americans. Williams et al., *supra* note 39, at 92. Observers have cited these indicators as some of the factors influencing the disparate impact of COVID-19 on Black Americans. *See generally* Maritza Vasquez Reyes, Student Essay, *The Disproportional Impact of COVID-19 on African Americans*, 22 Health & Hum. Rts. J. 299 (2020).

41. *See* Islam & Winkel, *supra* note 39, at 7 ("Climate change thus makes inequality worse, thus perpetuating the cycle.").

42. *See* U.N. OHCHR, *Analytical Study on the Relationship between Climate Change and the Human Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health*, ¶ 42, U.N. Doc. A/HRC/32/23 (May 6, 2016). *See generally* H. Shellae Versey, *Missing Pieces in the Discussion on Climate Change and Risk: Intersectionality and Compounded Vulnerability*, 8 Pol'y Insights Behav. & Brain Sci. 67 (2021).

An intersectional health-centric approach in human rights-based climate litigation would better showcase the adverse health impacts of climate change based on various individual and social risk factors. First, in many cases, climate change-induced health impact is shaped by location. Climate change is especially noticeable in the regions where the applicants in the two ECtHR cases hailed from. Switzerland heats up two to three times more than the global average and heatwaves are likely to increase.[43] Portugal is one of the European States most at risk of wildfires,[44] with some regions in Portugal being especially prone, as asserted by the applicants.[45] People living in the regions that the cases focused on are especially likely to suffer from heart and respiratory diseases linked to extreme heat and smoke from wildfires.

Second, climate change-induced health impact is shaped by age. For example, children face very specific health risks, such as malnutrition caused by water stress and droughts.[46] Climate anxiety, as reiterated by the young applicants in *Duarte Agostinho*, is a "chronic stressor" for young people.[47] On top of that, children may not have access to mental health support.[48] Elderly people, too, face heightened health risks from climate change. Both pre-existing medical conditions and a weaker ability to thermo-regulate make elderly people more sensitive to heat waves.[49] On the other hand, isolation, lacking autonomy, and reduced mobility are some of the factors that can hinder their ability to protect themselves.[50]

Elderly women, like the applicants in *KlimaSeniorinnen*, face intersectional disadvantages based on sex and gender, which impact how they are affected by heatwaves.[51] Extreme heat impacts elderly women differently and heatwaves may be conducive to their premature deaths.[52] Elderly women in regions vulnerable to climate change impacts may therefore find it more challenging to recover after wildfires and heatwaves, both mentally and physically.[53] Finally, health status is an important factor, as children and elderly women with pre-existing health issues like asthma and heart diseases form a subcategory that is acutely affected.[54]

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43. Int'l Energy Agency, *Switzerland Climate Resilience Policy Indicator – Analysis* (Aug. 16, 2023), https://www.iea.org/articles/switzerland-climate-resilience-policy-indicator [https://perma.cc/S5JP-YQ8H].

44. OECD, *Taming Wildfires in the Context of Climate Change: The Case of Portugal*, at 5–6 (2023).

45. *See* Duarte Agostinho v. Portugal and 32 Other States, Application, Eur. Ct. H.R., ¶ 22 (Sept. 2, 2020) [hereinafter Agostinho Application].

46. U.N. OHCHR, *supra* note 42, ¶¶ 23–25.

47. Versey, *supra* note 42, at 68. Duarte Agostinho v. Portugal and 32 Other States, Observations of the Applicants on Admissibility and Merits, Eur. Ct. H.R., ¶ 320 (Feb. 9, 2022).

48. Versey, *supra* note 42, at 68, 70.

49. Paavola, *supra* note 6, at 62. Antonia Kaltsatou, Glen P. Kenny & Andreas D. Flouris, *The Impact of Heat Waves on Mortality among the Elderly: A Mini Systematic Review*, 4 J. Geriat. Med. & Geront. 1, 1 (2018).

50. Paavola, *supra* note 6, at 62–64.

51. *See* Angela Hefti, *Intersectional Victims as Agents of Change in International Human Rights-Based Climate Litigation*, Transnat'l Env't L. 1, 9 (2024).

52. Yvette van Steen et al., *Sex Differences in Mortality after Heat Waves: Are Elderly Women at Higher Risk?*, 92 Int'l Arch. Occup. & Env't Health 37, 44 (2019).

53. *See id.* at 44.

54. Versey, *supra* note 42, at 69. Annette Peters & Alexandra Schneider, *Cardiovascular Risks of Climate Change*, 18 Nature Rev. Cardio. 1, 1–2 (2021).

We argue that the ECtHR and other human rights bodies should adopt an intersectional approach to the right to health. Scholars have proposed the concept of intersectionality as a response to the shortcomings of single-axis anti-discrimination analysis.[55] Under this framework, intersectional approaches recognize that a specific combination of inequalities places certain groups at greater risk of climate change damage while the presence of one or more of those factors may present differently with other groups.[56]

An intersectional approach to health clarifies why exactly the individual or specific community is at risk from the consequences of climate change.[57] For example, climate change would affect a person with heart disease, who is both Black and a woman, differently than someone who possesses only one of the two characteristics, since Black women face historical barriers to accessing healthcare.[58] Similarly, Indigenous children living on Pacific islands with higher outbreaks of waterborne diseases, such as diarrhea, would be more at risk of falling ill because of tidal rises. These illnesses can impact a child's long-term health impacts and lead to disability.[59] Communities who already are living in poverty in these areas because of colonial and racist systems would be more affected by these health risks. A health-centric intersectional approach to climate litigation would compel courts to grapple with the complexities and inequalities of climate change impacts.

II. The Role of Health Arguments in Climate Litigation before the ECtHR

A. *Health Arguments in ECtHR Litigation*

Climate change detrimentally affects a broad range of rights recognized under international human rights law, such as the right to a healthy environment, the right to food, the right to water, the right to housing, and the

55. Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1 U. Chi. Legal Forum 139, 140 (1989).

56. The case of Hurricane Harvey provides an apt example. Scholars studying the hurricane associated climate change with flood depths and damages that occurred as a result. While low-income Latina/x/o neighborhoods were more impacted by climate change-induced flooding than high-income Latinx neighborhoods in Harris County, Texas, the scholars did not find similar differences between lower-income and higher-income neighborhoods more generally in the county. On the contrary, higher-income neighborhoods tended to be more impacted by the floods overall. Smiley et al., *Social inequalities in Climate Change-attributed Impacts of Hurricane Harvey*, 13 Nature Commc'n 1, 3 (2022). The authors attribute their findings to "socio-spatial inequality" that maps onto the realities of both race and income in the United States. *Id.* at 7, Similarly, studies have shown differences in the impact of heatwaves on elderly people. In regions with stronger adaptation responses and higher levels of physiological and behavioral acclimation, heatwaves are thought to be less risky for elderly populations. *See* Kaltsatou et al., *supra* note 49, at 4–5; Jian Cheng et al., *Heatwave and Elderly Mortality: An Evaluation of Death Burden and Health Costs Considering Short-Term Mortality Displacement*, 115 Env't Int'l 334, 339–40 (2018).

57. *See* Versey, *supra* note 42, at 67.

58. Juanita Chinn, Iman Martin & Nicole Redmond, *Health Equity among Black Women in the United States*, 30 J. Women's Health 212, 213 (2021).

59. Karen Levy, Shanon M. Smith & Elizabeth J. Carlton, *Climate Change Impacts on Waterborne Diseases: Moving Toward Designing Interventions*, 5 Current Env't Health 272, 273 (2019).

right to health.[60] In response to states' obligations to respect, protect, and fulfill human rights, international litigators increasingly invoke human rights law to compel governments to mitigate climate change. European human rights law, however, presents significant challenges in responding to climate change.[61] These challenges include the difficulty of establishing standing in climate cases, where public interest claims are not permitted, and substantiating climate change impacts as human rights violations given human rights law's traditional concern with past occurrences.[62] Using intersectional health arguments in human rights-based litigation may avoid some of these shortcomings.

