Rape Myths in the European Court of Human Rights' *Non-refoulement* Case Law on Sexual and Gender-Based Violence

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ABSTRACT

The criminal justice and the refugee/human rights systems operate within different procedural and substantial frameworks. However, analysis of the European Court of Human Rights' case law reveals a significant parallel between the two, namely judges' acceptance of 'rape myths' in making their decisions. Criminal justice scholarship has defined rape myths as stereotyped and false beliefs about rape (including about victims and perpetrators). This article translates the concept to the refugee/human rights context and extends it to other forms of sexual or gender-based violence (SGBV) as well. It identifies four specific SGBV myths in the court's *non-refoulement* case law: non-reporting of SGBV in the country of origin equals non-exhaustion of local remedies and protection (institutional scope: section 4.1); the existence of a private (male) support network suffices to protect an applicant from SGBV (interpersonal scope: section 4.2); resourceful applicants do not need protection against SGBV (personal scope: section 4.3); and any vagueness, incompleteness, or inconsistency in SGBV disclosures indicates a false or exaggerated story (narrative scope: section 4.4). These types of reasoning not only lack evidence-based grounds, but also demonstrate a striking lack of understanding of the nature of SGBV and the protection needs of its survivors/victims. In theory, SGBV has been recognized as a form of ill-treatment deserving protection from *refoulement*. In practice however, access to this protection is hindered by a tendency to use SGBV myths in (credibility) assessments of applicants who fear ill-treatment on the basis of sexual and gender-based violence. While the exact meaning of gender-sensitive *non-refoulement* assessments remains undefined, it cannot entail the practices of SGBV myth acceptance uncovered in this article.

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1. INTRODUCTION

'As an adult single male, healthy and capable of work, the applicant cannot be considered particularly vulnerable [to further sexual exploitation].'[1] With these words, the European Court of Human Rights (ECtHR) judged an Afghan applicant's fear of sexual or gender-based violence (SGBV) as non-credible and his application as inadmissible. The ECtHR seemed to suggest here that adult, healthy, and able-bodied men are unlikely to be subjected to SGBV. This reasoning shows strong characteristics of what is termed a 'rape myth' in criminal justice literature. More specifically, it can be categorized as a victim precipitation myth: namely, that SGBV only happens to certain types of persons.[2] In the case above, the ECtHR assessed an alleged violation of the *non-refoulement* principle inherent in article 3 of the European Convention on Human Rights (ECHR).[3] Other relevant international instruments, such as the Council of Europe (CoE) Istanbul Convention, specify that such an assessment ought to happen in a gender-sensitive manner.[4] However, how this gender sensitivity should be understood and implemented appears to be less clear.[5] Against this background, the United Nations High Commissioner for Refugees (UNHCR) and others[6] have expressed the concern that decision makers might base credibility assessments on 'stereotypical, superficial, erroneous, or inappropriate perceptions of gender'[7].

The fact that credibility issues are often at the core of refusals of gender-related asylum applications[8] prompts the question: what parallels exist between rape mythology in criminal procedures and credibility assessments in asylum/*non-refoulement* procedures of persons fleeing SGBV? This question serves as the leitmotiv for this article. After discussing the methodology in section 2, section 3 sets out how 'rape myths' in the criminal justice system can be translated as 'SGBV myths' in the asylum/*non-refoulement* context. Section 4 illustrates four SGBV myths in the ECtHR's case law. Section 5 concludes the article by arguing that, while the precise meaning of gender-sensitive *non-refoulement*

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[1] *MH v Finland* App No 42255/18 (ECtHR, 16 June 2020) paras 57–58.

[2] Sarah Ben-David and Ofra Schneider, 'Rape Perceptions, Gender Role Attitudes, and Victim-Perpetrator Acquaintance' (2005) 53 Sex Roles 385, 386.

[3] Convention for the Protection of Human Rights and Fundamental Freedoms, as Amended by Protocols No 11 and No 14 (opened for signature 4 November 1950, entered into force 3 September 1953) CETS No 005 (ECHR) art 3.

[4] Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (opened for signature 11 May 2011, entered into force 1 August 2014) CETS No 210 (Istanbul Convention) arts 60–61.

