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# Intersectional Victims as Agents of Change in International Human Rights-Based Climate Litigation

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## Abstract

Climate change uniquely affects those who are at the intersection of several inequalities simultaneously, such as those based on gender, age, and disability. This makes them ‘directly affected’ by climate change, which is crucial in establishing ‘victim status’ under Article 34 of the European Convention on Human Rights. At the same time, as a result of unequal power relations, intersectional victims face exclusion from, or minimal participation in, political decision-making processes concerning climate change. This further justifies their claim to victim status as a matter of procedural climate justice. As agents of change, intersectional victims, namely elderly women and girls with disabilities, can be empowered to contribute to climate decision making, thereby reshaping unjust power relations. The article examines two climate cases currently before the European Court of Human Rights: *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland*, brought by elderly women, and *Duarte Agostinho et al. v. Portugal and 32 other States*, brought by children and young people.

**Keywords:** Victim status; Climate litigation; *KlimaSeniorinnen*; *Duarte Agostinho*; Intersectionality; Gender; Article 14 European Convention on Human Rights

## 1. Introduction

Elderly women, children and young people susceptible to climate impacts are making history at the European Court of Human Rights (ECtHR). On 29 March 2023, the ECtHR heard its first-ever climate case in *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland (KlimaSeniorinnen)*,<sup>1</sup> which was brought by four women over the age of 75 along with an association of other elderly women.<sup>2</sup> They argue that as elderly women, they bear a disproportionate burden from heatwaves, and assert that Switzerland is violating their right to life and private life by failing to cut greenhouse

<sup>1</sup> ECtHR, *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland*, Appl. No. 53600/20, communicated on 17 Mar. 2021.

<sup>2</sup> On the role of the association see H. Keller & V. Gurash, ‘Expanding NGOs’ Standing: Climate Justice through Access to the European Court of Human Rights’ (2023) 14(2) *Journal of Human Rights and the Environment*, pp. 194–218.

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gas (GHG) emissions in line with the 2015 Paris Agreement.<sup>3</sup> At the same time, the high-profile case *Duarte Agostinho and Others v. Portugal and 32 other States (Duarte Agostinho)*,<sup>4</sup> which was heard by the ECtHR on 27 September 2023, was brought by six children and young people, four of whom are female.<sup>5</sup> They argue that as children they will suffer more from climate effects (such as forest fires) throughout their lives, which aggravates their current health conditions and causes them anxiety.<sup>6</sup> In bringing their cases before the ECtHR, some applicants are turning their unequal experience of climate change into a source of strength to demand more ambitious climate action.

However, before their cases are decided on the merits, these applicants must establish victim status before the ECtHR. This remains a significant challenge, as climate-related harm often affects entire populations, which makes it difficult for these applicants to show that they are ‘directly affected’ by the effects of climate change.<sup>7</sup> Applicants who experience unequal and overlapping climate impacts, however, have successfully claimed victim status before United Nations (UN) treaty bodies;<sup>8</sup> it is reasonable to expect that they can claim the same status before the ECtHR. Claims brought on behalf of the general public, also known as *acciones populares*, are not accepted.<sup>9</sup> The Council of Europe (CoE) European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)<sup>10</sup> does not include a (human) right to a healthy environment, and the ECtHR consistently rejects any interpretation that suggests otherwise.<sup>11</sup> The ECHR also does not recognize inherent rights of nature. Currently, therefore, melting glaciers in Switzerland and forests threatened by heatwaves and wildfires in Portugal do not qualify as victims in their own right.<sup>12</sup> In this anthropocentric human rights system, an intersectionality analysis can demonstrate

<sup>3</sup> ECtHR, *KlimaSeniorinnen*, n. 1 above. Paris Agreement, Paris (France), 12 Dec. 2015, in force 4 Nov. 2016, available at: [https://unfccc.int/sites/default/files/english\\_paris\\_agreement.pdf](https://unfccc.int/sites/default/files/english_paris_agreement.pdf).

<sup>4</sup> ECtHR, *Duarte Agostinho and Others v. Portugal and 32 other States*, Appl. No. 39371/20, communicated on 13 Nov. 2020 (*Duarte Agostinho*).

<sup>5</sup> An overview of the cases pending before the ECtHR Grand Chamber is available at: <https://www.echr.coe.int/cases-pending-before-the-grand-chamber>.

<sup>6</sup> *Duarte Agostinho*, n. 4 above.

<sup>7</sup> R. Luporini & A. Savaresi, ‘International Human Rights Bodies and Climate Litigation: Don’t Look Up?’ (2023) 32(2) *Review of European, Comparative and International Environmental Law*, pp. 267–78, at 275. ECtHR, *Lambert and Others v. France*, GC, Appl. No. 46043/14, 5 June 2015, para. 89.

<sup>8</sup> Views Adopted by the UN Human Rights Committee in *Billy et al. v. Australia*, Communication No. 3624/2019, 21 July 2022, UN Doc. CCPR/C/135/D/3624/2019 (*Billy*), available at: <https://juris.ohchr.org/casedetails/3855/en-US>; Views Adopted by the UN Human Rights Committee in *Ioane Teitiota v. New Zealand*, 7 Jan. 2020, UN Doc. CCPR/C/127/D/2728/2016 (*Teitiota*), available at: <https://juris.ohchr.org/casedetails/2798/en-US>; and Decision by the UN Committee on the Rights of the Child (CRC) in *Sacchi et al. v. Argentina et al.*, Communication No. 107/2019, 22 Sept. 2021, UN Doc. CRC/C/88/D/107/2019 (*Sacchi*), available at: <https://juris.ohchr.org/casedetails/2952/en-US>.

<sup>9</sup> ECtHR, *Perez v. France*, GC, Appl. No. 47287/99, 12 Feb. 2004, CEDH 2004-I, para. 70.

<sup>10</sup> Rome (Italy), 4 Nov. 1950, in force 3 Sept. 1953, available at: <http://www.echr.coe.int/pages/home.aspx?p=basictexts>.

<sup>11</sup> ECtHR, *Kyrtatos v. Greece*, Appl. No. 41666/98, 22 May 2003, para. 52.

<sup>12</sup> See L. Burgers, ‘Private Rights of Nature’ (2022) 11(3) *Transnational Environmental Law*, pp. 463–74, at 467.

particularly well the harm caused to some of the applicants by climate change, who therefore satisfy the victim status requirement under the ECHR.

Much of the scholarship on climate litigation has focused on vulnerabilities related to climate change,<sup>13</sup> particularly those experienced by women in non-European contexts.<sup>14</sup> While intersectionality and climate change have been studied in other disciplines,<sup>15</sup> the legal aspect of this field remains underexplored.<sup>16</sup> This article explores the potential of intersectionality to determine victim status before human rights courts, thereby adding to the emerging legal scholarship on intersectionality in climate litigation. Given that intersectionality is a socio-legal concept and climate change is an interdisciplinary challenge,<sup>17</sup> I draw on interdisciplinary scholarship to inform a human rights-based approach to assessing victim status.

The article argues that applicants experiencing intersecting inequalities – such as those based on gender and age, as well as disability all at once – are uniquely affected by climate change. This makes them ‘directly affected’ by climate change, which is crucial in establishing ‘victim status’ under Article 34 ECHR. At the same time, as a result of unequal power relations, intersectional ‘victims’ face exclusion from, or minimal participation in, political decision-making processes concerning climate change. This further justifies their claim to victim status as a matter of procedural climate justice. As agents of change, intersectional victims, namely elderly women and girls with disabilities, can be empowered by the ‘rights turn in climate litigation’<sup>18</sup> to contribute actively to climate laws and policies, thereby reshaping unjust power dynamics.<sup>19</sup>

This two-fold argument draws upon the socio-legal concept of intersectionality to argue that those who experience unequal and overlapping climate impacts can and

<sup>13</sup> E.g., B. Ohdedar, ‘Climate Adaptation, Vulnerability and Rights-Based Litigation: Broadening the Scope of Climate Litigation Using Political Ecology’ (2022) 13(1) *Journal of Human Rights and the Environment*, pp. 137–56. See also A. Venn, ‘Rendering International Human Rights Law Fit for Purpose on Climate Change’ (2023) 23(1) *Human Rights Law Review*, pp. 1–25.

<sup>14</sup> S. Atapattu, *Human Rights Approaches to Climate Change: Challenges and Opportunities* (Routledge Press, 2016). S. Atrey, ‘The Inequality of Climate Change and the Difference It Makes’, in C. Albertyn et al. (eds), *Feminist Frontiers in Climate Justice* (Edward Elgar, 2023), pp. 17–39.

<sup>15</sup> E.g., M. Mikulewicz et al., ‘Intersectionality & Climate Justice: A Call for Synergy in Climate Change Scholarship’ (2023) 32(7) *Environmental Politics*, pp. 1275–86. A. Kaijser & A. Kronsell, ‘Climate Change through the Lens of Intersectionality’ (2014) 23(3) *Environmental Politics*, pp. 417–33. H.S. Versey, ‘Missing Pieces in the Discussion on Climate Change and Risk: Intersectionality and Compounded Vulnerability’ (2021) 8(1) *Policy Insights from the Behavioral and Brain Sciences*, pp. 67–75. F. Sultana, ‘Critical Climate Justice’ (2022) 188 *The Geographical Journal*, pp. 118–24.

<sup>16</sup> P. Sußner, ‘Intersectionality in Climate Litigation: The Case of KlimaSeniorinnen v. Switzerland at the ECtHR’, *Verfassungsblog*, 20 Apr. 2023, available at: <https://verfassungsblog.de/intersectionality-in-climate-litigation>. See also Atrey, n. 14 above, and J.B. Martignoni, ‘Intersectionalities, Human Rights, and Climate Change: Emerging Linkages in the Practice of the UN Human Rights Monitoring System’, in S. Duyck, S. Jodoin & A. Johl (eds), *Routledge Handbook of Human Rights and Climate Governance* (Routledge Press, 2018), pp. 397–404.

<sup>17</sup> Mikulewicz et al., n. 15 above, p. 1275.

<sup>18</sup> J. Peel & H.M. Osofsky, ‘A Rights Turn in Climate Change Litigation?’ (2018) 7(1) *Transnational Environmental Law*, pp. 37–67.