The international climate change regime supports the centrality of health-based human rights arguments in climate change litigation strategies. Many key treaties articulate the importance of the right to health: the United Nations Framework Convention on Climate Change considers that states should protect public health in mitigation efforts in Article 4(f); the Paris Agreement specifically mentions the right to health in its preamble; and the International Covenant on Social and Economic Rights ("ICESCR") explicitly protects the right to health via Article 12.[63] However, in climate change litigation before the ECtHR, applicants must primarily rely on the European Convention. Unlike the ICESCR, for example, the ECHR does not explicitly protect socio-economic rights, such as the right to food, water, housing, and health.[64] As a result, climate change litigants before the ECtHR cannot directly invoke the right to health.[65] Instead, health concerns must be addressed under Article 8 (the right to private life) and Article 2 (the right to life) of the Convention, which the Court has interpreted to cover health-related harm.[66]

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60. *See* Ron Dudai, *Climate Change and Human Rights Practice: Observations on and around the Report of the Office of the High Commissioner for Human Rights on the Relationship between Climate Change and Human Rights*, 1 J. HUM. RTS. PRAC. 294, 297–98 (2009).

61. Heri, *supra* note 18, at 926; César Rodríguez-Garavito, *Litigating the Climate Emergency: The Global Rise of Human Rights–Based Litigation for Climate Action*, *in* LITIGATING THE CLIMATE EMERGENCY, *supra* note 7, at 9, 36–37.

62. *Report of the Office of the United Nations High Commissioner for Human Rights on the relationship between climate change and human rights*, ¶ 70, U.N. Doc. A/HRC/10/61 (Jan. 15, 2009) [hereinafter U.N. OHCHR Climate Change Report].

63. United Nations Framework Convention on Climate Change Art. 4(f), May 9, 1992, 1771 U.N.T.S. 107; Paris Agreement pmbl., Dec. 12, 2015, 3156 U.N.T.S. 79; International Covenant on Economic, Social and Cultural Rights Art. 12, Dec. 16, 1966, 993 U.N.T.S. 3.

64. CESCR, *General Comment No. 14: the right to the highest attainable standard of health (Art 12)*, ¶¶ 34–37 U.N. Doc. E/C.12/2000/4 (Aug. 11, 2000).

65. In contrast, other human rights instruments such as the Convention on the Rights of the Child ("CRC") protect the right to health: CRC Article 24 stipulates that "1. States Parties recognize the right of the child to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health. States Parties shall strive to ensure that no child is deprived of his or her right of access to such health care services." Convention on the Rights of the Child Art. 24, Nov. 20, 1989, 1577 U.N.T.S. 3.

66. KlimaSeniorinnen Judgment, 2024 Eur. Ct. H.R. ¶¶ 504–20.

The ECtHR has a strong track record of holding states responsible for health-related human rights violations associated with environmental threats.[67] The Court has clarified that, despite the European Convention's focus on civil and political rights, "there is no watertight division" separating socio-economic rights from civil and political rights, so aspects of socio-economic rights can be interpreted into the Convention.[68] In prior jurisprudence, the ECtHR has considered other socio-economic conditions relevant to the right to health, such as the right to water, in connection with the human rights protected by the Convention.[69] For example, the Court found that socio-economic deficiencies, such as living in "most extreme poverty, unable to cater for . . . food, hygiene and a place to live," violated Article 3 (the prohibition of inhuman and degrading treatment).[70] The ECtHR has typically examined health-related threats under Article 2 (the right to life) and particularly Article 8 (the right to respect for private and family life) of the Convention.[71] In Article 8 cases, claimants must show that harms suffered reach a certain "level of severity" before the Court finds interference with the applicants' rights to private and family life.[72] The Court does not require impact on *health* to trigger the application of Article 8 in environmental cases.[73] However, *if* the person's health is at stake, the Court typically recognizes that the severity threshold is met.[74] The Court has found health-related violations of Article 8 in cases of toxic industrial emissions,[75] waste collection mismanagement,[76] and water pollution.[77] In *KlimaSeniorinnen*, the ECtHR also examined climate change-related health claims under Article 8.[78] This suggests that the lack of explicit socio-economic

67. *See generally* Di Sarno v. Italy, App. No. 30765/08, Judgment, Eur. Ct. H.R. (Jan. 10, 2012) (holding that the government's inability to ensure proper waste management violated the Article 8 right to life); Cordella v. Italy, App. Nos. 54414/13, 54264/15, Judgment, Eur. Ct. H.R. (Jan. 24, 2019) (holding that the government's failure to address toxic emissions from a steel plant violated the Article 8 right to life); Dubetska v. Ukraine, App. No. 30499/03, Judgment, Eur. Ct. H.R., ¶¶ 146–56 (Feb. 10, 2011).

68. Airey v. Ireland, App. No. 6289/73, Judgment, Eur. Ct. H.R. ¶ 26 (Oct. 9, 1979).

69. *See* Helen Keller & Angela Hefti, *Bringing the Right to Water into the Spotlight: A Civil Right before the European Court of Human Rights?*, 31 Rev. Eur. Comp. & Int'l Env't L. 50, 51–55 (2022).

70. M.S.S. v. Belgium and Greece, App. No. 30696/09, Judgment, Eur. Ct. H.R., ¶ 254 (Jan. 21, 2011).

71. *See, e.g.*, Brincat v. Malta, App. Nos. 60908/11 et al., Judgment, Eur. Ct. H.R., ¶¶ 73–117 (July 24, 2014) (concerning both Articles 8 and 2 in connection with asbestos exposure, resulting in the death of one of the applicants).

72. *See, e.g.*, Fadeyeva v. Russia, App. No. 55723/00, Judgment, Eur. Ct. H.R., ¶ 70 (June 9, 2005); Brincat, 2014 Eur. Ct. H.R. ¶ 144.

73. Fadeyeva, 2005 Eur. Ct. H.R. ¶ 70; Brincat, 2014 Eur. Ct. H.R. ¶ 144. *See also* KlimaSeniorinnen Judgment, 2024 Eur. Ct. H.R. ¶ 516.

74. Brincat, 2014 Eur. Ct. H.R. ¶ 144; López Ostra v. Spain, App. No. 16798/90, Judgment, Eur. Ct. H.R., ¶ 51 (Dec. 9, 1994).

75. *See, e.g.*, Fadeyeva, 2005 Eur. Ct. H.R. ¶ 88 (operation of a steel plant affecting the applicants' health and therefore violating Article 8 ECHR); Cordella v. Italy, 2019 Eur. Ct. H.R. ¶ 163 (toxic emissions from steel plant, where studies showed the negative impacts on the applicants' health).

76. *See* Di Sarno, 2012 Eur. Ct. H.R. ¶ 112.

77. Dzemyuk v. Ukraine, App. No. 42488/02, Judgment, Eur. Ct. H.R., ¶¶ 81–84 (Sept. 4, 2014) (water contamination from a cemetery); Dubetska v. Ukraine, App. No. 30499/03, Judgment, Eur. Ct. H.R., ¶ 111 (Feb. 10, 2011) (pollution from a coal mine affected the applicants for more than a decade).

78. KlimaSeniorinnen Judgment, 2024 Eur. Ct. H.R. ¶ 536.

rights protections under the ECtHR does not preclude consideration of health rights in climate change cases.