[5] Christel Querton, 'Gender and the Boundaries of International Refugee Law: Beyond the Category of "Gender-Related Asylum Claims"' (2019) 37 Netherlands Quarterly of Human Rights 379, 380; Adrienne Anderson and Michelle Foster, 'A Feminist Appraisal of International Refugee Law' in Cathryn Costello, Michelle Foster, and Jane McAdam (eds), *The Oxford Handbook of International Refugee Law* (OUP 2021) 60.

[6] Human Rights Watch, 'Fast-Tracked Unfairness: Detention and Denial of Women Asylum Seekers in the UK' (Human Rights Watch 2010) 61; Helen Muggeridge and Chen Maman, 'Unsustainable: The Quality of Initial Decision-Making in Women's Asylum Claims' (Asylum Aid 2011) 5; British Red Cross and the VOICES Network, *We Want to Be Strong, but We Don't Have the Chance: Women's Experiences of Seeking Asylum in the UK* (2022) 6.

[7] UNHCR, *Beyond Proof: Credibility Assessment in EU Asylum Systems* (May 2013) 70.

[8] Hana Cheikh Ali, Christel Querton, and Elodie Soulard, *Gender Related Asylum Claims in Europe: A Comparative Analysis of Law Policies and Practice Focusing on Women in Nine EU Member States* (Policy Department C: Citizens' Rights and Constitutional Affairs, Directorate-General for Internal Policies, European Parliament, 2012) 61; Debora Singer, 'Falling at Each Hurdle: Assessing the Credibility of Women's Asylum Claims in Europe' in Efrat Arbel, Catherine Dauvergne, and Jenni Millbank (eds), *Gender in Refugee Law: From the Margins to the Centre* (Routledge 2014) 98.

assessments remains unclear, it certainly cannot permit the kind of SGBV myth acceptance observed in the case law sample.

2. METHODOLOGY

Granting protection to persons fleeing SGBV arises in two procedural settings relevant to this article, respectively falling under international refugee law and human rights law. It arises both in the asylum context, which includes a determination as to whether or not a person is a refugee, and in the *non-refoulement* context, entailing an assessment as to whether or not a person must be protected from forced return to certain forms of ill-treatment. This article focuses on the latter. The relevance of a human rights (case) law analysis (based on the ECHR and the Istanbul Convention) for international refugee law scholarship is situated at two levels. First, on the general level, the Istanbul Convention's *non-refoulement* provision (article 61) is intended to be read compatibly with the 1951 Refugee Convention[9] and the ECHR, both of which contain a *non-refoulement* obligation (articles 33 and 3, respectively).[10] Next to this obvious point of contact between human rights and refugee law,[11] operational criteria used in refugee status determination are also applied to *non-refoulement* procedures in human rights law (as before the ECtHR).[12] In addition, *non-refoulement* claims often coincide with or follow denied applications for refugee status.[13] Therefore, a comprehensive human rights perspective, including the definitions of torture and inhuman or degrading treatment/punishment,[14] is incorporated in international refugee law.[15] Secondly, for gender-related procedures specifically, research has uncovered worrying discrepancies between national refugee status determination practices, leaving applicants with little legal certainty about the gender sensitivity and outcome of their case.[16] They are too often confronted with sub-standard procedures that may unjustly deny them international protection. These discriminatory

[9] Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 (Refugee Convention).

[10] The *non-refoulement* obligation is not explicitly referred to in article 3 ECHR. However, according to the court's jurisprudence, the absolute nature of the prohibition of torture or inhuman or degrading treatment or punishment implies an obligation not to return persons to a place where they face a real risk of being subjected to such treatment. This interpretation was first formulated in *Soering v the United Kingdom* App No 14038/88 (ECtHR, 7 July 1988). Council of Europe (CoE), *Explanatory Report to the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence* (2011) para 300; Dolores Morondo Taramundi, 'Gender-Based Violence against Women and International Protection Needs: The Contribution of the Istanbul Convention' in Johanna Niemi, Lourdes Peroni, and Vladislava Stoyanova (eds), *International Law and Violence Against Women: Europe and the Istanbul Convention* (Routledge 2020) 254–55.

[11] Deborah E Anker, 'Refugee Law, Gender, and the Human Rights Paradigm: Boundaries in the Field of Human Rights' (2002) 15 Harvard Human Rights Journal 133, 149.