<sup>19</sup> J.A. Goldston, ‘Climate Litigation through an Equality Lens’, in C. Rodríguez-Garavito (ed.), *Litigating the Climate Emergency: How Human Rights, Courts, and Legal Mobilization Can Bolster Climate Action* (Cambridge University Press, 2022), pp. 132–44, at 141.

should have victim status. It is also guided by the normative ideal of procedural climate justice, which asks ‘what are fair procedures for addressing climate change’.<sup>20</sup> Considerations of procedural climate justice are reflected in the right to equality, access to justice, and the right to an effective remedy, which were invoked by some of the applicants.<sup>21</sup>

I do not mean to suggest that women and children are weak when I use the terms ‘victim’ and ‘vulnerable’. Instead, the term ‘victim’ is used here as a procedural concept required for establishing standing before the ECtHR. In the context of climate change, the term ‘vulnerability’, which denotes the universal potential of human suffering,<sup>22</sup> is often used to describe health-related and biophysical climate impacts, such as the vulnerability of people with heart problems to heatwaves.<sup>23</sup> The concept of vulnerability is also well established in the ECtHR case law to define marginalized groups,<sup>24</sup> such as Roma communities, asylum seekers, and HIV-positive persons,<sup>25</sup> as well as people in detention who do not experience systemic inequalities.<sup>26</sup> Hence, the Court could consider intersectionality under a vulnerability analysis as an alternative to explicitly recognizing intersectionality.<sup>27</sup> As a ‘chameleon concept’,<sup>28</sup> vulnerability covers one or more open-ended disadvantages without necessarily linking them to a prohibited ground of discrimination.<sup>29</sup> While vulnerability certainly holds the potential to ‘interrog[ate] the institutional practices that produce the identities and inequalities in the first place’,<sup>30</sup> in the context of climate change, the term can be associated with weakness.<sup>31</sup> In this sense, the Committee on the Elimination of Discrimination against Women (CEDAW Committee) noted that describing women as ‘vulnerable groups’ in the context of climate change can perpetuate negative gender stereotypes and undermine their contribution in addressing climate effects.<sup>32</sup>

<sup>20</sup> E. Brandstedt & B. Brülde, ‘Towards a Theory of Pure Procedural Climate Justice’ (2019) 36(5) *Journal of Applied Philosophy*, pp. 785–99, at 788.

<sup>21</sup> Arts 6 (right to a fair trial) and 13 (right to an effective remedy): *KlimaSeniorinnen*, n. 1 above; and Art. 14 (prohibition of discrimination): *Duarte Agostinho*, n. 4 above, and *KlimaSeniorinnen*, n. 1 above.

<sup>22</sup> M. Fineman, ‘The Vulnerable Subject: Anchoring Equality in the Human Condition’ (2008) 20(1) *Yale Journal of Law and Feminism*, pp. 1–23, at 9.

<sup>23</sup> E.g., J. Balbus & C. Malina, ‘Identifying Vulnerable Subpopulations for Climate Change Health Effects in the United States’ (2009) 31(1) *Journal of Occupational and Environmental Medicine*, pp. 33–7.

<sup>24</sup> C. Heri, *Responsive Human Rights: Vulnerability, Ill-Treatment and the ECtHR* (Hart, 2021), p. 205.

<sup>25</sup> Case law in L. Peroni & A. Timmer, ‘Vulnerable Groups: The Promise of an Emerging Concept in European Human Rights Convention Law’ (2013) 11(4) *International Journal of Constitutional Law*, pp. 1056–85, at 1063–70.

<sup>26</sup> See case law in Heri, n. 24 above, p. 63. E.g., ECtHR, *Mammadov and Others v. Azerbaijan*, Appl. No. 35432/07, 21 Feb. 2019, para. 120.

<sup>27</sup> Sußner, n. 16 above. E. Brems et al., Submission of Written Comments by Third-Party Intervenors, 30. Nov. 2022, p. 9, available at: [https://www.klimasenioren.ch/wp-content/uploads/2023/01/53600\\_20\\_GC\\_OBS\\_P3\\_Ghent\\_University\\_30\\_11\\_22.pdf](https://www.klimasenioren.ch/wp-content/uploads/2023/01/53600_20_GC_OBS_P3_Ghent_University_30_11_22.pdf).

<sup>28</sup> A. Timmer et al., ‘The Potential and Pitfalls of the Vulnerability Concept for Human Rights’ (2021) 39(3) *Netherlands Quarterly of Human Rights*, pp. 190–7, at 195.

<sup>29</sup> Fineman, n. 22 above, p. 16.

<sup>30</sup> *Ibid.*

<sup>31</sup> See Timmer et al., n. 28 above, p. 194.

<sup>32</sup> CEDAW Committee, General Recommendation No. 37 on the Gender-related Dimensions of Disaster Risk Reduction in the Context of Climate Change, 13 Mar. 2018, UN Doc. CEDAW/C/GC/37, para. 7.

This article contends that human rights courts, particularly the ECtHR, should prioritize intersectionality in defining direct impact in climate litigation because the concept entails an empowering aspect and is precise in defining direct climate impacts. Intersectionality examines the distinct disadvantages that people experience based on their interrelated identities, such as race *and* gender.<sup>33</sup> It refers to the structural inequalities underlying these identities, rather than the juxtaposition of identity categories.<sup>34</sup> As it is grounded in at least two intersecting identity markers, intersectionality can reveal how the impacts of climate change connect to systemic inequalities. For example, recognizing that claimants are susceptible to forest fires, both because they (i) have a disability, which makes it challenging to access a hospital, and (ii) they belong to a racial group that experiences systemic barriers to healthcare, produces a more complete picture of victim status. Some interdisciplinary scholarship has shifted towards an intersectional analysis to better grasp the social issues linked to climate change.<sup>35</sup> This article can only begin to examine the impacts of climate change on certain applicants, and cannot comprehensively address the many ways in which groups are affected by, excluded from, or empowered by climate litigation. Thus, this article should be considered an impetus for further research on this aspect of the human dimension of climate change.

This article is organized into five sections. Section 2 contends that applicants experiencing intersecting inequalities can qualify for victim status before the ECtHR. Section 3 introduces the concept of intersectionality and explains why intersectional applicants are directly affected by climate effects and should qualify for victim status under Article 34 ECHR. I exemplify the concept of intersectionality with the applicants in the *KlimaSeniorinnen* and *Duarte Agostinho* cases, focusing on gender *and* age *as well as* disability, while keeping in mind race and class.<sup>36</sup> Section 4 focuses on the political aspect of intersectionality, which is concerned with unequal power dynamics that define the applicants' experiences of climate effects. It also considers the crucial role of intersectional climate victims as active catalysts for change in climate litigation, and provides a normative rationale for recognizing victim status as a matter of procedural climate justice. I emphasize that intersectional victims should not be essentialized as climate victims, and caution against exploiting them as instruments for climate cases, which would be contrary to the concept of intersectionality. Section 5 concludes by reflecting on how intersectionality can be applied in climate litigation.

<sup>33</sup> S. Atrey, *Intersectional Discrimination* (Oxford University Press, 2019), p. 44. See also K. Crenshaw, 'Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics' (1989) 1 *University of Chicago Legal Forum*, pp. 139–67.

<sup>34</sup> See K. Crenshaw, 'Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color' (1990) 43(6) *Stanford Law Review*, pp. 1241–99, at 1283; G. De Beco, 'Harnessing the Full Potential of Intersectionality Theory in International Human Rights Law', in S. Atrey & P. Dunne (eds), *Intersectionality and Human Rights Law* (Hart, 2020), pp. 39–58, at 43.

<sup>35</sup> E.g., Sultana, n. 15 above.

<sup>36</sup> Kaijser & Kronsell, n. 15 above, p. 422.

## 2. Intersectional Climate Victims

Article 34 ECHR establishes the procedural framework for individual applications to the ECtHR, but does not define the concept of ‘victim status’. The concept has been developed through case law: litigants must show that they are ‘directly affected’ by an interference with their human rights.<sup>37</sup> Similar standards apply before the Human Rights Committee (‘actually affected’)<sup>38</sup> and the Committee on the Rights of the Child (CRC) (‘personally affected’),<sup>39</sup> which have already accepted victim status in climate cases.<sup>40</sup> To establish standing, applicants must therefore demonstrate a link between the climate harm and the applicants’ human rights.<sup>41</sup> The ECtHR interprets victim status without applying ‘rigid, mechanical and inflexible [criteria]’.<sup>42</sup> It also applies the concept of ‘victim status’ independently, without relying on domestic interpretations.<sup>43</sup> The Swiss Federal Supreme Court’s finding that the *KlimaSeniorinnen* (German for ‘senior climate women’) were not ‘particularly affected by the impacts of climate change’ in comparison with the general public<sup>44</sup> is therefore unlikely to influence the ECtHR assessment. However, less stringent domestic interpretations of standing rules – such as those in the notable *Urgenda* ruling,<sup>45</sup> where a class action was allowed under Dutch law, or the class action recently decided by the Brussels Court of Appeal<sup>46</sup> – are also unlikely to influence the Court’s approach to victim status.<sup>47</sup>

Article 34 ECHR does tell us that the petitioners before the Court include ‘any person, non-governmental organisation or group of individuals’, thus encompassing groups at the intersections of systemic inequalities.<sup>48</sup> Cases involving groups of applicants are rare,<sup>49</sup> but this category holds great potential for climate cases characterized by intersectional harm. Moreover, the Court seems willing to acknowledge

<sup>37</sup> *Lambert*, n. 7 above, para. 89.

<sup>38</sup> *Billy*, n. 8 above, para. 7.9.

<sup>39</sup> *Sacchi*, n. 8 above, para. 10.13.

<sup>40</sup> *Ibid.* *Billy*, n. 8 above. *Teitiota*, n. 8 above.

<sup>41</sup> ECtHR, *Gorraiz Lizarraga and Others v. Spain*, Appl. No. 62543/00, 27 Apr. 2004, para. 35.

<sup>42</sup> ECtHR, *Micallef v. Malta*, GC, Appl. No. 17056/06, 15 Oct. 2009, para. 45.

<sup>43</sup> ECtHR, *Kalfagiannis and Pospert v. Greece* (dec.), Appl. No. 74435/14, 9 June 2020, para. 47. The Court’s approach is inconsistent: *Micallef*, n. 42 above, para. 48.

<sup>44</sup> Translated by J. Reich, F. Hausamman & N.V. Boss, ‘Climate Change Litigation Before the ECtHR: How Senior Women from Switzerland Might Advance Human Rights Law’, *Verfassungsblog*, 16 May 2022, available at: <https://verfassungsblog.de/climate-change-litigation-before-the-ecthr>.

<sup>45</sup> *The State of the Netherlands (Ministry of Infrastructure and the Environment) v. Stichting Urgenda, Hoge Raad* [Supreme Court], 20 Dec. 2019, ECLI:NL:HR:2019:2007, English translation available at: <https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:HR:2019:2007>. See J. van Zeben, ‘Establishing a Governmental Duty of Care for Climate Change Mitigation: Will *Urgenda* Turn the Tide?’ (2015) 4(2) *Transnational Environmental Law*, pp. 339–57; and B. Mayer, ‘*The State of the Netherlands v. Urgenda Foundation*: Ruling of the Court of Appeal of The Hague (9 October 2018)’ (2019) 8(1) *Transnational Environmental Law*, pp. 167–92.

<sup>46</sup> *VZW Klimaatzaak v. Kingdom of Belgium and Others*, Brussels Court of Appeal, Case Nos. 2021/AR/1589, 2022/AR/737 & 2021/AR/891, 30 Nov. 2023, available at: <http://climatecasechart.com/non-us-case/vzw-klimaatzaak-v-kingdom-of-belgium-et-al>.

<sup>47</sup> *Gorraiz Lizarraga*, n. 41 above, para. 35.

<sup>48</sup> See also J. Marquis, *La qualité pour agir devant la Cour européenne des droits de l’homme* (Schulthess, 2017), p. 136.