In assessing health-related evidence, the Court typically applies the "beyond reasonable doubt" standard of proof.[79] However, the Court has made clear that this standard must be considered in line with its function as a human rights court concerned with adjudicating human rights claims against states rather than establishing criminal responsibility. The Court may broadly assess evidence, "including such inferences as may flow from the facts and the parties' submissions."[80] In health cases, the Court typically gives weight to domestic and international studies pointing to a major public health risk, and tends to find implicit right to health violations.[81] For example, in one of the Court's early environmental cases, *Guerra v. Italy*, it relied on the authorities' own documentation of the risk level of a plant as evidence of the plant's hazardous nature. In that case, the Court found a violation of the applicants' rights under Article 8.[82] Similarly, in *Tătar v. Romania*, it considered that a gold mine posed a health risk because its pollution exceeded both domestic and international standards, triggering the application of Article 8.[83] The Court's reliance on scientific and international standards is illustrated by its *Fägerskiöld v. Sweden* decision, where it declared the case inadmissible because the noise complained of had not reached the noise levels set out by the WHO and the applicant had failed to provide a medical certificate.[84]

The Court also accepts medical certificates as evidence of harm when seeking to establish a violation in environmental cases.[85] However, medical certificates must not be the only evidence of applicants' health issues. Rather, medical documentation should tie applicants' health problems to relevant environmental effects, such as heatwaves or smoke from forest fires.[86] For example, in *Fadeyeva v. Russia*, an applicant who lived near a steel plant alleged that she had experienced health problems because of the plant's toxic pollution.[87] The applicants' medical certificate listed various illnesses, explaining that "working in conditions of vibration, toxic pollution and an unfavorable climate" would worsen them.[88] The ECtHR considered that the medical report "did not establish any causal link between environmental pollution and the applicant's illnesses."[89] Hence, similarly imprecise medical documentation would not suffice to demonstrate a causal link between health effects and climate change.

79. Ledyayeva v. Russia, App. Nos. 53157/99 et al., Judgment, Eur. Ct. H.R., ¶ 89 (Oct. 26, 2006).
80. *Id.*
81. *See* Cordella, 2019 Eur. Ct. H.R. ¶¶ 161–74.
82. Guerra v. Italy, App. No. 14967/89, Judgment, Eur. Ct. H.R., ¶ 57 (Feb. 19, 1998). *See also* Taşkın v. Turkey, App. No. 46117/99, Judgment, Eur. Ct. H.R., ¶¶ 112–13 (Nov. 10, 2004).
83. Tătar v. Romania, App. No. 67021/01, Judgment, Eur. Ct. H.R., ¶¶ 93–97, 107 (Jan. 27, 2009); *see also* Cordella, 2019 Eur. Ct. H.R. ¶¶ 162–79 (Jan. 24, 2019).
84. Fägerskiöld v. Sweden, App. No. 37664/04, Judgment, Eur. Ct. H.R. ¶¶ 2–3 (Feb. 26, 2008).
85. *See id.*
86. *See* Fadeyeva, 2005 Eur. Ct. H.R. ¶ 80.
87. *Id.* ¶¶ 10–19.
88. *Id.* ¶ 45.
89. *Id.* ¶ 80.

In contrast, in *López Ostra v. Spain*, the medical certificate of the applicant's daughter noted that the daughter experienced nausea, vomiting, allergic reactions, and other symptoms that "could only be explained by [her] living in a highly polluted area."[90] The applicant submitted a medical certificate, which, along with expert opinions, influenced the Court's finding of an implicit right to health violation.[91] It follows that medical certificates should specifically link health conditions to their climate-related causes to support health-centric climate litigation.

B. Health Arguments of the Duarte Agostinho and KlimaSeniorinnen Applicants

The applicants in both cases before the ECtHR heavily relied on health-based arguments. However, because of the limited subject matter jurisdiction of the Court, neither of the two cases specifically framed climate change as an issue of *health inequity*. The applicants invoked the right to life (Article 2) and private life (Article 8)—and in the case of the *Duarte Agostinho*, the right to non-discrimination (Article 14). In *Agostinho*, the Court also began considering a potential violation of the prohibition of ill-treatment (Article 3) of its own accord.[92] In essence, the cases addressed health claims that fit under the human rights protected by the ECHR.

The *Duarte Agostinho* applicants, who live in Leiria, Portugal, asserted that the effects of climate change, particularly heatwaves, endanger their health.[93] Heat-related wildfires have killed many people in Portugal, and the region where they live is particularly at risk from forest fires.[94] Some of the applicants had experienced the effects of forest fires first-hand.[95] The applicants pointed to studies showing that heat stress and respiratory diseases were linked to higher mortality.[96] Some of the applicants also argued that increasing ozone, pollen, and particulate matters worsened their respiratory conditions.[97] These conditions further prevented the applicants from sleeping and exercising outdoors, and also caused them anxiety. The applicants considered that these risks would only increase over their lives, affecting them and their children.[98]

Under Articles 2 and 8 combined, the *Duarte Agostinho* applicants argued that Portugal and thirty-two other respondent states in the Council of Europe

90. López Ostra, 1994 Eur. Ct. H.R. ¶¶ 19, 49–50 (Dec. 9, 1994).

91. *Id.* ¶¶ 49–58. This poses potential limits as medical doctors may be uncomfortable or need more scientific expertise to make such claims. It may be easier to demonstrate a health risk through international and domestic emission standards, as well as scientific studies and reports. For example, relevant medical research may help the ECtHR estimate the health risks to the KlimaSeniorinnen. However, the technicalities of this research would go beyond the expertise of the Court, which is not trained in medical science.

92. Agostinho Summary, 2020 Eur. Ct. H.R. ¶ 3.

93. Duarte Agostinho v. Portugal and Others, App. No. 39371/20, Application, Eur. Ct. H.R., ¶ 18 (Sept. 2, 2020) [hereinafter Agostinho Application].

94. *Id.* ¶¶ 14, 18–19.

95. *Id.* ¶ 22.

96. *Id.* ¶¶ 14, 18–19.

97. *Id.* ¶ 20.

98. *Id.* ¶¶ 21, 27.

(and hence subject to the ECtHR's jurisdiction) had not taken sufficient measures to protect the applicants from these "serious and substantial" health risks.[99] In addition, the applicants argued that, to comply with Articles 2 and 8, the states should have mitigated current and future impacts since the health risks were set to increase over time.[100] In relation to Article 14, the applicants argued that, as children, they were particularly impacted by climate change effects, since they would likely experience not only its current, but also future, impacts.[101] Moreover, Article 3 should be considered in relation to their physical and mental health.[102]

The intersectional right to health is particularly salient in *KlimaSeniorinnen*. The individual applicants in *KlimaSeniorinnen* claimed that, as women aged seventy-five years and older, they were more likely to die from heatwaves as a result of their age and gender.[103] They argued that climate change disproportionately affected the health and lives of elderly people, but most of all, elderly *women*'s health and lives.[104] They adduced statistics on the prevalence of heat-related deaths in older populations, with "nearly 90% of heat related deaths occurring in women."[105] The four individual applicants all had pre-existing health problems, evidenced by personal statements and several medical certificates linking their health problems to excessive heat.[106] One of the applicants wore a pacemaker and a heatwave caused her previous unconsciousness. Another woman had a cardiovascular disease that rendered her intolerant to excessive heat and required that she remain inside. Two other applicants with respiratory and pulmonary diseases argued that their health problems worsened during heatwaves.[107] They also argued that heatwaves already affected their health, yet they also expected to experience additional, imminent health-related harm.[108]

For the most part, the Grand Chamber in *KlimaSeniorinnen* implicitly accepted the medical evidence submitted by the applicants, as reflected in the Court's summaries of the applicant's medical certificates.[109] The Court only questioned the legitimacy of the evidence provided by the fifth applicant, noting that, "while she provided a medical certificate attesting that she suffered from asthma, in her declaration she stated that she had never seen a doctor concerning heatwaves."[110]

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99. *Id.* ¶ 25.
100. *Id.* ¶ 27.
101. *Id.* ¶ 31 (invoking Article 14 together with Articles 2 and 8 when making this claim).
102. Corina Heri, *The ECtHR's Pending Climate Change Case: What's Ill-Treatment got to do with It?*, EJIL: TALK! (Dec. 22, 2022), https://www.ejiltalk.org/the-ecthrs-pending-climate-change-case-whats-ill-treatment-got-to-do-with-it/ [https://perma.cc/CR9X-5PER].
103. KlimaSeniorinnen v. Switzerland, App. No. 53600/20, Application, Eur. Ct. H.R., ¶ 3 (Nov. 26, 2020) [hereinafter KlimaSeniorinnen Application].
104. KlimaSeniorinnen Judgment, 2024 Eur. Ct. H.R. ¶ 24.
105. KlimaSeniorinnen Application, 2020 Eur. Ct. H.R. ¶ 4.
106. *Id.* Additional Submission, ¶¶ 7, 54. The applicants' medical certificates are not publicly available.
107. *Id.* Additional Submission, ¶¶ 7–11.
108. *Id.* Additional Submission, ¶¶ 13, 29.
109. KlimaSeniorinnen Judgment, 2024 Eur. Ct. H.R. ¶¶ 16–21.
110. *Id.* ¶ 534.