[12] European Court of Human Rights and Council of Europe, 'Dialogue between Judges 2017: "Non-Refoulement as a Principle of International Law and the Role of the Judiciary in Its Implementation"' (2017) 33.

[13] Anker (n 11) 149.

[14] ibid.

[15] ibid 141; Rodger Haines, 'Advancing a Gendered Interpretation of the Refugee Convention: Refugee Appeal No 76044' (Presentation for 2009 National Members' Conference of the Migration Review Tribunal and Refugee Review Tribunal, Bowral, 10 September 2009) <https://www.refugee.org.nz/Reference/Sydney09.html> accessed 16 August 2023, para 25.

[16] Ali, Querton, and Soulard (n 8) 8–9.

interpretations of international refugee law[17] push applicants with gender-related flight stories towards last resort legal pathways to protection.[18] Examples like the *non-refoulement* procedure before the ECtHR are therefore all the more relevant in cases where asylum seekers flee SGBV, as examined in this article.

The case law analysed here was identified by an article 3 ECHR search in the ECtHR (HUDOC) database, selecting *non-refoulement* cases involving applicants of all gender identities[19] who had fled their country of origin owing to a fear of becoming a survivor/victim[20] of SGBV.[21] The case law dates range from January 2023 back to 11 May 2011, when the Istanbul Convention was opened for signature, indicating an increased awareness around gender sensitivity within the CoE.[22] Without guaranteeing absolute exhaustiveness,[23] 21 relevant cases were identified and analysed. They were initiated by both male and female applicants,[24] and resulted in 16 inadmissibility decisions, four judgments where no violation was found, and one judgment where article 3 ECHR was found to have been violated. The article's analysis is not concerned with whether or not a violation was found, but rather focuses on individual myth-based reasoning patterns leading (amongst other arguments) to the final decision.

3. THEORETICAL FRAMEWORK

3.1 SGBV in international refugee and human rights law

SGBV is often committed by non-State actors in the private sphere and was originally perceived as non-attributable to the State, rendering its survivors/victims ineligible for international protection.[25] Gradually, key actors challenged this public/private dichotomy and shifted towards more SGBV-

[17] ibid 12.
[18] Lourdes Peroni, 'The Protection of Women Asylum Seekers under the European Convention on Human Rights: Unearthing the Gendered Roots of Harm' (2018) 18 Human Rights Law Review 347, 349.
[19] Instead of girls and women only, since SGBV occurs across the entire gender spectrum. See World Health Organization (WHO), *Guidelines for Medico-Legal Care of Victims of Sexual Violence* (2003) 8; Chloé Lewis, 'Systemic Silencing: Addressing Sexual Violence against Men and Boys in Armed Conflict and Its Aftermath' in Gina Heathcote and Dianne Otto (eds), *Rethinking Peacekeeping, Gender Equality and Collective Security* (Palgrave Macmillan 2014) 203.
[20] Stacy L Young and Katheryn C Maguire, 'Talking about Sexual Violence' (2003) 26 Women and Language 40, 40.
[21] 'Sexual violence' here is taken to mean violence of a sexual nature inflicted on any person for reasons (un)related to gender; and 'gender-based violence' here is taken to mean violence of any form inflicted on any person for reasons of gender. Search terms used were: [asylum] AND [gender], [sex*], [rape], [domestic], [genital mutilation], [FGM], [forced marriage], [honour], [femicide] [sterili*], [abort*], [adultery*], [traffic*], and [exploit*].
[22] CoE, *Explanatory Report to the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence* (2011) para 6.
[23] The selected case law was complemented by the cases used in Annemarie Middelburg and Alina Balta, 'Female Genital Mutilation/Cutting as a Ground for Asylum in Europe' (2016) 3 International Journal of Refugee Law 416, 440; Peroni (n 18) 349.
[24] Although case file selection was open to survivors/victims across the entire gender spectrum, the eventual sample did not include trans, intersex, or otherwise queer persons.
[25] Donna Sullivan, 'The Public/Private Distinction in International Human Rights Law' in JS Peters and Andrea Wolper (eds), *Women's Rights, Human Rights* (Routledge 1995) 126; Guy S Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (4th edn, OUP 2007) 81, 351.