<sup>49</sup> *Ibid.*, p. 186.



entire groups of victims as rights bearers. For example, it recognized in *Cordella v. Italy* a group of 196 residents living in a high environmental risk zone as victims.<sup>50</sup> Similarly, in *Pavlov and Others v. Russia*, a group of applicants was granted standing, despite living far from the polluting source.<sup>51</sup> This case law could provide the basis for the ECtHR to recognize groups with pending climate cases as climate victims.<sup>52</sup>

Intersectionality analysis has not expressly informed the Court's analysis of victim status in the past. Nevertheless, Article 34 is sufficiently flexible to incorporate intersectionality in analyzing victim status. Notably, the threshold for establishing victim status is relatively low, since, as a procedural issue, it does not yet provide any indication of whether the applicant's rights have been violated. In this sense the Court often links questions of victim status to the merits of the case.<sup>53</sup> Hence, the Court could consider intersectionality – ideally explicitly – in determining victim status. Even when applicants only implicitly raise intersectionality arguments, the Court, under *jura novit curia*, can go beyond what they argue and 'view the facts in a different manner'.<sup>54</sup> If the Court is not ready to undertake a fully fledged intersectionality analysis, it can include intersectionality implicitly,<sup>55</sup> or in relation to its well-established vulnerability analysis, where it sometimes considers intersecting identities.<sup>56</sup> For example, in *Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania*, the ECtHR accepted an exceptionally strong claim to victim status on account of the 'extreme vulnerability' of a severely disabled Roma man who had spent most of his life in a mental health institution.<sup>57</sup> Similarly, in *J.I. v. Croatia*, the Court accepted the 'particular vulnerability' of a Roma woman survivor of sexual abuse 'on account of her sex, ethnic origin and past traumas'.<sup>58</sup> This case law would provide the Court with an opportunity to incorporate intersectionality in a victim status analysis. Yet, to do justice to the concept of intersectionality, it should not merely limit its analysis to listing the victim's identities or experiences of sexual abuse or institutionalization.<sup>59</sup> Instead, it should engage more deeply with underlying systemic inequalities that shape their experiences with climate change.

A slow shift towards recognizing intersectionality in human rights law is under way. In *B.S. v. Spain*, the Court acknowledged that 'the position [of the applicant] as an African woman working as a prostitute' caused the sexual harassment and physical abuse she experienced at the hands of police officers.<sup>60</sup> Similarly, in *Carvalho Pinto*

<sup>50</sup> ECtHR, *Cordella and Others v. Italy*, Appl. Nos. 54414/13 & 54264/15, 24 Jan. 2019, paras 100–9.

<sup>51</sup> ECtHR, *Pavlov and Others v. Russia*, Appl. No. 31612/09, 11 Oct. 2022, paras 58–71.

<sup>52</sup> H. Keller & C. Heri, 'The Future Is Now: Climate Cases Before the ECtHR' (2022) 40(1) *Nordic Journal of Human Rights*, pp. 153–74, at 157.

<sup>53</sup> E.g., ECtHR, *Siliadin v. France*, Appl. No. 73316/01, 26 July 2005, para. 63.

<sup>54</sup> ECtHR, *S.M. v. Croatia*, Appl. No. 60561/14, 25 June 2020, para. 218.

<sup>55</sup> J. Theilen, 'Intersectionality's Travels to International Human Rights Law' (2024) 45(2) *Michigan Journal of International Law* (forthcoming).

<sup>56</sup> E.g., ECtHR, *Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania*, Appl. No. 47848/08, 17 July 2014, para. 108. Brems et al., n. 27 above.

<sup>57</sup> ECtHR, *Centre for Legal Resources on behalf of Valentin Câmpeanu*, n. 56 above, para. 108.

<sup>58</sup> ECtHR, *J.I. v. Croatia*, Appl. No. 35898/16, 8 Sept. 2022, para. 97.

<sup>59</sup> See De Beco, n. 34 above, p. 40.

<sup>60</sup> ECtHR, *B.S. v. Spain*, Appl. No. 47159/08, 24 July 2012, para. 62.

*de Sousa Morais v. Portugal*, the Court recognized that the domestic courts' stereotypes against a women, which presumed that 'sexuality is not as important for a fifty-year-old woman and mother of two children as for someone of a younger age', amounted to discrimination against her.<sup>61</sup> While the Court still referred to the applicant's 'particular vulnerability' in *B.S.*,<sup>62</sup> it no longer did so in *Carvalho Pinto de Sousa*, but instead emphasized her age and gender. This shift could indicate that the Court has started to address intersectional claims and redress associated inequalities, although it has not fully embraced the concept and its implications.<sup>63</sup>

Furthermore, the Court could consider the approaches of UN treaty bodies concerning intersectionality in determining victim status. For instance, the CRC has already invoked intersectionality in its Concluding Observations.<sup>64</sup> In its 'General Comment on Children's Rights and the Environment with a Special Focus on Climate Change', it recognized the need 'to better understand intersectionalities, paying special attention to groups of children who are most at risk', signifying the CRC's openness towards the concept.<sup>65</sup> Remarkably, the CEDAW Committee has embraced intersectionality since 2020.<sup>66</sup> For example, it considered that a doctor's refusal to provide reproductive services for Roma women constituted intersectional discrimination.<sup>67</sup> The ECtHR regularly consults the CEDAW Committee's relevant cases<sup>68</sup> and has noted that it 'will also look for any consensus and common values emerging from the practices of ... specialised international instruments, such as the CEDAW'.<sup>69</sup> Thus, particularly in the context of gender, the concept of intersectionality is gradually gaining recognition in human rights law.

### 3. Intersectionality in Climate Litigation

In both ECtHR climate cases, an intersectionality analysis can help to delineate a group of applicants against the background of the near-infinite number of people affected by climate change. While the *KlimaSeniorinnen* argue that they are particularly affected by heatwaves because of their age and gender,<sup>70</sup> the *Duarte Agostinho* children and youth

<sup>61</sup> ECtHR, *Carvalho Pinto de Sousa Morais v. Portugal*, Appl. No. 17484/15, 25 July 2017, para. 52.

<sup>62</sup> *B.S.*, n. 60 above, para. 62.

<sup>63</sup> Atrey, n. 33 above, p. 134.

<sup>64</sup> E.g., CRC, 'Concluding Observations on Poland', 6 Dec. 2021, CRC/C/POL/CO/5-6, para. 19a; 'Concluding Observations on Guatemala', 28 Feb. 2018, UN Doc. CRC/C/GTM/CO/5-6, paras 30a-b; 'Concluding Observations on Costa Rica', 4 Mar. 2020, UN Doc. CRC/C/CRI/CO/5-6, paras 11c, 16b, 17b.

<sup>65</sup> CRC, 'General Comment No. 26 on Children's Rights and the Environment, with a Special Focus on Climate Change', 22 Aug. 2023, UN Doc. CRC/C/GC/26, para. 15.

<sup>66</sup> E.g., Decisions by the CEDAW Committee, *G.H. v. Hungary*, 26 Aug. 2020, UN Doc. CEDAW/C/76/D/114/2017, para. 5(6). See also Decision by the CERD Committee, *Grigore Zapescu v. Republic of Moldova*, 22 Apr. 2021, UN Doc. CERD/C/103/D/60/2016, para. 8(9).

<sup>67</sup> CEDAW Committee, *S.B. & M.B. v. North Macedonia*, 7 Dec. 2020, UN Doc. CEDAW/C/77/D/143/2019, paras 7.2-3, 9.

<sup>68</sup> E.g., on domestic violence: ECtHR, *Volodina v. Russia*, Appl. No. 41261/17, 4 Nov. 2019, para. 84; *Opuz v. Turkey*, Appl. No. 33401/02, 9 June 2009, para. 164.

<sup>69</sup> *Opuz*, n. 68 above, para. 164.

<sup>70</sup> 'KlimaSeniorinnen v. Switzerland and Request under Rule 41 (Priority)', Application to the ECtHR, submitted on 26 Nov. 2020, paras 5 and 36, available at: [https://www.klimasenioren.ch/wp-content/uploads/2020/11/201126\\_Application\\_ECtHR\\_KlimaSeniorinnen\\_extract\\_anonymised-2.pdf](https://www.klimasenioren.ch/wp-content/uploads/2020/11/201126_Application_ECtHR_KlimaSeniorinnen_extract_anonymised-2.pdf).



did not raise claims relating to the intersecting inequalities that some of the children are likely to experience. Instead, they argue that, as children, they will experience the worst impacts of climate change.<sup>71</sup> Nevertheless, climate change could affect some of the applicants in both cases based on their position in society, shaped by a combination of factors such as gender, sex, race, ethnicity, chronological age, and disabilities, among others. This section introduces the concept of intersectionality, links it to its related concept of discrimination under Article 14 ECHR, and examines how, in the two cases before the Court, intersectionality could be applied in practice.

### 3.1. Intersectionality as Discrimination

The concept of intersectionality can be understood in terms of its two characteristics. Firstly, it examines the distinct inequality produced by various power relations based on gender, race, disability, age, etc.<sup>72</sup> These identity categories do not operate as separate axes of oppression, but intersect and shape each other, thereby creating a distinct social experience.<sup>73</sup> Secondly, intersectionality seeks to remedy the inequalities that marginalized groups experience based on their identities, such as race, disability, and age.<sup>74</sup> The concept aims to transform the oppressive structures that keep applicants in their place.<sup>75</sup> This should be kept in mind when considering how climate change affects disadvantaged groups, and in relation to their quest for participation in climate decision making, as explored in Section 4.

The concept of intersectionality must be understood in its historical context, which preceded its application in the legal field. Since the 1960s, social movements in the United States (US), spearheaded by Black, Indigenous, and other women of colour (BIWOC), have drawn attention to interconnected experiences of inequality.<sup>76</sup> Patricia Monture-Angus pointedly exemplified intersectionality with her own lived experience:

I am not just woman. I am a Mohawk woman. It is not solely my gender through which I first experience the world, it is my culture (and/or race) that precedes my gender. Actually, if I am object of some form of discrimination, it is very difficult for me to separate what happens to me because of my gender and what happens to me because of my race and culture. My world is not experienced in a linear and compartmentalized way. I experience the world simultaneously as Mohawk and as woman.<sup>77</sup>

To shed light on these interconnected inequalities, BIWOC have sought political empowerment and equality through community engagement, literature, poetry, and

<sup>71</sup> EctHR, *Duarte Agostinho*, n. 4 above, Observations on the Admissibility and Merits, 9 Feb. 2022, paras 343b–d.

<sup>72</sup> P.H. Collins, 'The Difference that Power Makes: Intersectionality and Participatory Democracy' (2017) 8(1) *Revista de Investigaciones Feministas*, pp. 19–39, at 20.

<sup>73</sup> Martignoni, n. 16 above, p. 397; Kaijser & Kronsell, n. 15 above, p. 423.

<sup>74</sup> Atrey, n. 33 above, p. 61. See Martignoni, n. 16 above, p. 397.

<sup>75</sup> Martignoni, n. 16 above, p. 397.

<sup>76</sup> P.H. Collins & S. Bilge, *Intersectionality* (Polity Press, 2<sup>nd</sup> edn, 2020), pp. 65–75.