The women applicants in *KlimaSeniorinnen* brought their health-related arguments under Articles 2 and 8 and followed a similar reasoning to the *Duarte Agostinho* case.[111] In addition to bringing claims as individual applicants, they also brought claims as a collective. A Swiss association to which the women belonged, named *Verein KlimaSeniorinnen Schweiz*, simultaneously applied to the Court for protection.[112] The association comprises over two thousand women members, with an average age of seventy-three.[113] One of its purposes is "to prevent health hazards caused by dangerous climate change."[114]

The ECtHR ultimately recognized the Swiss association's standing, i.e., its right to bring the complaint. However, it did not recognize "victim status" for the individual applicants, where the applicants had to prove that they were directly affected and thus entitled to bring their claims in their individual capacities. The outcome necessarily reflects two new tests that the Court introduced as guiding its approach to standing in climate change cases.

The test for individuals is particularly stringent while the bar for associations is lower. Individuals applying to the Court for protection must show "a high intensity of exposure" to the adverse effects of climate change.[115] The applicants must also demonstrate a "pressing need" for the Court's protection.[116] The two prongs together serve as proof of direct affectedness.[117] Even the Court itself concluded that this new threshold was "especially high."[118] To demonstrate both a high intensity of exposure to the effects of climate change *and* a pressing need for the Court's protection, applicants would have to demonstrate that they both faced "significant" adverse consequences as a result of respondent states' failure to mitigate climate change,[119] and that they lacked other means to reduce the harms.[120]

Associations, on the other hand, have much lower hurdles. Any association with standing to act in the respondent state could qualify as having standing before the ECtHR so long as the association had a mission to advance climate change protection and human rights.[121] The association would also need to be qualified to advocate on behalf of individuals in the jurisdiction in question.[122] Further, an association could have its own standing to represent the interests of its members even in cases where the individual members themselves would not meet the victim status requirements.[123]

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111. *Id.* ¶¶ 49–54.
112. *Id.* ¶ 1.
113. *Id.* ¶¶ 10–11.
114. KlimaSeniorinnen Application, 2020 Eur. Ct. H.R. ¶ 35.
115. KlimaSeniorinnen Judgment, 2024 Eur. Ct. H.R. ¶ 487(a).
116. *Id.* ¶ 487(b).
117. *Id.* ¶ 487.
118. *Id.* ¶ 488.
119. *Id.* ¶ 487 ("[T]he level and severity of (the risk of) adverse consequences of government action or inaction affecting the applicant must be significant.").
120. *Id.* ¶ 487(b) ("[T]here must be a pressing need . . . owing to the absence or inadequacy of any reasonable measures to reduce harm.").
121. *Id.* ¶ 502(a), (b).
122. *Id.* ¶ 502(c).
123. *Id.* ¶ 502 ("[T]he standing of an association to act on behalf of the members or [on behalf of] other affected individuals . . . will not be subject to a separate requirement of showing that those on whose

Based on this reasoning, the Court declined to recognize the individual *KlimaSeniorinnen* applicants as "victims." It concluded that the harms that the applicants suffered—including respiratory and cardiovascular issues—were not sufficiently severe to meet the threshold test for individuals.[124] In addition, the individual applicants would have recourse to already available "adaptation measures" in Switzerland—presumably, access to healthcare—that would alleviate the health risks that the applicants highlighted.[125] As such, the Court concluded that the individual *KlimaSeniorinnen* did not have standing to bring their claims.[126] Because the Court did not go further to analyze the substantive health claims on their merits, it only marginally examined the applicants' individual health arguments when determining victim status.[127]

At the same time, the association had standing because it met the threshold set forth by the Court: it was legally constituted in Switzerland;[128] its activities involved advocating for climate change protection on behalf of its members,[129] and it clearly represented those members in its advocacy.[130] Nevertheless, the Court did not examine the individual members' substantive health claims. In *KlimaSeniorinnen* and in past decisions, the Court has explained that associations cannot make health claims or rely on "problems which can only be encountered by natural persons."[131] Thus, the Court shifted its focus away from the victims' health statuses and onto questions of climate policy when it considered the case's merits.

The outcome of *Duarte Agostinho* was even more limiting. The Court declared the young people's case against Portugal and other Council of Europe states inadmissible on procedural grounds (specifically, the failure to exhaust domestic remedies and to show extraterritorial jurisdiction).[132] Because the case was inadmissible, the Court did not examine those health inequities at all.

III. Strengthening Climate Change Litigation Using Health Arguments

The *KlimaSeniorinnen* case demonstrates the need for an intersectional health analysis in human rights-based climate change cases. A health-centric intersectional approach would better overcome procedural and substantive challenges when addressing climate change as a human rights violation. First, under the newly introduced victim status and standing tests, individual applicants face

behalf the case has been brought would themselves have met the victim-status requirements for individuals in the climate-change context.").

124. *Id.* ¶¶ 533–35.
125. *Id.* ¶ 533.
126. *Id.* ¶ 535.
127. *Id.* ¶¶ 528–34.
128. *Id.* ¶ 521.
129. *Id.*
130. *Id.*
131. *Id.* ¶¶ 473, 496.
132. Agostinho Judgment, 2024 Eur. Ct. H.R. ¶¶ 214, 216–28 (holding that the Court has jurisdiction only with regard to Portugal, but that the applicants had failed to exhaust domestic remedies in Portugal).

nearly insurmountable obstacles to standing whereas association applicants do not. If the ECtHR and other bodies followed this outcome, they would rarely engage the substance of applicants' health claims. Alternatively, prioritizing the victim status of individuals with intersectional claims would not hinder the Court's ability to concretely engage with the health claims of those individuals. Such a prioritization would simultaneously aid human rights courts by limiting access to the courts under some rationale, which was clearly one of the ECtHR's concerns.

Second, human rights bodies typically hold states accountable for failing to prevent imminent harm for damages that have already occurred. The health-centric intersectional approach can demonstrate this temporal proximity, bringing damages and remediation within the realm of state responsibility. In *KlimaSeniorinnen*, the Court reaffirmed the imminence standard.[133] However, the fact that many climate change impacts are projected into the future has posed particular challenges for litigants making claims based on the right to life. By focusing on the impacts to claimants' health, rather than threats to life alone, applicants can link current health conditions to today's extreme temperatures and heat-induced wildfires.

Accordingly, the next two Sections will show that the health-centric intersectional approach can overcome these two fundamental challenges: (1) appropriately tailoring victim status and (2) demonstrating the imminence of any potential harm.[134]

A. Victim Status

One of the most important steps towards climate justice is establishing that applicants are "victims" of human rights violations that stem from climate change, and hence have standing to assert a claim. The ECtHR does not hear cases defending broader societal interests but requires applicants to show that they are "directly affected" by a human rights violation to establish victim status.[135] General petitions, known as *actiones populares*, are outside the Court's jurisdiction. For those affected by climate change, the requirement of particularized harm poses challenges as nearly everyone worldwide is impacted in some way by climate change. A balance must therefore be struck between ensuring access to the Court for redress of climate change harms and opening the floodgates to an unmanageable number of cases.

In *KlimaSeniorinnen*, the Court decided to forestall *actiones populares* by establishing stringent standing requirements for individual applicants. By setting an "especially high" victim status threshold, the Court limited the pool of potential victims who could assert a claim before it.[136] As a compromise, the Court set out a relatively lenient rule that grants associations standing on a

133. KlimaSeniorinnen Judgment, 2024 Eur. Ct. H.R. ¶ 513.

134. *See* Dudai, *supra* note 60, at 297–98 (2009).

135. Per the Court's interpretation of ECHR Art. 34. Micallef v. Malta, App. No. 17056/06, Judgment, Eur. Ct. H.R., ¶ 44 (Oct. 15, 2009).