inclusive interpretations.[26] However, their non-binding nature and lack of political support led to inadequate implementation.[27] Today, legally binding provisions centralize SGBV in refugee and human rights law, both on the procedural and substantive level (the latter being discussed in this article). Of relevance for *non-refoulement* procedures is article 61 of the Istanbul Convention, obliging State parties to respect the *non-refoulement* principle in SGBV-related applications.[28] As this treaty is meant to be read compatibly with the *non-refoulement* principle as interpreted by the ECtHR,[29] it is regularly cited as relevant international law. While the CoE recently reconfirmed this obligation of gender-sensitive *non-refoulement* and asylum assessments,[30] scholarship has uncovered less-promising implementation practices.[31] These circumstances call for a more profound analysis of the protection options for SGBV survivors/victims under the ECHR.

3.2 Rape mythology and rape myth acceptance

The challenging credibility assessment of gender-related *non-refoulement* applications fits into a longer history of the legal system preserving the belief that survivors/victims lie about experiences of SGBV.[32] In the context of rape, criminal justice scholarship has theoretically framed this set of beliefs as 'rape mythology'. The feminist movement in the 1970s[33] introduced the term 'rape myth' to identify certain 'prejudicial, stereotyped, or false beliefs about rape, rape victims, and rapists'.[34] Like stereotypes in general, these beliefs function as (sub)conscious cognitive schemes, enabling people to understand and explain events and phenomena, like SGBV, in their social world and everyday life. However, they can also cause cognitive distortions justifying, rationalizing, or minimizing behaviour of perpetrators.[35] Such

[26] UNHCR Executive Committee General Conclusion No 39 (XXXVI), 'Refugee Women and International Protection' (1985) para k; UNHCR Executive Committee General Conclusion No 77 (XLVI), 'International Protection' (1995) para g; Committee on the Elimination of Discrimination against Women (CEDAW), 'General Recommendation No 32: The Gender-Related Dimensions of Refugee Status, Asylum, Nationality and Statelessness of Women', UN doc CEDAW/C/GC/32 (14 November 2014) para 25.
[27] Efrat Arbel, Catherine Dauvergne, and Jenni Millbank, 'Introduction: Gender in Refugee Law: From the Margins to the Centre' in Arbel, Dauvergne, and Millbank (n 8) 14; Querton (n 5) 380–81.
[28] Istanbul Convention art 61.
[29] CoE (n 10) para 300; Sara De Vido, 'The Istanbul Convention as an Interpretative Tool at the European and National Levels' in Johanna Niemi, Lourdes Peroni, and Vladislava Stoyanova (eds), *International Law and Violence Against Women: Europe and the Istanbul Convention* (Routledge 2020) 65.
[30] CoE Committee of Ministers, 'Recommendation CM/Rec(2022)17 of the Committee of Ministers to Member States on Protecting the Rights of Migrant, Refugee and Asylum-Seeking Women and Girls' paras 103, 105.
[31] Middelburg and Balta (n 23) 451; Peroni (n 18) 348; Janna Wessels, 'The Boundaries of Universality: Migrant Women and Domestic Violence before the Strasbourg Court' (2019) 37 Netherlands Quarterly of Human Rights 336, 348.
[32] Katie M Edwards and others, 'Rape Myths: History, Individual and Institutional-Level Presence, and Implications for Change' (2011) 65 Sex Roles 761, 768.
[33] Julia R Schwendinger and Herman Schwendinger, 'Rape Myths: In Legal, Theoretical, and Everyday Practice' [1974] Crime and Social Justice 18; Susan Brownmiller, *Against Our Will: Men, Women and Rape* (Open Road Integrated Media Inc 1975); Hubert S Feild, 'Attitudes toward Rape: A Comparative Analysis of Police, Rapists, Crisis Counselors, and Citizens' (1978) 36 Journal of Personality and Social Psychology 156.
[34] Martha R Burt, 'Cultural Myths and Supports for Rape' (1980) 38 Journal of Personality and Social Psychology 217, 217.
[35] Gerd Bohner and others, 'Rape Myth Acceptance: Cognitive, Affective and Behavioural Effects of Beliefs That Blame the Victim and Exonerate the Perpetrator' in Miranda Horvath and Jennifer Brown (eds), *Rape: Challenging Contemporary Thinking* (Willan Publishing 2011) 23.