<sup>77</sup> P. Monture-Angus, *Thunder in My Soul: A Mohawk Woman Speaks* (Fernwood, 1995), p. 177.

art.<sup>78</sup> As sociologist Patricia Hill Collins put it, intersectionality's '*raison d'être* lies in its attentiveness to power relations and social inequalities'.<sup>79</sup> Human rights bodies, working within the boundaries of human rights law, cannot fully unravel these complex social underpinnings.<sup>80</sup> Nevertheless, intersectionality has an important place within human rights law. In particular, it can be investigated and addressed through non-discrimination provisions, as evidenced by the work of Kimberlé Crenshaw in the context of discrimination against Black women in the US.<sup>81</sup>

As intersectionality is tied to systemic inequalities,<sup>82</sup> the ECtHR could adopt Article 14 ECHR – its non-discrimination provision – as a broad model to translate intersectionality into an analysis of victim status. The substantive Article 14 claim raised by the *Duarte Agostinho* children and youth offers the Court an entry point for examining intersectionality, even though they did not raise intersectional claims.<sup>83</sup> The *KlimaSeniorinnen* did not make an Article 14 claim, but relied on intersectional reasoning. Article 14 considers as discriminatory differential treatment based on prohibited grounds without objective justification.<sup>84</sup> In the context of climate change, such differential treatment would be implicit through the disproportionate effects of climate change policies (also known as 'indirect discrimination').<sup>85</sup> Although Article 14 lists specific grounds (such as sex, race, etc.), it is not limited to a specific set of discriminatory grounds, but encompasses '[the] personal characteristic (or "status") by which persons or a group of persons are distinguishable'.<sup>86</sup> Similarly, intersectionality contains an open-ended list of identities,<sup>87</sup> while linking unequal treatment to two or more discriminatory factors such as gender, race, and ethnicity.<sup>88</sup> That intersectionality categorizes disadvantages based on identity markers also distinguishes it from vulnerability, which covers human experiences beyond prohibited identities.<sup>89</sup> The aim of an intersectionality lens aligns with the objectives of non-discrimination: to remedy unequal and interconnected power structures.<sup>90</sup> Consequently, intersectional climate impacts fit squarely within the right to equality. However, Article 14 also poses challenges for intersectionality, such as when discriminatory grounds are evaluated separately instead of as interlocked, or identity categories are defined too restrictively.<sup>91</sup> These challenges can be avoided when the Court incorporates intersectionality under its

<sup>78</sup> Collins & Bilge, n. 76 above, p. 66.

<sup>79</sup> P.H. Collins, 'Intersectionality's Definitional Dilemmas' (2015) 41 *Annual Review of Sociology*, pp. 1–20, at 3.

<sup>80</sup> De Beco, n. 34 above, p. 42.

<sup>81</sup> Crenshaw, n. 33 above, p. 140.

<sup>82</sup> L. Sosa, 'Inter-American Case Law on Femicide: Obscuring Intersections' (2017) 35(2) *Netherlands Quarterly of Human Rights*, pp. 85–103, at 103.

<sup>83</sup> See Atrey, n. 33 above, p. 61.

<sup>84</sup> ECtHR, *D.H. and Others v. Czech Republic*, GC, Appl. No. 57325/00, 13 Nov. 2007, para. 175.

<sup>85</sup> *Ibid.*

<sup>86</sup> ECtHR, *Carson and Others v. United Kingdom*, GC, Appl. No. 42184/05, 16 Mar. 2010, para. 70.

<sup>87</sup> Atrey, n. 33 above, p. 149.

<sup>88</sup> *Ibid.*, pp. 61–2.

<sup>89</sup> Fineman, n. 22 above, pp. 16–7.

<sup>90</sup> See Atrey, n. 33 above, p. 61.

<sup>91</sup> De Beco, n. 34 above, p. 41.

victim status analysis, which is not limited by identity categories, but could be interpreted to include the ways in which climate change has an impact on and interacts with multiple forms of oppression. Because the Court has already integrated ‘vulnerability’ into its victim status analysis, it could similarly embrace the concept of intersectionality. Moreover, as a criterion for legal standing, victim status is construed in less stringent terms than a substantive Article 14 analysis.

### 3.2. Intersectional Victims before the ECtHR?

Climate change does not affect everyone equally around the world. In the global south, millions of people are projected to suffer from extreme heat by 2030.<sup>92</sup> Heatwaves of over 40° Celsius have already threatened people’s lives, resulting in heat stroke among the elderly and severe malnourishment in children because of crop damage caused by intense heat.<sup>93</sup> People living in poverty often reside in cramped houses, and lack funds to adapt to the heat.<sup>94</sup> Compounding these challenges, women and girls, responsible for their households’ water supply, travel long distances to wells, while facing risks of sexual harassment and violence.<sup>95</sup> Climate change affects people based on various forms of oppression.<sup>96</sup> For example, disadvantages based on gender, socio-economic status, and ethnicity interact where girls and women from ethnic minorities are forcibly married to generate an income after a tsunami struck (‘tsunami marriages’) or droughts destroy families’ crops (‘famine brides’).<sup>97</sup> As a complex social issue, climate change shapes a person’s position in society characterized by intersectional inequality.<sup>98</sup>

Against this background, in the context of *European* climate litigation, it is pertinent to ask why intersectionality should be employed in a victim status analysis. While it is true that climate change disproportionately affects the global south – where climate risks are exacerbated by colonialism, racism, classism, and sexism<sup>99</sup> – an intersectional analysis is effective in a victim status analysis in the European human rights system, which is particularly strict relative to other regional human rights systems. Both the African and the Inter-American human rights systems feature more expansive rules

<sup>92</sup> A. Gowen et al., ‘The Inequality of Heat’, *The Washington Post*, 22 Sept. 2023, available at: <https://www.washingtonpost.com/climate-environment/interactive/2023/india-deadly-extreme-heat-poverty>.

<sup>93</sup> Ibid. See also A. Gowen et al., ‘Climate-Linked Ills Threaten Humanity’, *The Washington Post*, 5 Sept. 2023, available at: [https://www.washingtonpost.com/climate-environment/interactive/2023/pakistan-extreme-heat-health-impacts-death/?itid=pr\\_enhanced-template\\_1](https://www.washingtonpost.com/climate-environment/interactive/2023/pakistan-extreme-heat-health-impacts-death/?itid=pr_enhanced-template_1).

<sup>94</sup> Ibid.

<sup>95</sup> Atapattu, n. 14 above, p. 200.

<sup>96</sup> Mikulewicz et al., n. 15 above, pp. 1279–81.

<sup>97</sup> See R. Maguire, ‘A Feminist Critique on Gender Based Violence in a Changing Climate: Seeing, Listening and Responding’, in C. Albertyn et al. (eds), *Feminist Frontiers in Climate Justice* (Edward Elgar, 2023), pp. 68–89, at 72.

<sup>98</sup> J. Birkmann et al., ‘Poverty, Livelihoods and Sustainable Development’, in IPCC (H. Pörtner et al. (eds)), *Climate Change 2022: Impacts, Adaptation and Vulnerability. Working Group II Contribution to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change* (Cambridge University Press, 2022), pp. 1171–284, at 1191.

<sup>99</sup> See N. Urzola Gutiérrez, ‘Gender in Climate Litigation in Latin America: Epistemic Justice Through a Feminist Lens’ (2023) *Journal of Human Rights Practice*, pp. 1–19, at 16.

for legal standing.<sup>100</sup> The Inter-American Court of Human Rights allows '[a]ny person or group of persons [or] on behalf of third persons' to lodge a petition.<sup>101</sup> The victim must still be identifiable, however, which thwarts public interest petitions, as in the European human rights system.<sup>102</sup> Going even further, the African human and peoples' rights system allows for public interest litigation.<sup>103</sup> Anyone can submit an application, with the consent of the actual victim if this can be obtained, to the African Commission on Human and Peoples' Rights (ACHPR), the primary human rights body handling petitions in the African region.<sup>104</sup> Considering the narrow standing requirements before the ECtHR, an intersectionality analysis can help to fill the gap in defining victim status.

Of course, there is a risk that the focus on the two European cases unduly 'whitens' the concept.<sup>105</sup> However, Crenshaw never limited the concept to race, but instead foresaw its application in relation to class and sexuality.<sup>106</sup> An intersectional analysis, such as the reference to the applicants' potential White race, can also serve to highlight their privilege.<sup>107</sup> I capitalize 'White' like 'Black' in line with Mantiangai Sirleaf's proposal to 'render whiteness visible' and bring attention to this position of privilege and power.<sup>108</sup>

To demonstrate the potential of an intersectionality analysis in defining victim status, the following subsections will analyze how climate change intersects with particular forms of inequality – based on gender, age, and disabilities all at once, while considering class, race, and ethnicity. However, this analysis is limited by the available factual information and the arguments made by the applicants. It aims to provoke a deeper reflection on these cases and to unveil the intersectional impact of climate change, which could shape human rights-based climate litigation.

<sup>100</sup> F. Hampson, C. Martin & F. Viljoen, 'Inaccessible Apexes: Comparing Access to Regional Human Rights Courts and Commissions in Europe, the Americas, and Africa' (2018) 16(1) *International Journal of Constitutional Law*, pp. 161–86, at 179–81.

<sup>101</sup> American Convention on Human Rights (ACHR), San José (Costa Rica), 22 Nov. 1969, in force 18 July 1978, Art. 44, available at: [https://www.oas.org/dil/access\\_to\\_information\\_American\\_Convention\\_on\\_Human\\_Rights.pdf](https://www.oas.org/dil/access_to_information_American_Convention_on_Human_Rights.pdf); Rules of Procedure of the Inter-American Commission on Human Rights, San José (Costa Rica), 8–22 Mar. 2013, in force 1 Aug. 2013, Art. 23, available at: <https://www.oas.org/en/IACHR/jsForm/?File=en/iachr/mandate/basics/rulesiachr.asp>.

<sup>102</sup> J.L. Cavallaro et al., *Doctrine, Practice, and Advocacy in the Inter-American Human Rights System* (Oxford University Press, 2019), p. 91.

<sup>103</sup> African Commission on Human and Peoples' Rights (ACHPR), *Social and Economic Rights Action Center (SERAC) and Center for Economic and Social Rights (CESR) v. Nigeria*, Case No. 155/96, 27 May 2002, para. 49.

<sup>104</sup> Rules of Procedure of the ACHPR, Banjul (The Gambia), 19 Feb.–4. Mar. 2020, in force 2 June 2020, rule 115.2(e), available at: <https://achpr.au.int/sites/default/files/files/2021-04/rulesofprocedur-e2020eng1.pdf>. See also Y. Suedi & M. Fall, 'Climate Change Litigation before the African Human Rights System: Prospects and Pitfalls' (2023) *Journal of Human Rights Practice*, pp. 2–14, at 5.

<sup>105</sup> S. Salem, 'Intersectionality and Its Discontents: Intersectionality as Traveling Theory' (2018) 25(4) *European Journal of Women's Studies*, pp. 403–18, at 406.

<sup>106</sup> Crenshaw, n. 34 above, p. 1245.

<sup>107</sup> Crenshaw, n. 33 above, p. 151.

<sup>108</sup> M. Sirleaf, 'Rendering Whiteness Visible' (2023) 117(3) *American Journal of International Law*, pp. 484–7.

### KlimaSeniorinnen: A Woman's Tale

Climate change exacerbates the disadvantages that the *KlimaSeniorinnen* already face and affects their ability to adapt to heatwaves. As elderly women now in their 80s, with one of them having died aged 90 in 2021,<sup>109</sup> they have endured a lifetime of inequality in the Swiss context, which cannot be compared with the experiences of young women.<sup>110</sup> They were unable to vote and influence decisions on climate change for several years. Their socio-economic position is affected by the intersection of both gender inequality and ageism. They may face stigma and prejudice as being elderly *and* women with potential disabilities and racial backgrounds.