136. *See* KlimaSeniorinnen Judgment, 2024 Eur. Ct. H.R. ¶ 488.

broad basis.[137] But in doing so, the Court simultaneously constrained its ability to engage the health equity issues at the core of many of the claims. Under the Court's existing jurisprudence, the claims of associations require different evidence than evidence demonstrating health concerns of natural persons.[138] The Court reaffirmed the rule in *KlimaSeniorinnen*.[139]

In its prior cases on environmental pollution, the ECtHR has limited victim status by taking the geographic location of the applicants into account. In *Cordella v. Italy*, for instance, the respondent state contested the victim status of applicants who complained that air pollution from a local steel plant adversely affected their health.[140] The state rebutted the applicants' complaints by calling their legal action general in nature. The state further argued that, even if the complaint was not general in nature, the applicants did not live in municipalities directly affected by the activities in question.[141] In finding that some applicants qualified as victims while others did not, the Court distinguished between the applicants living in municipalities with documented exposure to the steel plant's pollution and other applicants living outside those municipalities. It considered scientific studies and government-issued determinations about affected municipalities when concluding that the former applicants had demonstrated their victim status while the latter had not.[142]

The fact that health damage may affect a wide geographic area has not deterred the Court from according victim status in the past. In *Di Sarno v. Italy*, for example, the respondent state challenged the victim status of applicants who complained that administrative neglect led to a breakdown in waste collection and disposal in the Campania region of Italy.[143] The state countered that the applicants, who claimed harms to their family and private life, were not true "victims," given the widespread nature of the waste management concerns in question.[144] The ECtHR rejected Italy's assertion. To determine victim status, the Court referenced news articles and the documentation of public authorities, which showed that the waste crisis had indeed affected the part of the region where the applicants lived and worked.[145] The Court ultimately granted standing based on this geographic determination.[146]

In *KlimaSeniorinnen*, on the other hand, the Court grappled with whether to follow its environmental pollution jurisprudence when determining victim status.[147] If the Court recognized standing for all individuals living in areas affected by climate change, the result would leave such a large number of

137. *See id.* ¶ 502
138. *Id.* ¶ 473 (internal citations omitted).
139. *Id.* ¶ 496.
140. Cordella, 2019 Eur. Ct. H.R. ¶¶ 96–98.
141. *Id.* ¶¶ 97–98.
142. *Id.* ¶¶ 100–109.
143. Di Sarno, 2012 Eur. Ct. H.R. ¶ 78.
144. *Id.* (arguing also that the applicants did not live in areas where the waste could have been dumped).
145. *Id.* ¶ 81.
146. *Id.*
147. KlimaSeniorinnen Judgment, 2024 Eur. Ct. H.R. ¶¶ 414–22.

potential victims that it would raise questions about whether a court is the correct venue to address their concerns.[148] To appreciably limit the pool of applicants, the Court set out two new thresholds for standing.[149] As mentioned above, the test for individual victim status is intentionally hard to clear, while associations would have an easier path. While this approach does significantly limit the number of entities with access to the Court, the approach also has the negative effect of burying health concerns.

Alternatively, human rights courts could grant victim status to applicants facing intersectional health risks.[150] By focusing on health inequity, courts could delineate a group of individually affected victims without resorting to geographic proximity as the determining factor. An intersectional health approach, which would provide relief to those facing intersecting risk factors, is narrow but necessary. Moreover, in contrast to limitations embedded in strict standing rules, equity-based considerations would still enable the ECtHR and other human rights bodies to examine how exactly human health is affected by climate change.[151] While it does not create a pathway to standing for all who are affected by climate change, the intersectional approach would grant adjudicators the ability to analyze the particularized claims and climate change-induced harms of the applicants who are particularly at risk.

B. Imminence

While some U.N. treaty bodies have preventive functions,[152] contentious cases before human rights courts and committees overwhelmingly address incidents that have occurred in the past. However, some climate change impacts will not materialize for decades. The "projections about future impact" inherent to climate change analyses make it difficult to address these harms as human rights violations, which "are normally established after the harm has

148. *Id.* ¶¶ 415, 479, 483.

149. *See id.* ¶¶ 487, 502.

150. Another approach is to define the marginalized group particularly at risk from climate effects through an intersectional lens more generally, without necessarily linking it to health. Hefti, *supra* note 51, at 12–18. An alternative approach, proposed by Calderón-Gamboa and Recinos, would grant standing even in cases where applicants cannot show personal harm from alleged environmental damage. Rather, the scholars argue that the ECtHR should recognize the interests of potential parties that are "diffuse." Diffuse interests would include parties in the "area of influence" of the relevant ecosystem and parties that would have benefitted from the "environmental services" of the damaged area. This approach would align with a more expansive notion of standing developed in the Mexican judiciary, which arguably enables Mexican courts to more readily address environmental cases. Jorge Calderón-Gamboa & Julie Diane Recinos, *Inter-American Approaches to the Protection of the Right to a Healthy Environment and the Rights of Nature and Potential Contributions to the European Human Rights System*, 13 J. Hum. Rts. & Env't 86, 108–11 (2022).

151. Alice Venn, *Rendering International Human Rights Law Fit for Purpose on Climate Change*, 23 Hum. Rts. L. Rev. 1, 16 (2023).

152. *See generally* Committee on the Elimination of Racial Discrimination [hereinafter CERD Committee], *Report of the CERD to the General Assembly: Seventieth Session (19 February – 9 March 2007) and Seventy-first session (30 July–17 August 2007)*, U.N. Doc. A/62/18, Annex III (Dec. 2008); Committee on the Rights of Persons with Disabilities, *Working Methods of the CRPD adopted at its fifth session (11–15 April 2011)*, U.N. Doc. CRPD/C/5/4, ¶¶ 26–29 (Sep. 2, 2011).

occurred."[153] For example, air pollution standards will achieve a level where human health is more broadly at risk in the coming years, even though those affected by asthma already suffer during days of heightened smoke from forest fires and heatwaves. Hence, the right to health is particularly important because human health is already impacted today and in the future.

Especially in right to life cases, human rights courts and committees have examined the temporal proximity of the danger in question to help determine state responsibility. For example, in *Teitota v. New Zealand*, an asylum seeker petitioned the U.N. Human Rights Committee to contest deportation from New Zealand based on the rise in sea levels in his home country of Kiribati. The petitioner argued that the gradual submersion of those low-lying islands under rising seas contaminated the freshwater supply, reduced the amount of land available for habitation and subsistence livelihoods, and increased incidents of land disputes between residents in Kiribati. In that case, the Human Rights Committee considered evidence that widespread risks would materialize in ten to fifteen years and concluded that those risks were not imminent on their own to constitute a right to life violation.[154]

The ECtHR has likewise applied an imminence requirement in environmental cases where applicants have alleged that a state violated their rights by failing to *prevent* harm. This requirement was first developed in *Osman v. United Kingdom*, where the applicants alleged that the authorities in the United Kingdom failed to act on threats to the physical safety of a father and his son.[155] In that case, the son's teacher had developed a disturbing attachment to the son, manifesting in obsessive behavior, harassment, and attacks on the family's property. While school officials had alerted the police, they did not manage to stop the teacher, who eventually shot and killed the father and severely injured the son.[156] The Court found no right to life violation in the case because the police acted on what it knew or ought to have known about a "real" and "immediate" threat to life.[157]

Applying the *Osman* test,[158] the Court considered environmental risks to be imminent in *Öneryıldız v. Turkey*. That case concerned a methane explosion at a municipal rubbish dump in the Ümraniye municipality of Istanbul in 1993. Nearly two years before the explosion, in March 1991, local authorities in Ümraniye received an expert report detailing risks posed by the dump, including the possibility of a methane explosion resulting from the decomposition of

153. U.N. OHCHR Climate Change Report, *supra* note 62, ¶ 70.

154. Hum. Rts. Comm. [hereinafter HRC], Teitiota v. New Zealand, ¶ 2.9, U.N. Doc. CCPR/C/127/D/2728/2016 (Jan. 7, 2020).

155. Osman v. United Kingdom, 1998-VIII Eur. Ct. H.R. ¶ 10.

156. *Id.* ¶¶ 28–30.