beliefs may stem from cultural stereotypes (eg traditional gender roles, acceptance of interpersonal violence, and misunderstandings of the nature of sexual assault)[36], but also from the so-called 'just world hypothesis'. This hypothesis assumes the world to be orderly and fair, implying that rape survivors/victims must somehow have deserved their treatment, and those who are non-deserving or innocent are therefore safe.[37] This not only results in self-blame by survivors/victims for having provoked the violence, but also in their being blamed by others, including social services, the legal system, and society at large.[38] When a survivor/victim discloses a SGBV experience, the perceived credibility of this disclosure is influenced by the extent to which the recipient has accepted rape myths as being true, which is termed 'rape myth acceptance'.[39] The higher one's level of rape myth acceptance, the more likely this person will apply rape myths when assessing ambiguous SGBV stories, that is, with little evidence and more room for interpretation.[40] In the context of legal claims, the processing of case file information becomes selective: a decision maker will rather focus on evidence that is congruent with pre-existing beliefs or expectations about rape (the rape myths) and discard information that contradicts these[41] (also termed 'confirmation bias'[42]).

To measure an individual's rape myth acceptance, specific questionnaires were developed, known as rape myth acceptance scales. These include statements or items (the specific rape myths), to which participants respond using a Likert-type scale ranging from strongly agree to strongly disagree.[43] Rape myth acceptance scales have allowed a rather intangible phenomenon like gender-insensitive attitudes to be objectified and quantified. One of the most well-known and reproduced traditional scale is the Illinois Rape Myth Acceptance Scale (IRMAS, 1999).[44] It contained 45 items divided into seven categories: (1) the survivor/victim asked for it; (2) it was not really rape; (3) the perpetrator did not mean to do it; (4) the survivor/victim wanted it; (5) the survivor/victim lied; (6) rape is a trivial event; and (7) rape is a deviant event.[45] In a contemporary setting, however, an increased awareness of rape myth acceptance (and the resulting socially desirable responses) and the time and culture boundedness of rape myth content have to be taken into account.[46] Therefore, new scales were (and are still being) developed,

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[36] Burt (n 34) 217; Karen Rich, *Interviewing Rape Victims: Practice and Policy Issues in an International Context* (Palgrave Pivot 2014) 22.
[37] Bohner and others (n 35) 27; Rich (n 36) 21–22.
[38] Bohner and others (n 35) 24; Edwards and others (n 32) 761; Rich (n 36) 21; Fiona Leverick, 'What Do We Know about Rape Myths and Juror Decision Making?' (2020) 24 The International Journal of Evidence & Proof 255.
[39] Bohner and others (n 35).
[40] Joke Depraetere, Charlotte Decrock, and Christophe Vandeviver, 'Een factorieel survey experiment naar de aanvaarding van verkrachtingsmythes binnen de politie in België' (2020) 4 Panopticon 373, 374.
[41] Bohner and others (n 35) 23.
[42] Ashleigh Parsons and Dara Mojtahedi, 'Can Jurors Be Biased in Their Evaluation of Third-Party Evidence within Cases of Rape?' (2022) 85 International Journal of Law and Psychiatry 1, 2.
[43] Sarah McMahon and G Lawrence Farmer, 'An Updated Measure for Assessing Subtle Rape Myths' (2011) 35 Social Work Research 71, 73; Agnès Schlegel and Robert Courtois, 'Scales for Evaluating the Acceptance of the Rape Myth: Benefits and Limitations' (2019) 2 International Journal of Risk and Recovery 23, 23.
[44] Diana L Payne, Kimberly A Lonsway, and Louise F Fitzgerald, 'Rape Myth Acceptance: Exploration of Its Structure and Its Measurement Using the Illinois Rape Myth Acceptance Scale' (1999) 33 Journal of Research in Personality 27.
[45] ibid 49–50.
[46] Rich (n 36) 26; Schlegel and Courtois (n 43) 24.