These disadvantages are not inherent but rather are socially constructed. I use the term 'gender' to refer to the *KlimaSeniorinnen*'s distinct societal position in Switzerland as elderly *women*.<sup>111</sup> The applicants did not define their positionality in this sense before the ECtHR, and academic research has not explored the interwoven aspects of age *and* gender as axes of oppression in relation to climate change. Women in Switzerland were enfranchised at the federal level in 1971 – exceptionally late compared with other countries worldwide,<sup>112</sup> and they finally received the right to vote in the canton of Appenzell-Innerrhoden in 1990, when the Swiss Supreme Court ruled in their favour after the Cantonal legislature had rejected such proposals.<sup>113</sup> This signals that courts, although in this instance a domestic forum, have an important role to play in safeguarding some women's political rights.<sup>114</sup> At the same time, Switzerland has pioneered environmental lawmaking since the 1870s, enacting several laws protecting forests and – in the 1950s – water.<sup>115</sup> Unable to contribute to politics until the end of the last century, women have only partially shaped the political context in which environmental policies were formed, and arguably still moderately influence the political landscape in which climate law operates today.<sup>116</sup> In the current gendered public domain, women's representation in the bicameral parliament is only 35% in the Senate ('Conseil des États') and 38% of the House ('Conseil national'). These numbers are lower at the cantonal level, which has resulted in international criticism by the CEDAW Committee.<sup>117</sup> The exclusion of Swiss women from politics situates them within a subordinated group, which seems particularly stark against the background of the Swiss direct democratic system.<sup>118</sup>

<sup>109</sup> *KlimaSeniorinnen*, n. 1 above, Observations on the Facts, Reply to the Respondent's Observations on the Facts, 13 Oct. 2021, para. 39.

<sup>110</sup> See Collins, n. 72 above, pp. 24–8.

<sup>111</sup> The term includes other gendered experiences; see Urzola Gutiérrez, n. 99 above, p. 3.

<sup>112</sup> B. Studer & J. Wyttenbach, *Frauenstimmrecht* (Hier und Jetzt Verlag, 2021), p. 160.

<sup>113</sup> Judgment of the Swiss Federal Supreme Court, Case No. 116 Ia 359, 27 Nov. 1990.

<sup>114</sup> See L.A. Banaszak, *Why Movements Succeed or Fail* (Princeton University Press, 1996), pp. 19–20.

<sup>115</sup> Federal Office of the Environment, Swiss Environmental Law (2022), UI-2218-E, p. 10, available at: <https://www.bafu.admin.ch/bafu/en/home/topics/law/publications-studies/publications/swiss-environmental-law.html>.

<sup>116</sup> See Atapattu, n. 14 above, p. 198.

<sup>117</sup> Swiss Confederation, 'Gewählte Frauen', available at: <https://www.bfs.admin.ch/bfs/de/home/statistiken/politik/wahlen/gewaehlte-frauen.html>. CEDAW Committee, 'Concluding Observations on Switzerland', 1 Nov. 2022, UN Doc. CEDAW/C/CHE/CO/6, paras 47–8.

<sup>118</sup> See J. Reich, 'Federalism and Mitigating Climate Change: The Merits of Flexibility, Experimentalism, and Dissonance' (2021) 10(2) *Transnational Environmental Law*, pp. 263–91.

Women in Switzerland still earn less than men today. In 2022, more than 60% of Swiss women with children worked part-time, while mostly being responsible for the household and childcare, whereas 90% of men worked full-time.<sup>119</sup> When the now retired *KlimaSeniorinnen* formed part of the workforce, this gendered division of labour, which influences their socio-economic positionality and ability to respond to climate change today, was even more pronounced.<sup>120</sup> Even in a wealthy state like Switzerland, women are still underpaid and perform most care work.<sup>121</sup> This aspect of gender inequality can affect Applicant 2 who remains indoors during heatwaves to avoid health-related complications.<sup>122</sup> Confined to her home, she is likely to encounter challenges in accessing medical care, in circumstances where elderly women are more susceptible to poverty.<sup>123</sup> She may also face stereotypes painting her as fragile when doing so.<sup>124</sup> At the same time, as ‘Swiss retirees’,<sup>125</sup> *KlimaSeniorinnen* may belong to a privileged group. For example, Elizabeth Stern, one of the most vocal of the *KlimaSeniorinnen*, is a psychologist and anthropologist who had a career in the US.<sup>126</sup> The challenges faced by elderly women can be exacerbated by an increased risk of domestic violence, a significant issue in Switzerland where approximately 60% of murders occur in domestic violence contexts.<sup>127</sup> The CEDAW Committee has highlighted that climate effects intensify the risks of domestic violence against women, particularly against those with disabilities.<sup>128</sup> In 2022, the Intergovernmental Panel on Climate Change’s (IPCC) Working Group II acknowledged that heatwaves exacerbate these risks.<sup>129</sup>

Additionally, the *KlimaSeniorinnen* face higher climate-related risks on account of their sex, with ‘sex’ denoting biological factors.<sup>130</sup> As they have argued, some medical research suggests that elderly women are more prone to developing health problems

<sup>119</sup> Office Fédéral de la Statistique, ‘Activité professionnelle, tâches domestiques et familiales’, available at: <https://www.bfs.admin.ch/bfs/de/home/statistiken/bevoelkerung/familien/erwerbs-haus-familienarbeit.html>.

<sup>120</sup> For around the 1950s see I. von Roten, *Frauen im Laufgitter, Offene Worte zur Stellung der Frau* (eFeF Bern, 5th edn, 1996), pp. 25–30.

<sup>121</sup> See O. Ammann, ‘Buchbesprechung: Iris von Roten, *Frauen im Laufgitter*’ (2018) 5 *Zeitschrift für Schweizerisches Recht*, pp. 579–97, at 580–5.

<sup>122</sup> *KlimaSeniorinnen*, n. 1 above, para. 9.

<sup>123</sup> Human Rights Council (HRC), ‘Analytical Study on the Promotion and Protection of the Rights of Older Persons in the Context of Climate Change’, 30 Apr. 2021, UN Doc. A/HRC/47/46, para. 35.

<sup>124</sup> *Ibid.*, para. 7.

<sup>125</sup> Sußner, n. 16 above.

<sup>126</sup> B. Hürlimann, ‘Frau Stern reist nach Strassburg’, *Republik*, 1 Apr. 2023, available at: <https://www.republik.ch/2023/04/01/frau-stern-reist-nach-strassburg>.

<sup>127</sup> Bundesamt für Statistik, ‘Häusliche Gewalt’, available at: [https://www.bfs.admin.ch/bfs/de/home/statistiken/kriminalitaet-straftrecht/polizei/haeusliche-gewalt.html#:~:text=Schwere%20Gewalt%20nach%20Beziehung%20und%20Art%20der%20Gewalt&text=Gesch%20C3%A4digte%20Personen-,F%C3%BCr%20das%20Jahr%202022%20wurden%2011%20388%20gesch%20C3%A4digte%20Personen%20polizeilich,h%C3%B6her%20\(%2B2%2C2%25\)](https://www.bfs.admin.ch/bfs/de/home/statistiken/kriminalitaet-straftrecht/polizei/haeusliche-gewalt.html#:~:text=Schwere%20Gewalt%20nach%20Beziehung%20und%20Art%20der%20Gewalt&text=Gesch%20C3%A4digte%20Personen-,F%C3%BCr%20das%20Jahr%202022%20wurden%2011%20388%20gesch%20C3%A4digte%20Personen%20polizeilich,h%C3%B6her%20(%2B2%2C2%25)).

<sup>128</sup> CEDAW Committee, n. 32 above, para. 5.

<sup>129</sup> G. Cissé et al., ‘Health, Wellbeing and the Changing Structure of Communities’, in IPCC, n. 98 above, pp. 1041–170, at 1088.

<sup>130</sup> ‘Feminist Perspectives on Sex and Gender’, *Stanford Encyclopedia of Philosophy*, 18 Jan. 2022, available at: <https://plato.stanford.edu/entries/feminism-gender>.



from heat stress compared with the general population.<sup>131</sup> While this sex-based and health-related risk does not constitute an inequality by itself, it can form part of an axis of oppression, and consequently have a gendered effect. For example, they may require assistance to cope with the increasing heat, including housing and medical treatment, while existing climate adaption policies often overlook these sex-based differences.<sup>132</sup> Another example includes the fact that women's specific susceptibility to climate impacts is inadequately examined because of a male bias in medicine.<sup>133</sup> As elderly women with heart problems, potential heat-induced heart attacks may be misdiagnosed, in that the typical symptoms associated with this condition are based on those of men.<sup>134</sup>

Moreover, the sex-based health issues of the *KlimaSeniorinnen* could constitute or lead to disability.<sup>135</sup> According to Article 1 of the Convention on the Rights of Persons with Disabilities (CRPD),<sup>136</sup> disabilities involve long-term impairments interacting with barriers that hinder societal participation. The CRPD defines disabilities as being influenced by environmental and social factors, a definition widely recognized across the globe, as 185 states have ratified the Convention.<sup>137</sup> As underscored by the CRPD Committee, an illness may turn into a disability 'as a consequence of its duration or its chronicity'.<sup>138</sup> Consequently, *KlimaSeniorinnen* with disabilities are particularly susceptible to extreme heat, as people with disabilities are often poor and may not have access to medication or care during periods of extreme heat.<sup>139</sup>

Climate change exacerbates existing prejudices and stereotypes based on a combination of age, gender, and disability. In bringing their case, the *KlimaSeniorinnen* were stereotyped as 'cute grandmothers',<sup>140</sup> which perpetuates the idea of women as being solely caregivers for children and portrays them as incompetent and not to be taken seriously.<sup>141</sup> While they could be held accountable for their contribution to the climate

<sup>131</sup> *KlimaSeniorinnen*, n. 70 above, para. 5. Y. van Steen et al., 'Sex Differences in Mortality after Heat Waves: Are Elderly Women at Higher Risk?' (2019) 92 *International Archives of Occupational and Environmental Health*, pp. 37–48.

<sup>132</sup> See CEDAW Committee, n. 32 above, paras 37, 64.

<sup>133</sup> On medical bias see L. Merone et al., 'Sex Inequalities in Medical Research: A Systematic Scoping Review of the Literature' (2022) 3(1) *Women's Health Reports*, pp. 49–59.

<sup>134</sup> J.C. Chrisler, A. Barney & B. Palatino, 'Ageism Can Be Hazardous to Women's Health: Ageism, Sexism, and Stereotypes of Older Women in the Healthcare System' (2016) 72(1) *Journal of Social Issues*, pp. 86–104, at 96.

<sup>135</sup> See M. Stein & P. Stein, 'Disability, Human Rights, and Climate Justice' (2022) 44(1) *Human Rights Quarterly*, pp. 81–110, at 89.

<sup>136</sup> New York, NY (US), 13 Dec. 2006, in force 3 May 2008, available at: [https://www.ohchr.org/sites/default/files/Ch\\_IV\\_15.pdf](https://www.ohchr.org/sites/default/files/Ch_IV_15.pdf).

<sup>137</sup> UN Treaty Body Database, Ratification Status for CRPD, available at: [https://tbinternet.ohchr.org/\\_layouts/15/TreatyBodyExternal/Treaty.aspx?Treaty=CRPD](https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?Treaty=CRPD).