157. *Id.* ¶¶ 111, 116. The Court reasoned that the police neither knew nor ought to have known that the son and his father's lives were at imminent risk.

158. Öneryıldız v. Turkey, App. No. 48939/99, Judgment, Eur. Ct. H.R., ¶ 93 (Nov. 30, 2004). For a longer discussion of the implications of the case, including analysis of the imminence and knowledge standards applied, see Bell-James & Collins, *supra* note 21, at 219–20.

household waste.[159] The report outlined how the dump had failed to meet technical standards for solid waste control since the early 1970s.[160] Nevertheless, the state took very limited measures to mitigate the threats posed.[161] The state also pointed to broader measures that it had taken to curb informal settlement in the areas adjacent to the installation.[162] However, the state apparently took no new measures following the publication of the expert report.[163] The ECtHR found that Turkey did not meet its positive obligation to protect the life of the applicants' relatives, who died in the explosion. According to the Court, the dump presented a danger to life that had manifested long before the explosion took place. Thus, the threat to life was indisputably imminent before the death of the applicants' kin.[164] In other cases concerning foreseeable accidents, structural harms, or the actions of non-state actors, the Court has similarly decided that a state's positive obligation to prevent threats to life emerge from a state's failure to act on risks that are knowable and *imminent*.[165]

The Court confirmed in *KlimaSeniorinnen* that imminence is a core element of a right to life claim in the climate change context as well. In the case, the Court chose not to analyze Article 2 claims in earnest. As it stood, the individual applicants did not have victim status, and the applicability of Article 2 to an association was deemed "questionable."[166] Nevertheless, the Court restated its longstanding rule that only "real" and "imminent" risks of harm are sufficient to trigger the application of Article 2.[167] As such, the ECtHR confirmed that the imminence rule would persist for climate change cases.

Scholars have indicated that the imminence requirement poses challenges in the context of climate change risks, which "happen[] to be at a temporally distant point."[168] Given this reality for climate change and other slower onset risks, some have proposed that the ECtHR drop the imminence requirement from its *Osman* test.[169] Bell-James and Collins, for example, argue that only the foreseeability element of the *Osman* rule should be retained.[170]

159. Öneryıldız, 2004 Eur. Ct. H.R. ¶ 98.

160. *Id.*

161. For example, Turkey indicated that the local authorities sprayed chemicals over the trash heap in an attempt to avert health hazards. *Id.* ¶ 98.

162. *Id.* ¶ 79.

163. *Id.*

164. *Id.* ¶ 100.

165. Franz Christian Ebert & Romina I. Sijniensky, *Preventing Violations of the Right to Life in the European and the Inter-American Human Rights Systems: From the Osman Test to a Coherent Doctrine on Risk Prevention?*, 15 Hum. Rts. L. Rev. 343, 347 (2015). The Inter-American Court of Human Rights has already implied that states' obligations in the context of forecasted environmental harm are to prevent "real and imminent danger." *See* The Environment and Human Rights, Advisory Opinion OC-23/17 Inter-Am. Ct. H.R. (ser. A) No. 23, ¶ 120 (Nov. 15, 2017).

166. KlimaSeniorinnen Judgment, 2024 Eur. Ct. H.R. ¶ 536.

167. *Id.* ¶ 513.

168. Bell-James & Collins, *supra* note 21, at 219; *see also* Monica Visalam Iyer, *Environmental Migration in Regional Human Rights Courts: a Lifeboat from the "Sinking Vessel"*, 92 Tenn. L. Rev. 307, 326–29 (2024).

169. *See* Bell-James & Collins, *supra* note 21, at 219–21; Ebert & Sijniensky, *supra* note 165, at 366–67.

170. Bell-James & Collins, *supra* note 21, at 220.

Such a development would undoubtedly expand the Court's jurisprudence with respect to environmental risks. The adjustment would imply that states have a broad positive obligation to prevent all foreseeable risks to life, regardless of when those risks might materialize. In the absence of a more fundamental adjustment, however, applicants seeking relief from climate change harms face an uphill battle to prove that the threats that they face are not only real but also fast approaching.

Articulating the harms as not only concerning risks to life but also risks to health—as read into Article 8—provides a potentially palatable approach to overcoming imminence challenges.[171] While states' preventative obligations are the same under Article 8,[172] the practical burden of proving the imminence of an adverse health impact is lighter. For example, taking an intersectional approach to health, certain groups, such as children, may already demonstrate how they are affected by waterborne diseases caused by flooding.[173] Intersectional health arguments could make the temporal connection between state actions, climate change impacts, and human rights harms more tangible.[174] Moreover, going further to analyze intersectional risks may evoke non-discrimination obligations under Article 14, which are not constrained by the imminence requirement.[175]

IV. Operationalizing Intersectionality to Address Health Inequity

A. An Intersectional Anti-Discrimination Analysis

The theory of intersectionality emerged in the legal field in response to limits in the application of anti-discrimination law.[176] Thus, the Court could most directly address intersectional health related harms by undertaking a multi-axis anti-discrimination analysis. This would be easier in cases like *Duarte Agostinho* where the applicants invoke Article 14 (non-discrimination) to claim that, as youth and child applicants, they are particularly impacted by climate change.[177] While the applicants in *KlimaSeniorinnen* made no express anti-discrimination claims, the facts underlying their claims were also linked to health inequities, especially concerning elderly women. However, the Court would have to proceed in several steps to find an Article 14 violation that could address health inequity in such cases.

171. We have some indication that the ECtHR would be amenable to this approach. The Court has also turned to Article 8 when applicants allege an Article 2 violation but fail to prove that the risk they face is truly lethal. *See, e.g.*, Brincat, 2014 Eur. Ct. H.R. ¶¶ 84–85 (Oct. 10, 2014).

172. *Id.* ¶ 102; Kolyadenko v. Russia, App. Nos. 17423/05 et al., Judgment, Eur. Ct. H.R., ¶ 216 (Sept. 7, 2012).

173. U.N. OHCHR Climate Change Report, *supra* note 62, at ¶ 70.

174. McCormick, *The Role of Health in Climate Litigation*, 108 Am. J. Pub. Health 104, 106 (2018).

175. *See infra* Section 5.

176. Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color*, 43 Stan. L. Rev. 1241, 1242, 1299 (1991).

177. Agostinho Application, 2020 Eur. Ct. H.R. ¶ 28.

1. *Incorporating implied health rights and determinants of health*

First, the Court must determine that the right to private life (Article 8) or the right to life (Article 2) imply a right to health.[178] The *KlimaSeniorinnen* case confirms this possibility. The Court would then need to find that the applicants faced discrimination with respect to these rights. This two-step analysis would be required because the text of Article 14 guarantees non-discrimination only as to "[t]he enjoyment of the rights and freedoms *set forth in this Convention*."[179] As applicants invoked Articles 2 and 8, they would need to demonstrate discrimination within the "ambit" of these rights.[180]

Second, Article 14 does not explicitly prohibit discrimination based on age or location, which are two of the determinants of health putting the applicants at heightened risk of climate change harms. The prohibited grounds explicitly listed in the Convention are: "sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status." However, Article 14 itself contains open-ended language. It prefaces the listing of grounds with the term "such as" and concludes with a catchall phrase, "or other status." Although neither age nor location is listed in Article 14, the broad notion of "other status" has been held to cover residence,[181] age,[182] and prior health status.[183] Framing claims that cover several grounds under Article 14 is important to counter arguments like the Swiss governments' contention in *KlimaSeniorinnen* that single-factor risk analyses are too broad and incomplete to merit protection from the Court.[184] Coupled with the Court's generous interpretations, the non-exhaustive nature of Article 14 enables consideration of many additional grounds.[185]

178. *See* Kiyutin v. Russia, App. No. 2700/10, Judgment, Eur. Ct. H.R., ¶ 56 (Mar. 10, 2011).

179. Convention for the Protection of Human Rights and Fundamental Freedoms Art. 14, Nov. 4, 1950, E.T.S. 5 (emphasis added).