such as the Acceptance of Modern Myths About Sexual Aggression (AMMSA, 2007) scale,[47] containing 30 statements on more modern rape myths and using more subtle wordings.[48] These appear in five categories: (1) denial of the scope of the problem; (2) antagonism toward victims' demands; (3) lack of support for policies designed to help alleviate the effects of sexual violence; (4) beliefs that male coercion forms a natural part of sexual relationships; and (5) beliefs that exonerate perpetrators by blaming the victim or the circumstances.[49] Next to the items in these scales, rape myths are identified in scholarship listing useful (categorizations of) rape myths, such as Ben-David and Schneider[50] (victim masochism; victim precipitation; and victim fabrication) or Leverick[51] (beliefs that blame the victim/survivor; beliefs that cast doubt on allegations; beliefs that excuse the accused; and beliefs about what real rape looks like). Their work is discussed further below. The phenomenon of rape myth acceptance has been widely studied in the criminal justice context (for instance, in the context of police officers,[52] prospective lawyers,[53] juror decision making,[54] and rape and sexual assault trials[55]), but never in the context of asylum/*non-refoulement* procedures.

3.3 Linking rape mythology and international refugee and human rights law

To make such studies possible, the differences need to be considered between the criminal justice context, on the one hand, and the asylum/*non-refoulement* context, on the other. For the latter, the consequences of rape myth acceptance might turn out to be even more problematic than already proven for criminal procedures.[56] The differences are mainly located on four levels. On the first, evidentiary level, persons are often fleeing in unexpected circumstances along dangerous routes, forcing them to prioritise survival over the collection of possible evidence for future legal proceedings. As such, corroborative evidence in asylum/*non-refoulement* procedures may be even more sparse[57] than is already the case for criminal SGBV procedures.[58] This often results in the applicant's story being the only or dominant source of information, without it being compared to (a lack of) evidence from the accused.

[47] Heike Gerger and others, 'The Acceptance of Modern Myths about Sexual Aggression Scale: Development and Validation in German and English' (2007) 33 Aggressive Behavior 422.
[48] Schlegel and Courtois (n 43) 24.
[49] Gerger and others (n 47) 439–40.
[50] Ben-David and Schneider (n 2) 386.
[51] Leverick (n 38) 257.
[52] Karl Ask, 'A Survey of Police Officers' and Prosecutors' Beliefs About Crime Victim Behaviors' (2010) 25 Journal of Interpersonal Violence 1132; Feild (n 33).
[53] Barbara Krahé and others, 'Prospective Lawyers' Rape Stereotypes and Schematic Decision Making about Rape Cases' (2008) 14 Psychology, Crime & Law 461.
[54] Leverick (n 38).
[55] Olivia Smith and Tina Skinner, 'How Rape Myths Are Used and Challenged in Rape and Sexual Assault Trials' (2017) 26 Social & Legal Studies 441.
[56] ibid 441; Eileen Skinnider, *Handbook for the Judiciary on Effective Criminal Justice Responses to Gender-Based Violence Against Women and Girls* (United Nations Office on Drugs and Crime (UNODC) 2019) 32.
[57] Ali, Querton, and Soulard (n 8) 60.
[58] Skinnider (n 56) 82.

Therefore, the 'innocent versus guilty' binary in the criminal justice system mostly shifts towards a 'credible versus non-credible' binary in asylum/*non-refoulement* procedures, with fewer evidentiary safeguards.[59] On the second, temporal level, the criminal justice system is oriented towards past offences. While past persecution/ill-treatment can be of relevance for asylum[60]/*non-refoulement* proceedings, the main question is whether the applicant is at risk of future persecution/ill-treatment upon return. Proving a hypothetical risk of gender-related harm in the future can be a substantial additional barrier to obtaining protection in asylum/*non-refoulement* procedures. On the third, personal level, the criminal justice system primarily works toward convicting perpetrators, while asylum/*non-refoulement* procedures exclusively focus on protecting survivors/victims. There is no accused who can be questioned or whose evidence can be examined. On the fourth, substantive level, displacement is caused by more forms of SGBV than rape alone (for instance, in this case sample, there were instances of honour-related violence, female genital mutilation/cutting (FGM/C), (trafficking for reasons of) sexual exploitation, and domestic violence).