<sup>138</sup> CRPD Committee, *S.C. v. Brazil*, Communication No. 10/2013, 2 Oct. 2014, UN Doc. CRPD/C/12/D/10/2013, para. 6.3.

<sup>139</sup> A. Engelman, L. Craig & A. Iles, 'Global Disability Justice in Climate Disasters: Mobilizing People with Disabilities as Change Agents' (2022) 41(10) *Health Affairs*, pp. 1496–504, at 1499.

<sup>140</sup> See Hürlimann, n. 126 above.

<sup>141</sup> See A. Blackham, 'A Life Course Approach to Addressing Exponential Inequalities: Age, Gender, and Covid-19', in S. Atrey & S. Fredman (eds), *Exponential Inequalities* (Oxford University Press, 2023), pp. 233–54, at 234.

crisis as elderly people,<sup>142</sup> their *gendered* experiences of climate harm would counter some of this blame. For example, studies conducted in similarly wealthy societies like Canada and Sweden suggest that women's emissions related to transportation and work are lower than those of men as a result of social inequalities.<sup>143</sup> They may also face stigmatization as disabled and elderly people when seeking healthcare, and could be overlooked in climate policy responses.<sup>144</sup>

The *KlimaSeniorinnen* could also experience racial discrimination in relation to climate change. Switzerland's population includes 30% non-Swiss residents, reflecting significant ethnic diversity.<sup>145</sup> However, the country has faced international criticism as a result of reported racist attacks against marginalized groups. In its 2021 report, the Committee on the Elimination of Racial Discrimination (CERD) was 'very concerned' about escalating hate speech and crimes directed at Muslims, Roma people, non-citizens, individuals of African descent, and Jewish communities.<sup>146</sup> Other issues highlighted were racial profiling, discrimination against non-citizens, and prevailing negative stereotypes against foreigners in the population.<sup>147</sup> This situation could worsen during climate disasters, potentially leading to racial profiling against racially and ethnically diverse *KlimaSeniorinnen* in their access to health and emergency services, thereby resulting in worse health outcomes.<sup>148</sup>

### *Duarte Agostinho: A Children's Crisis*

Children bear a greater burden of the effects of climate change. As the CRC held in the *Sacchi* case, 'children ... are particularly impacted by the effects of climate change, both in terms of the manner in which they experience such effects as well as the potential of climate change to affect them throughout their lifetime'.<sup>149</sup> While children and young people have contributed less to global warming, they will have to confront the climate crisis. For example, rising sea levels are already unavoidable, as indicated in the IPCC 6<sup>th</sup> assessment report,<sup>150</sup> which makes tangible the related harm for today's children. However, children everywhere in the world are *vulnerable* to climate effects, such as

<sup>142</sup> L. Ayalon & S. Roy, 'The Role of Ageism in Climate Change Worries and Willingness to Act' (2023) 42(6) *Journal of Applied Gerontology*, pp. 1305–12, at 1307.

<sup>143</sup> A. Carlsson Kanyama, J. Nässén & R. Benders, 'Shifting Expenditure on Food, Holidays, and Furnishings Could Lower Greenhouse Gas Emissions by Almost 40%' (2021) 25(6) *Journal of Industrial Ecology*, pp. 1602–16, at 1612–3. M. Griffin Cohen, 'Using Information about Gender and Climate Change to Inform Green Economic Policies', in M. Griffin Cohen (ed.), *Climate Change and Gender in Rich Countries: Work, Public Policy and Action* (Routledge, 2017), pp. 297–312, at 310–1.

<sup>144</sup> HRC, 'Analytical Study on the Promotion and Protection of the Rights of Persons with Disabilities in the Context of Climate Change', 22 Apr. 2020, UN Doc. A/HRC/44/30, paras 7, 37–8.

<sup>145</sup> Federal Statistical Office, 'Population by Migration Status', available at: <https://www.bfs.admin.ch/bfs/en/home/statistics/population/migration-integration/by-migration-status.html>.

<sup>146</sup> CERD Committee, 'Concluding Observations on Switzerland', 27 Dec. 2021, UN Doc. CERD/C/CHE/CO/10-12, para. 15.

<sup>147</sup> *Ibid.*, paras 17–9, 27.

<sup>148</sup> See T.A. Deivanayagam et al., 'Envisioning Environmental Equity: Climate Change, Health, and Racial Justice' (2023) 402(10395) *The Lancet*, pp. 64–78.

<sup>149</sup> *Sacchi*, n. 8 above, para. 10.13.

<sup>150</sup> H.-O. Pörtner et al., 'Technical Summary', in IPCC, n. 98 above, pp. 37–118, at 62.

heatwaves, which lead to dehydration because of their limited body mass.<sup>151</sup> As a result, the Court would be likely to see their case as an *actio popularis*. Although climate change is a children's rights crisis, the applicants are not yet intersectional victims uniquely affected by this issue as children and youth.

However, climate change has the potential to create age-based inequalities for the *Duarte Agostinho* applicants – throughout their lives both as children and later as elderly people<sup>152</sup> – that intersect with disadvantages related to disability or gender. Although they did not plead the intersectional aspects of their case, disadvantages based on gender and disability are apparent from the facts *for some of the applicants*. Several applicants are dealing with asthma and pollen allergies, in addition to experiencing the psychological impacts of climate change, including climate anxiety stemming from the 2017 wildfires.<sup>153</sup> Climate change can exacerbate or create new disabilities that marginalize the applicants. They may face stigmatization because of their eco-anxiety, which could intersect with childism, whereby children's concerns about climate change are not taken seriously when they are stereotyped as too young to understand its effects.<sup>154</sup> At the same time, disabilities can be a source of empowerment in addressing climate change, rather than constituting a disadvantage. For example, Greta Thunberg has called her Asperger's Syndrome 'a gift' and a 'superpower', which made her aware of the action needed to tackle the climate crisis.<sup>155</sup>

Another notable aspect of the applicants' case is that four out of the six applicants are girls or young women, including one girl who was only seven years old when the application was filed before the ECtHR.<sup>156</sup> They therefore belong to a historically disadvantaged group and are likely to encounter greater difficulties when faced with forest fires and other climate effects. These disadvantages could intersect with the applicants' disabilities, and potentially their age. Girls with disabilities, as well as those of Roma origin, face specific obstacles in accessing healthcare and education, including stigma and prejudice, as highlighted in the CEDAW Committee's 2022 General Observation on Portugal.<sup>157</sup> The case files do not provide enough public information on intersectional aspects, particularly the mental health status of the

<sup>151</sup> J.M. Balbus & C. Malina, 'Identifying Vulnerable Subpopulations for Climate Change Health Effects in the United States' (2009) 51(1) *Journal of Occupational and Environmental Medicine*, pp. 33–7.

<sup>152</sup> See G.L. Neuman & A.M. Ibrahim, 'When Is Age Discrimination a Human Rights Violation?' (2023) 36(2) *Harvard Human Rights Journal*, pp. 223–46, at 224–5.

<sup>153</sup> *Duarte Agostinho v. Portugal and 32 Other States*, Application to the ECtHR, submitted on 2 Sept. 2020, paras 21–3 (application form).

<sup>154</sup> Ayalon & Roy, n. 142 above, p. 1307.

<sup>155</sup> K. O'Malley, 'Greta Thunberg Says "Gift" of Asperger Syndrome Helps Her See through Environment "Lies"', *The Independent*, 26 Apr. 2019, available at: <https://www.independent.co.uk/life-style/health-and-families/greta-thunberg-gift-asperger-syndrome-environment-strike-climate-change-radio-4-a8883056.html>. See also A. Rourke, 'Greta Thunberg Responds to Asperger's Critics: "It's a Superpower"', *The Guardian*, 2 Sept. 2019, available at: <https://www.theguardian.com/environment/2019/sep/02/greta-thunberg-responds-to-aspergers-critics-its-a-superpower>.

<sup>156</sup> See Global Legal Action Network (GLAN), 'A Trial Like No Other', available at: <https://youth4climate-justice.org>.

<sup>157</sup> CEDAW Committee, 'Concluding Observations on Portugal', 12 July 2022, UN Doc. CEDAW/C/PRT/CO/10, paras 25–38.

applicants – the relevant parts in the case files having been heavily redacted<sup>158</sup> – as well as their racialized identities and socio-economic status.<sup>159</sup> It is plausible that at least some applicants face intersecting disadvantages, yet whether these could be recognized in relation to victim status depends on the Court’s willingness to conduct an intersectionality analysis. Given that the applicants did not plead intersectionality, the Court would need to be creative in capturing these facts under a victim status analysis.<sup>160</sup>

### 3.3. Intersectionality in Practice

To determine victim status, the Court could establish a link between the societal challenges faced by the applicants and the intersectional climate effects they endure. The fact that the applicants experience climate effects because of their place of residence – the *Duarte Agostinho* applicants live in an area at risk of forest fires,<sup>161</sup> and the *KlimaSeniorinnen* inhabit a country with temperature rises that surpass the global average<sup>162</sup> – already narrows down the affected group. In an intersectionality analysis the Court could then link the applicants’ identities – as elderly women or girls, for example – to unequal power systems, such as sexism, racism or classism, and examine how they interact with climate impacts. In doing so, it could draw on the structure of Article 14. In line with Crenshaw’s critique of the ‘single-axis’ framework,<sup>163</sup> the Court should identify at least two intersecting axes of oppression affected by climate change to carve out the unique disadvantage the applicants face based on both factors at the same time. Focusing solely on one factor runs contrary to the concept of intersectionality, and could yield such a large group as to constitute an *actio popularis*, while still failing to do justice to the complex and intertwined impacts of climate change. For example, an analysis based on gender alone would overlook the many young, able-bodied White women who are not disproportionately affected by climate harm. Adding additional axes of inequality that affect these women’s social positioning – such as class, race or disability – is essential for defining the affected group. This approach helps to identify the exact causes of climate-based inequality for applicants.<sup>164</sup> The Court could prioritize the grounds raised in climate claims and/or consider the most relevant axes of oppression, an approach recommended by Anna Kaijser and Annica Kronsell for researchers studying intersectionality.<sup>165</sup> It could also rely on the axes of oppression that receive higher scrutiny under Article 14 ECHR, such as gender and

<sup>158</sup> *Duarte Agostinho*, n. 71 above, para. 329.

<sup>159</sup> *Ibid.*

<sup>160</sup> See *S.M.*, n. 54 above, para. 219.

<sup>161</sup> *Duarte Agostinho*, n. 71 above, paras 296–9.

<sup>162</sup> IEA50, ‘Switzerland Climate Resilience Policy Indicator’, 18 Feb. 2022, available at: <https://www.ica.org/articles/switzerland-climate-resilience-policy-indicator>.

<sup>163</sup> Crenshaw, n. 33 above, p. 140.

<sup>164</sup> See Atrey, n. 33 above, pp. 80–4.

<sup>165</sup> Kaijser & Kronsell, n. 15 above, p. 422.

race,<sup>166</sup> while according less protection to age<sup>167</sup> – although this approach runs the risk of being unresponsive to the applicants’ actual lived experiences. The Court should conduct this analysis separately for every applicant, as they may not all belong to the same disadvantaged groups. This could lead to the conclusion that some applicants, for example, in *Duarte Agostinho* have victim status, whereas others do not.<sup>168</sup> An intersectionality analysis can serve the ECtHR, as well as UN treaty bodies with similar victim status requirements, in recognizing those applicants who are directly affected by climate change as victims. The paths outlined here can also guide litigants in framing their arguments in climate cases around the world or those before other human rights courts and UN treaty bodies.