180. Sandra Fredman, *Emerging from the Shadows: Substantive Equality and Article 14 of the European Convention on Human Rights*, 16 HUM. RTS. L. REV. 273, 275–77 (2016). A subsequent protocol to the Convention goes further to prohibit discrimination in relation to *any* human right—not just those explicitly mentioned in the Convention. Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms [2000] ETS 177. However, the Court's broad interpretations of Article 14 have made a reference to this expansion somewhat irrelevant. *Id.* at 277.

181. *See generally* Carson v. United Kingdom, App. No. 42184/05, Judgment, Eur. Ct. H.R. (Mar. 16, 2010) (finding a violation of the rights of overseas pensioners who were denied equivalent pension increases as pensioners residing in the United Kingdom or in countries with certain reciprocal agreements with the United Kingdom). The Court determined that residency entailed an aspect of one's personal status such that the factor could be captured by the catchall in Article 14. *Id.* ¶ 71.

182. *See generally* Schwizgebel v. Switzerland, App. No 25762/07, Judgment, Eur. Ct. H.R. (June 10, 2010) (no violation of the applicants' rights who complained about an age limit for adoption due to the legitimate aim of protecting the well-being of the child).

183. *See* Glor v. Switzerland, App. No. 13444/04, Judgment, Eur. Ct. H.R., ¶ 80 (Apr. 30, 2009); G.N. v. Italy, App. No. 43134/05, Judgment, Eur. Ct. H.R., ¶ 126 (Dec. 1, 2009).

184. KlimaSeniorinnen Judgment, 2024 Eur. Ct. H.R. ¶ 342 (stating that "the exact age of the person concerned was only one factor, which made it impossible to take all older persons as a single category at particular risk [of climate change]").

185. *Id.* ¶ 277.

By arguing that their health was particularly impacted because of their age and their sex,[186] the *KlimaSeniorinnen* had opened a window of opportunity for an intersectional health analysis under Article 14. Such an analysis would have ensured that the Court reacted to health inequities. Like the applicants in *Duarte Agostinho*, the applicants in *KlimaSeniorinnen* were particularly impacted by climate change because of their prior health status, which itself was impacted by age and location, but also because of their sex.[187] The Court has consistently considered that "a complaint is always characterized by the alleged facts."[188] It has even reframed applicants' complaints under more relevant human rights provisions, as long as the newly considered rights were at least implicitly raised in the complaint.[189] Given that the Convention lists sex as a prohibited ground in Article 14, and also recognizes health status, age, and residence among "other grounds," the Court would have been well positioned to analyze the KlimaSeniorinnen's various health inequities through the lens of intersectionality.

2. *Addressing multiple risk factors simultaneously*

In future cases, the Court could recognize intersecting multiple risk factors simultaneously if applicants make sufficiently clear intersectional claims. Notably, the Court has recently started to examine harms emerging from multiple simultaneous risk factors in its jurisprudence.[190] For example, in *B.S. v. Spain*, both the applicant herself and third-party interveners explicitly asked the Court to conduct an intersectional analysis.[191] The case concerned a woman sex worker of Nigerian descent who alleged intersectional discrimination on the grounds of her race and gender. The applicant claimed that the state had discriminated against her given other women of European descent had not been subjected to the same treatment.[192] The police had subjected the applicant to physical and verbal abuse on two separate occasions when attempting to remove her from public spaces.[193] She had filed official complaints about the abuse, but the courts had declined to carry forward disciplinary proceedings in either case, citing a lack of evidence.[194] Noting the police's reportedly racist, degrading statements, the Court found that the state had failed to "take account of the applicant's particular vulnerability inherent in her position as an

186. KlimaSeniorinnen Application, 2020 Eur. Ct. H.R. ¶ 36.

187. Angela Hefti, *Intersectionality and Standing in Climate-Related Human Rights Cases*, HARV. HUM. RTS. PROG. REFLECTIONS (Apr. 22, 2024).

188. Radomilja v. Croatia, App. Nos. 37685/10 & 22768/12, Judgment, Eur. Ct. H.R., ¶ 115 (Mar. 20, 2018).

189. In *KlimaSeniorinnen* itself, the ECtHR confirmed that, under *the jura novit curia* principle, the Court had the competence to raise legal issues that it deduced from the facts itself. KlimaSeniorinnen Judgment, 2024 Eur. Ct. H.R. 278.

190. *See generally* B.S. v. Spain, App. No. 47159/08, Judgment, Eur. Ct. H.R. (July 24, 2012).

191. *Id.* ¶¶ 52–57

192. *Id.* ¶ 29

193. *Id.* ¶¶ 8, 22.

194. *Id.* ¶ 12.

African woma[n]."[195] It concluded that the state had violated Articles 14 and 3 (prohibition of ill-treatment) of the Convention.[196]

The treaty bodies have similarly begun to recognize intersecting grounds in their anti-discrimination cases.[197] For example, in *R.P.B. v. Philippines*, a case about access to justice following a rape, the U.N. Committee on the Elimination of All Forms of Discrimination Against Women analyzed how the state had relied on gendered stereotypes about consent and ableist assumptions about the capacity to noisily resist in its assessment of the petitioner's credibility. The Committee considered that the state had discriminated against the petitioner—a young, deaf-mute girl—on the grounds of several intersecting factors, including her gender and disability.[198] Similarly, in *L.N.P. v. Argentina*, the Human Rights Committee considered that a judicial and investigative process discriminated against a young indigenous girl on grounds of gender and ethnicity.[199] The authorities in that case relied on gendered notions about prior sexual activity when assessing whether the petitioner had consented to sexual intercourse with her attackers. The local authorities also failed to provide translation services and dismissed evidence provided by members of the petitioner's community after prejudging those community members as racially biased.[200]

However, the U.N. treaty bodies have not yet recognized intersectional factors in the climate change cases that have come before them. When describing the life-threatening climate change impacts that imperiled his rights, the petitioner in *Teitota v. New Zealand*, who fled sea-level rise in Kiribati, outlined impacts affecting his and his family's health.[201] However, the Committee did not consider the factors that put his family at greater risk of negative health impacts than others, likely because the petitioner did not make

195. *Id.* ¶ 62.

196. *Id.* ¶ 63.

197. Gauthier de Beco, *Harnessing the Full Potential of Intersectionality Theory in International Human Rights Law*, *in* Intersectionality and Human Rights Law 39, 43 (Shreya Atrey & Peter Dunne eds., 2020).

198. Committee on the Elimination of All Forms of Discrimination Against Women [hereinafter CEDAW Committee], R.P.B. v. Philippines, ¶¶ 8.1–10, U.N. Doc. CEDAW/C/57/D/34/2011 (Feb. 21, 2014).

199. HRC, L.N.P. v. Argentina, ¶ 13.3, U.N. Doc. CCPR/C/102/D/1610/2007 (July 18, 2011).

200. *Id.* ¶¶ 2.3–2.4. *L.N.P. v. Argentina* notwithstanding, many more treaty body cases mention—but do not break down—the nature of the intersectional discrimination. *See, e.g.*, CEDAW Committee, Teixeira v. Brazil, ¶ 7.2, U.N. Doc. CEDAW/C/49/D/17/2008 (July 25, 2007); CEDAW Committee, Kell v. Canada, ¶ 10.2, U.N. Doc. CEDAW/C/51/D/19/2008 (Mar. 2, 2012); HRC, Yaker v. France, ¶ 8.17, U.N. Doc. CCPR/C/123/D/2747/2016 (July 17, 2018); HRC, Hebbadj v. France, ¶ 7.17, U.N. Doc. CCPR/C/123/D/2807/2016 (July 17, 2018); HRC, Türkan v. Turkey, ¶ 7.8, U.N. Doc. CCPR/C/123/D/2274/2013/Rev.1 (July 17, 2018); F.A. v. France, ¶ 8.13, U.N. Doc. CCPR/C/123/D/2662/2015 (July 16, 2018); CEDAW Committee, E.S. & S.C. v. Tanzania, ¶ 7.6 n.32, U.N. Doc. CEDAW/C/60/D/48/2013 (Mar. 2, 2015). In other cases, the treaty bodies recognize discrimination on only one ground despite the facts of the cases pointing to intersecting causes. *See, e.g.*, CERD Committee, A. Yilmaz-Dogan v. Netherlands, ¶ 9.4, U.N. Doc. CERD/C/36/D/1/1984 (Aug. 12, 1998) (analyzing allegations of racial discrimination without regard to intersectional effect of gender); HRC, Nyaya v. Nepal, ¶ 7.3, U.N. Doc. CCPR/C/125/D/2556/2015 (Mar. 28, 2019).

201. HRC, Teitiota v. New Zealand, ¶ 5, U.N. Doc. CCPR/C/127/D/2728/2016 (Jan. 7, 2020).

an explicit claim of inequality in rights enjoyment between himself and other Kiribati residents.[202] On the other hand, in *Sacchi v. Argentina*, the petitioners did allege that residency, age, and indigeneity pre-disposed them to certain climate change-related health impacts.[203] The Committee did not examine their claims on the merits, however, because the applicants had failed to exhaust domestic remedies.[204]

Another case before the Human Rights Committee, *Billy v. Australia*, took a similar approach.[205] In that case, indigenous residents of the low-lying Torres Strait Islands argued that Australia had not taken sufficient mitigation and adaptation actions to protect their rights to life, family life, and culture. That case concerned rising sea levels and flooding that destroyed the petitioners' crops and burial grounds and impacted their diet, with crayfish having disappeared.[206] The petitioners also feared future heat-related and other health risks.[207] The petitioners did not, however, make any discrimination claims.[208] The Human Rights Committee recognized a violation of the applicants' private, family and home life as sufficiently demonstrated, namely with regard to flooding and salinification of fertile soil.[209] However, it rejected the health-related aspects of their case, which were raised under the right to life, noting that the applicants from the Torres Strait Islands had not made any health-related arguments.[210]

Against this backdrop and in future climate cases, the ECtHR and other human rights bodies could break new ground by addressing intersectionality. A health-centric intersectional approach would not only empower applicants to navigate the previously mentioned procedural obstacles, but also shine a spotlight on the particularities of applicants' health claims and the ways that intersecting risk factors could amplify climate change harms.

B. An Intersectional Health Inequity Approach

As an alternative to conducting an intersectional anti-discrimination analysis directly, the Court could highlight intersecting factors that contribute to substantive right to health violations under Articles 2 and 8. This approach would follow along closely from past ECtHR jurisprudence where the Court has highlighted the heightened risk of harm faced by applicants in vulnerable

202. *Id.* ¶ 9.7. The failure to show an individualized risk to his life was one of the reasons that the Committee did not decide in his favor.

203. Sacchi, *supra* note 14, ¶¶ 3.5, 3.8, 10.15; Sacchi et al. v. Argentina, Brazil, France, Germany & Turkey, *Communication to the Committee on the Rights of the Child*, ¶¶ 87–133 (Sept. 23, 2019).

204. Sacchi, *supra* note 14, ¶ 10.2.

205. HRC, Billy. v. Australia, ¶ 2.2, U.N. Doc. CCPR/C/135/D/3624/2019 (Sept. 22, 2022).

206. *Id.* ¶ 2.5.

207. *Id.* ¶ 2.6.

208. *Id.*

209. *Id.* ¶ 8.12.

210. *Id.* ¶ 8.6.

situations for context even if the Court did not analyze those factors as a means to ascertain whether an Article 14 violation took place.[211]

In *I.G. v. Slovakia*, for example, the Court determined that the forcible sterilization of three Romani women constituted a violation of Articles 3 (prohibition of ill-treatment) and 8 (respect for private and family life) of the Convention.[212] When weighing the Article 8 claim, the Court considered shortcomings in law and practice in Slovakia that exposed Romani women, in particular, to risks of uninformed sterilizations.[213] It also weighed the age of minority of one applicant when determining whether the severity of the state's treatment amounted to a violation of Article 3.[214] While two of the applicants in that case alleged discrimination in breach of Article 14 of the Convention, the Court did not find it necessary to conduct an Article 14 analysis. Instead, it evaluated the heightened risks that the applicants faced during its assessment of their substantive rights claims.[215] Given its limited jurisprudence on intersectionality, the Court may be more open to examining the intersecting health risks at the core of climate change claims in this way.

Conclusion

The right to health should not be ignored in human rights litigation before the ECtHR. While the Court did well to connect climate change and human rights more generally, it missed the opportunity to address health claims expressly in its recent climate judgments. Applicants in both *KlimaSeniorinnen* and *Agostinho* rightly relied on health arguments to demonstrate violations of their human rights. In future climate change cases, the Court should accordingly account for unequal health impacts when adjudicating similar claims that come before it. In doing so, the Court should use an intersectional approach to health that would illuminate both biological and social determinants of health. Through this approach, the ECtHR would consider applicants' particular health risk factors, such as their age, gender, residence, and prior health status, when determining how they are affected by climate change.

Of course, the intersectional health-centric approach entails certain limitations. For one, the ECHR does not protect the right to health explicitly. Thus, applicants must rely on existing Convention provisions through which the Court could infer a right to health. Secondly, the Court has yet to truly

211. *See* Shreya Atrey, Intersectional Discrimination 22 (2019) (referencing the 2014 case on the French "headscarf ban," *S.A.S. v France*, and the 2011 case concerning sterilization of Roma women, V.C. v. Slovakia) (internal citations omitted).

212. I.G. v. Slovakia, App. No. 15966/04, Judgment, Eur. Ct. H.R. ¶¶ 124, 126, 146 (Nov. 13, 2012).

213. *Id.* ¶¶ 143–46.

214. *Id.* ¶ 123.

215. *Id.* ¶¶ 162–67. *See also* P. and S. v. Poland, App. No. 57375/08, Judgment, Eur. Ct. H.R., ¶ 56 (Oct. 30, 2012). In its jurisprudence on Article 2 (right to life), the Court has considered the particular risks to life that vulnerable people face as relevant to the question of whether the respondent State mitigated these risks once it knew of them. *See, e.g.*, Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania, App. No. 47848/08, Judgment, Eur. Ct. H.R., ¶¶ 141–44 (July 17, 2014).

analyze intersectional risk factors in its jurisprudence. Other limitations include the narrowness of an intersectional health approach to victim status that would center people in particularly risky situations while excluding others affected by the climate crisis. While not comprehensive, such an approach may be necessary to avoid extending victim status to anyone in the world.

Yet, the health-centric intersectional approach could avoid some pitfalls inherent to climate change litigation. First, this approach could show that applicants that are highly exposed to health risks as a result of intersecting disadvantages suffer a concrete injury. Therefore, those applicants should receive victim status. Medical studies and other reports can evidence the unequal health impact of climate change on individual applicants from different population groups. Second, the imminence of harm would become clearer when examined through an intersectional health lens. By showing the current impacts of climate change on individuals, an intersectional health-centric approach would make the linkages between present-day harm and climate change more tangible. The recognition of the intersectional right to health would also inevitably require the Court to look at the truly unequal impacts of climate change.

Future cases before the ECtHR will present it with the opportunity to bring health inequity claims to the forefront and respond to such harm within the discretionary space in which the Court operates. In applying this approach, the ECtHR ought to provide judicial reasoning that touches on the health claims that are core to the arguments of the applicants. Surely, the Court as a dynamic human rights adjudicator[216] can and must rely on a "practical and effective, not theoretical and illusory" interpretation of human rights to give sufficient attention to health inequity in the climate change context.[217] It can do so by conducting an intersectional health analysis under Article 14 or by highlighting intersecting factors that contribute to violations of health rights. Intersectional health risk could also be a limiting factor governing which applicants are prioritized as having "victim status." As the ECtHR has ventured into new territory and is influencing the field of climate change accountability regardless, the Court ought to be flexible in its approach.

216. *See* Corina Heri, *supra* note 18, at 936.

217. KlimaSeniorinnen Judgment, 2024 Eur. Ct. H.R. ¶ 545; Demir and Baykara v. Turkey, App. No. 34503/97, Judgment, Eur. Ct. H.R. ¶ 66 (Nov. 12, 2008).