#### 4. Agents of Change: Achieving Climate Justice

As the UN High Commissioner for Human Rights had already noted in 2009, elderly women and children ‘should be perceived as active agents of change and not as passive victims’.<sup>169</sup> As a result of their unequal positionality, which is linked to both age and gender, some elderly Swiss women and Portuguese children find themselves in an unequal power situation where they have limited means of influencing the decisions that affect them. Intersectionality does not simply point out the intersectional impact of climate change on some groups, but also entails a transformative dimension,<sup>170</sup> thereby ‘unveil[ing] agency and emancipatory pathways’.<sup>171</sup> It supports these groups’ struggle in overhauling power relations that make them more affected by climate change in the first place.<sup>172</sup> As agents of change, intersectional applicants can address the climate inequalities affecting them through human-rights based litigation. As such, climate litigation can counterbalance their exclusion from climate politics and provide them with the participative space to contribute to climate laws and policies.<sup>173</sup> Concomitant with this, they can participate, to some degree, in procedures to ensure their voices are heard as a matter of substantive equality,<sup>174</sup> which is also in line with the concept of procedural climate justice that seeks to include these voices.<sup>175</sup>

<sup>166</sup> ECtHR, *J.D. and A. v. United Kingdom*, Appl. Nos. 32949/17 and 34614/17, 24 Oct. 2019, para. 89; *D.H.*, n. 84 above, para. 176.

<sup>167</sup> ECtHR, *British Gurkha Welfare Society and Others v. United Kingdom*, Appl. No. 44818/11, 15 Sept. 2016, para. 88.

<sup>168</sup> E.g., *Cordella*, n. 50 above, paras 103, 108.

<sup>169</sup> Office of the High Commissioner for Human Rights, ‘Report on the Relationship between Climate Change and Human Rights’, 15 Jan. 2009, UN Doc. A/HRC/10/61, para. 94.

<sup>170</sup> Martignoni, n. 16 above, p. 397.

<sup>171</sup> H. Djoudi et. al., ‘Beyond Dichotomies: Gender and Intersecting Inequalities in Climate Change Studies’ (2016) 45(3) *Ambio*, pp. 248–62, at 248.

<sup>172</sup> See Atrey, n. 33 above, p. 61.

<sup>173</sup> See E. Colombo, ‘The Politics of Silence: Hannah Arendt and Future Generations’ Fight for the Climate’ (2023) 17(1) *ICL Journal*, pp. 1–39, at 10.

<sup>174</sup> S. Fredman, *Discrimination Law* (Oxford University Press, 3<sup>rd</sup> edn, 2023), p. 40.

<sup>175</sup> Brandstedt & Brülde, n. 20 above, p. 786.

#### 4.1. Participation in Climate Decision Making

Applicants who face the intersectional impact of climate change are likely to be marginalized from climate decision making and the public space.<sup>176</sup> As a result of their unequal positionality – which can be linked to age, disability, gender, etc. – they have limited means of influencing the decisions that affect them. However, it is precisely the intersectional impact of climate change that can empower women and children to resist unequal power dynamics.<sup>177</sup> These applicants, granting their intersectional heterogeneity, through litigation can challenge power structures that have excluded them from the public sphere.

Aside from school strikes and civil disobedience, climate litigation is one of the few ways in which children can actively engage in climate law and policies.<sup>178</sup> Children did not participate in the 26<sup>th</sup> Conference of the Parties (COP) to the UN Framework Convention on Climate Change (UNFCCC),<sup>179</sup> in 2021, which ‘should have been the COP for children’.<sup>180</sup> Children are often excluded from the avenues that could provide redress for the deterioration of the climate, despite being increasingly seen as important actors in climate litigation.<sup>181</sup>

Women’s voices were underrepresented during the drafting of the UNFCCC.<sup>182</sup> Only around 30% of the delegates participating in COP negotiations are women.<sup>183</sup> The international climate regime also contains minimal mention of women, equality or gender.<sup>184</sup> The UNFCCC is completely silent on these issues, and while the Paris Agreement mentions gender equality in its Preamble, and with regard to adaptation (Article 7(5)) and gender-responsive capacity building (Article 11(2)), it does not consider women as a group at risk of climate effects.<sup>185</sup> The Rio Declaration considers women’s ‘vital role in environmental management and development’ (Principle 20),<sup>186</sup> while some other COPs have focused on women’s rights and climate change.<sup>187</sup> Still, women’s voices remained marginal in subsequent COPs, with only 37%

<sup>176</sup> Kaijser & Kronsell, n. 15 above, p. 418.

<sup>177</sup> Djoudi et al., n. 171 above, p. 249.

<sup>178</sup> See Colombo, n. 173 above, p. 11.

<sup>179</sup> New York, NY (US), 9 May 1992, in force 21 Mar. 1994, available at: <https://unfccc.int>.

<sup>180</sup> Colombo, n. 173 above, p. 3.

<sup>181</sup> See A. Daly, ‘Climate Competence: Youth Climate Activism and Its Impact on International Human Rights Law’ (2022) 22 *Human Rights Law Review*, pp. 1–24, at 19.

<sup>182</sup> Atapattu, n. 14 above, p. 206; UNFCCC, n. 179 above; R. Maguire & B. Lewis, ‘Women, Human Rights and the Global Climate Regime’ (2018) 9 *Journal of Human Rights and the Environment*, pp. 51–67, at 58.

<sup>183</sup> *Ibid.*

<sup>184</sup> *Ibid.*

<sup>185</sup> Paris Agreement, n. 3 above.

<sup>186</sup> Rio Declaration on Environment and Development (Rio Declaration), adopted by the UN Conference on Environment and Development, Rio de Janeiro (Brazil), 3–14 June 1992, UN Doc. A/CONF.151/26/Rev.1 (Vol. I), available at: <https://www.un.org/esa/dsd/agenda21/Agenda%202021.pdf>.

<sup>187</sup> E.g., Decision 36/CP.7, ‘Improving the Participation of Women in the Representation of Parties in Bodies Established under the UNFCCC or the Kyoto Protocol’, 9 Nov. 2001, UN Doc. FCCC/CP/2001/13/Add.4; Decision 18/CP.20, ‘Lima Work Program on Gender’, 2 Feb. 2015, UN Doc. FCCC/CP/2014/10/Add.3.



representation in 2022, and 29% of the total speaking time.<sup>188</sup> Much remains to be done to fully include female voices in the climate change regime. Climate litigation led by elderly women does not by itself remedy the overrepresentation of male voices in climate contexts, but it can be seen to constitute a notable form of participation in climate decision making.<sup>189</sup>

#### 4.2. Challenging Unequal Power Dynamics

Climate litigation can serve as an avenue for ‘the extension of citizenship rights’<sup>190</sup> and as a ‘proxy for political participation’,<sup>191</sup> which is in line with the political aim of intersectionality, – that is, to challenge unequal power dynamics.<sup>192</sup> As such, intersectionality is closely linked to the concept of procedural climate justice, with which it shares its origin in critical theory.<sup>193</sup> Procedural climate justice seeks to ensure fairness in procedures, including participation in climate decision making for everyone affected by such decisions.<sup>194</sup> Procedural climate justice is interested in the question of who participates in the climate decision-making procedure rather than its outcome,<sup>195</sup> although the procedure could influence the substantive result.<sup>196</sup> For example, children are often worried about climate change,<sup>197</sup> while some women tend to be more supportive of climate protection measures.<sup>198</sup> Older men in positions of power, on the other hand, often reject climate-friendly policies.<sup>199</sup> These trends show that who contributes to climate decision making does matter, but they overlook the diverse perspectives within these groups, which can differ significantly across various regions and cultures worldwide.

The concept of intersectionality rejects the idea that women and children are monolithic groups and therefore counters the risk of essentialism<sup>200</sup> – that is, the idea that the experience of one group such as ‘white-middle class women’ reflects the experiences of all women.<sup>201</sup> Conflating the experiences of Swiss climate victims and Portuguese children with those of women and children in the global south, who are clearly more affected by climate change, would risk viewing women and children as

<sup>188</sup> Report by the Secretariat, ‘Gender Composition and Progress on Implementation’, 16–28 Nov. 2022, UN Doc. FCCC/CP/2022/3, para. 33.

<sup>189</sup> See Decision 18/CP.20, n. 187 above.

<sup>190</sup> D. Bertram, ‘For You Will (Still) Be Here Tomorrow’: The Many Lives of Intergenerational Equity’ (2022) 12(1) *Transnational Environmental Law*, pp. 121–49, at 141.

<sup>191</sup> Colombo, n. 173 above, p. 6.

<sup>192</sup> Martignoni, n. 16 above, p. 397.

<sup>193</sup> See Mikulewicz et al., n. 15 above, p. 1278.

<sup>194</sup> P. Newell et al., ‘Towards Transformative Climate Justice: An Emerging Research Agenda’ (2021) 12(1) *Wiley Interdisciplinary Reviews: Climate Change*, pp. 1–17, at 4.

<sup>195</sup> *Ibid.*, pp. 4–5.

<sup>196</sup> Brandstedt & Brülde, n. 20 above, p. 793.

<sup>197</sup> Ayalon & Roy, n. 142 above, p. 1306.

<sup>198</sup> *Ibid.*

<sup>199</sup> *Ibid.*

<sup>200</sup> Kaijser & Kronsell, n. 15 above, p. 423.

<sup>201</sup> E.V. Spelman, *Inessential Woman* (Beacon Press, 1992), p. 4.

a homogeneous group.<sup>202</sup> For example, the CRC statement in *Sacchi* that the ‘climate crisis is a children’s rights crisis’ essentializes children, obscuring their various experiences of climate change.<sup>203</sup> This not only oversimplifies experiences of climate harm, but also risks raising public interest arguments. Given that the case involved children from Argentina, Brazil, France, Germany, India, the Marshall Islands, Nigeria, Palau, South Africa, Sweden, Tunisia, and the US,<sup>204</sup> the CRC should have considered their intersectional disadvantages, as these have a profound impact on their experiences of climate change.

Climate decision-making processes should embrace multiple perspectives. The international climate regime, in particular the Paris Agreement, recognizes the significance of ‘public participation’ in climate decisions,<sup>205</sup> and the protection of the climate ‘for the benefit of present and future generations of humankind, on the basis of equity’ (Article 3(1)).<sup>206</sup> It also draws attention to ‘gender equality, empowerment of women and intergenerational equity’ in addressing climate change, and acknowledges the importance of human rights, including the right to health, and the rights of children and people in vulnerable situations.<sup>207</sup> The intersecting disadvantages of applicants can result in potential barriers to access to justice and an effective remedy, while their alienation from the political space threatens their political rights and freedom of expression.<sup>208</sup>

The UN treaty bodies have also made a nuanced call for the participation of diverse groups in climate decision making. The CEDAW Committee’s General Recommendation No. 27 references the challenges of *older women’s* ‘limited access to resources and decision-making processes [that] increases their vulnerability to climate change’.<sup>209</sup> General Recommendation No. 37 on the gender-related dimensions of disaster risk reduction in the context of climate change recognizes ‘[the] right of women to participate at all levels of decision-making ... in climate change policies and programmes’.<sup>210</sup> This could include intersectional voices, as the Committee acknowledged that some groups who experience intersecting forms of discrimination have limited access to political power.<sup>211</sup> The CRPD also recognizes that intersectionality plays a role in the climate risks faced by persons with disabilities, and calls for the inclusion of people with disabilities in climate decision making, ‘including in leadership positions’.<sup>212</sup> The CRC General Comment No. 26 mirrors the CRPD’s approach, emphasizing that children should have opportunities to engage in climate decision

<sup>202</sup> Ibid.

<sup>203</sup> *Sacchi*, n. 8 above, para. 3(3).

<sup>204</sup> Ibid., para. 1(1).

<sup>205</sup> Atrey, n. 14 above, p. 31.

<sup>206</sup> Paris Agreement, n. 3 above, Art. 3(1).

<sup>207</sup> Ibid., Preamble.

<sup>208</sup> See Venn, n. 13 above, p. 3.

<sup>209</sup> CEDAW Committee, ‘General Recommendation No. 27 on Older Women and Protection of their Human Rights’, 16 Dec. 2010, UN Doc. CEDAW/C/GC/27, para. 25.

<sup>210</sup> CEDAW Committee, n. 32 above, para. 8.

<sup>211</sup> Ibid., para. 29.

<sup>212</sup> HRC, n. 144 above, paras 6, 41, 58.

making.<sup>213</sup> Demonstrating its commitment to the right to participate, the CRC asked the applicants in *Sacchi* to contribute to the development of General Comment No. 26.<sup>214</sup>

As Shreya Atrey noted, ‘the right to participate’ is reflected in the right to equality,<sup>215</sup> which in turn exposes the disadvantages that intersectional victims face. The ‘participative dimension’ of equality, as theorized by Sandra Fredman, also refers to the political contribution of marginalized groups and the ability to speak up.<sup>216</sup> In the light of this, the Court would advance intersectional voices by recognizing them as victims under Article 34 ECHR, thereby upholding procedural climate justice. The Court can accept climate victimhood based on considerations of procedural climate justice, which is ‘part of the value system [human rights] represent’.<sup>217</sup>

### 4.3. Instrumentalizing Intersectional Applicants?

Instrumentalizing applicants to bring intersectional claims would conflict with the essence of intersectionality, which prioritizes the agency of marginalized groups.<sup>218</sup> These applicants should not be burdened or singled out to bring climate litigation despite their great potential in overcoming victim status. The *Duarte Agostinho* applicants were selected by staff members of the Global Legal Action Network (GLAN),<sup>219</sup> but they have also spoken up about their case and travelled to Strasbourg for the hearings at the ECtHR.<sup>220</sup> While the *Sacchi* children were represented by lawyers,<sup>221</sup> their case was visibly child-led, and included slow-food activist Chiara Sacchi<sup>222</sup> and Greta Thunberg, who gained global attention for her school strikes. The CRC conducted an online meeting with the children, which ensured their voices were genuine and could be heard.<sup>223</sup> The fact that these children

<sup>213</sup> CRC, n. 65 above, paras 8, 102.

<sup>214</sup> M. Wewerinke-Singh, ‘Between Cross-Border Obligations and Domestic Remedies: The UN Committee on the Rights of the Child’s Decision on *Sacchi v. Argentina* (Part 1)’, *Oxford Human Rights Hub Blog*, 29 Oct. 2021, available at: <https://ohrh.law.ox.ac.uk/between-cross-border-obligations-and-domestic-remedies-the-un-committee-on-the-rights-of-the-childs-decision-on-sacchi-v-argentina-part-1>.

<sup>215</sup> Atrey, n. 14 above, pp. 31–7.

<sup>216</sup> See Fredman, n. 174 above, pp. 39–41.

<sup>217</sup> E. Brems & L. Lavrysen, ‘Procedural Justice in Human Rights Adjudication: The European Court of Human Rights’ (2013) 35(1) *Human Rights Quarterly*, pp. 176–200, at 178, 185.

<sup>218</sup> Mikulewicz et al., n. 15 above, p. 1278.

<sup>219</sup> Daly, n. 181 above, p. 19.

<sup>220</sup> S. Petrequin, ‘6 Young Climate Activists Take European Governments to Court over Climate Change’, *AP News*, 27 Sept. 2023, available at: [https://apnews.com/article/europe-climate-court-portugal-children-activists-fee72a346a980a8b5758651927bf00ab#:~:text=STRASBOURG%2C%20France%20\(AP\)%20%E2%80%94,court%20to%20force%20climate%20action](https://apnews.com/article/europe-climate-court-portugal-children-activists-fee72a346a980a8b5758651927bf00ab#:~:text=STRASBOURG%2C%20France%20(AP)%20%E2%80%94,court%20to%20force%20climate%20action).

<sup>221</sup> Hausfeld, ‘Climate Change and Children’s Rights’, available at: <https://www.hausfeld.com/en-us/what-we-do/current-claims/climate-change-and-children-s-rights>.

<sup>222</sup> E. Giannini, ‘“Give Us Back Our Future.” Chiara Sacchi, Slow Food Activist with Greta to the UN’, *Slow Food International*, 25 Sept. 2019, available at: <https://www.slowfood.com/give-us-back-our-future-chiara-sacchi-slow-food-activist-with-greta-to-the-un>.

<sup>223</sup> CRC, ‘Open Letter to the Authors: Simplified Explanation of the Case’, available at: [https://www.ohchr.org/sites/default/files/2021-12/Open\\_letter\\_on\\_climate\\_change.pdf](https://www.ohchr.org/sites/default/files/2021-12/Open_letter_on_climate_change.pdf).

commented on, and expressed dismay at, the Committee's rejection of their case<sup>224</sup> signals that child-led litigation can be politically empowering. While Vanuatu's request for an Advisory Opinion on climate change was not a classic youth-led case, in that it was brought by a state before the International Court of Justice – an international court handling state-led complaints – the 'Pacific Islands Students Fighting Climate Change'<sup>225</sup> was instrumental in instigating the request for an Advisory Opinion.<sup>226</sup> By initiating international human rights-based climate cases, children have become some of the most powerful activists in influencing climate laws and policies.

By contrast, we could question whether climate litigation has been empowering for the *KlimaSeniorinnen*. While Greenpeace was instrumental in developing their litigation strategy, some *KlimaSeniorinnen* have been activists throughout their lives. Elizabeth Stern vehemently rejects the idea that they were instrumentalized: 'Greenpeace was where we got our know-how. We challenged them and pushed for things to speed up'.<sup>227</sup> But why should 'old women, of all people, who statistically will be gone from this planet in ten years anyway' bring a climate case before a human rights court?<sup>228</sup> *KlimaSeniorinnen* bring their case to make an impact beyond their lifetime, with their advocacy for long-term climate policies envisioning the protection of the present generation, such as their grandchildren, and providing benefit for younger women and girls.<sup>229</sup> Ultimately, those affected by climate change in intersectional ways, yet excluded from climate decision making, can use litigation to shape climate laws and policies.

## 5. Conclusion

This article has argued for the recognition of victim status for applicants affected by climate change based simultaneously on their gender *and* age *and* disability. Dismissing their climate case for lack of victim status would deprive intersectional groups of women and girls the opportunity to contribute to climate decision making in line with the political aim of intersectionality.<sup>230</sup> The ECtHR itself would benefit from upholding procedural (climate) justice, as judgments that consider the voices of

<sup>224</sup> Earthjustice, 'UN Committee on the Rights of the Child Turns Its Back on Climate Change Petition from Greta Thunberg and Children from Around the World', 11 Oct. 2021, available at: <https://earthjustice.org/press/2021/un-committee-on-the-rights-of-the-child-turns-its-back-on-climate-change-petition-from-greta-thunberg-and>.

<sup>225</sup> Pacific Island Students Fighting Climate Change, available at: <https://www.pisfcc.org>.

<sup>226</sup> UN General Assembly Resolution A/77/L.58, 'Request for an Advisory Opinion of the International Court of Justice on the Obligations of States with respect to Climate Change', 29 Mar. 2023, available at: <https://climatecasechart.com/non-us-case/request-for-an-advisory-opinion-on-the-obligations-of-states-with-respect-to-climate-change>.

<sup>227</sup> Hürlimann, n. 126 above (translated by the author).

<sup>228</sup> E. Stern, 'KlimaSeniorinnen: Our Shared Right to Life and Health', *Greenpeace International*, 24 Mar. 2023, available at: <https://www.greenpeace.org/international/story/58842/klimasenorinnen-our-shared-right-to-life-and-health>.

<sup>229</sup> Ibid.

<sup>230</sup> L. Turquet et al., *Feminist Climate Justice: A Framework for Action* (UN-Women, 2023), p. 15, available at: <https://www.unwomen.org/sites/default/files/2023-12/Feminist-climate-justice-A-framework-for-action-en.pdf>.

those affected would be likely to be perceived as more fair and just.<sup>231</sup> This, in turn, could enhance the legitimacy of the Court's judgments, particularly in respect of 'controversial issues' like climate change.<sup>232</sup>

Because the ECtHR is not bound by national standing rules, it can choose to recognize intersectional victims under Article 34 ECHR – a flexible provision that in principle covers individuals and groups. The concept of victim status is also adaptable to changing circumstances, such as those arising from climate change. Intersectionality could provide valuable insights for human rights courts in examining victim status in climate-related cases. It emphasizes that socially constructed and identity-based inequalities are underlying factors that determine people's direct affectedness by climate effects. It can therefore offer a more precise answer to the question of victim status. Moreover, intersectionality reflects people's unique experiences with oppression, and avoids stereotyping women and children as weak. An intersectionality analysis is mindful of the principle of empowering marginalized groups, rather than instrumentalizing them to advance climate litigation on behalf of others.

To define direct affectedness, it is necessary to determine at least two interconnected disadvantages in relation to climate change. Some of the applicants in the two cases can be defined by interwoven disadvantages based on age *and* gender *and* disability, but also potentially race, ethnicity, and class, which distinguishes their claims from those of the general public. The Court might find that only some applicants experience climate change in intersectional ways and therefore qualify as victims within the broad scope of Article 34 ECHR. The Court could also consider intersectionality in a victim status analysis, modelled after Article 14 ECHR, or it could fit intersectionality under the umbrella of vulnerability.<sup>233</sup>

The concept of intersectionality also entails a participatory function, which seeks to redress unequal power relations. The right to substantive equality recognizes this participatory aspect of intersectionality, which is also linked to the concept of procedural climate justice. Climate litigation offers applicants who experience intersectional climate effects a chance to engage in climate decision making, or at least to have their voices heard. These groups must be part of climate decision making, as reflected in the concept of procedural climate justice, considering the profound inequalities they face. The right to participate in climate decision making is recognized by some UN treaty bodies, while several human rights categories also encompass participatory functions, including the right to access justice, effective remedies, and political rights. In emphasizing their right to participate, intersectional climate victims serve as important agents of change. The ECtHR should therefore acknowledge the victim status of marginalized groups with intersecting experiences of climate harm to amplify those voices that have only just started to speak up.

<sup>231</sup> Brems & Lavrysen, n. 217 above, pp. 178–9.

<sup>232</sup> *Ibid.*, p. 183.

<sup>233</sup> Brems et al., n. 27 above.

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