As such, the concept of 'rape myths that exonerate the perpetrator for past rape' in the criminal justice system could be translated[61] in the asylum and *non-refoulement* context as 'SGBV myths that undermine the credibility of applicants' fear of future persecution or ill-treatment'. Rape myth acceptance occurs across different social and institutional contexts[62] and originates from the various beliefs mentioned above. There are few, if any, reasons to believe that decision makers' asylum and *non-refoulement* assessments would not risk a similar influence by gender stereotypes and cultural preconceptions.[63] This is all the more plausible in the context of the 'culture of disbelief' already identified in asylum/*non-refoulement* procedures generally.[64] Below, four SGBV myths in the ECtHR's case law will be discussed and linked to the existing framework of rape mythology (see figure 1). While the case law analysis uncovered at least five more SGBV myths (namely, that: (1) sustained legislative and policy efforts to combat SGBV are sufficient to establish State protection; (2) the existence of local NGOs supporting SGBV survivors/victims is sufficient to protect an applicant from SGBV; (3) applicants who fear/experienced SGBV can usually find protection by leaving the violent situation and making use of an internal flight alternative; (4) applicants who fear/experienced SGBV in a place where there is little/no mention of such violence in country of origin information can hardly be considered credible;

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[59] Gregor Noll, 'Credibility, Reliability, and Evidential Assessment' in Costello, Foster, and McAdam (n 5) 607.
[60] eg Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast) [2011] OJ L337/9, art 4(4).
[61] Helen Baillot, Sharon Cowan, and Vanessa E Munro, 'Reason to Disbelieve: Evaluating the Rape Claims of Women Seeking Asylum in the UK' (2014) 10 International Journal of Law in Context 105, 106.
[62] Edwards and others (n 32) 761.
[63] Baillot, Cowan, and Munro (n 61) 106.
[64] Cécile Rousseau and others, 'The Complexity of Determining Refugeehood: A Multidisciplinary Analysis of the Decision-Making Process of the Canadian Immigration and Refugee Board' (2002) 15 Journal of Refugee Studies 43, 50; Jenni Millbank, '"The Ring of Truth": A Case Study of Credibility Assessment in Particular Social Group Refugee Determinations' (2009) 21 International Journal of Refugee Law 1, 16; Olga Jubany, 'Constructing Truths in a Culture of Disbelief: Understanding Asylum Screening from Within' (2011) 26 International Sociology 74, 74.

and (5) delayed disclosure of SGBV during asylum/*non-refoulement* procedures indicates a false or exaggerated story[65]), the current article will only cover those emerging most prominently from the case law analysis.

Figure 1.

*The **fear of ill-treatment** is ill-founded (amongst other arguments) due to the belief that …*

	Institutional scope	Interpersonal scope	Personal scope	Narrative scope	*Reference*
Rape myths		Rape is a deviant event		Rape is a trivial event and the survivor/victim lied	*Payne, Lonsway, and Fitzgerald*
			Victim precipitation	Victim fabrication	*Ben-David and Schneider*
	Beliefs that cast doubt on allegations	Beliefs about what real rape looks like		Beliefs that cast doubt on allegations	*Leverick*
SGBV myths	1. **Non-reporting** of SGBV in the country of origin equals non-exhaustion of local remedies/ protection	2. The existence of a **private (male) support network** suffices to protect an applicant from SGBV	3. **Resourceful** applicants do not need protection against SGBV	4. Any **vagueness, incompleteness, or inconsistency** in SGBV disclosures indicates a false or exaggerated story	

4. SGBV MYTHOLOGY IN THE *NON-REFOULEMENT* CASE LAW OF THE ECTHR

4.1 Institutional scope: the myth on non-reporting of SGBV in the country of origin

The first identified SGBV myth reads: one must report SGBV in the country of origin to prove the unavailability of State protection.[66] When the actors of ill-treatment are non-State actors (which is often the case with SGBV), applicants must show that local authorities are unable to provide protection against it[67] (similar to asylum procedures).[68] Therefore, failure to report SGBV is regularly seen as an indication that State protection is available. The assumption that such protection is, by definition, effective resonates with the myths that: '[persons] who really sexually assault [others] are punished justly'[69]; 'any delay in reporting rape is suspicious';[70] or real survivors/victims would promptly seek help and report[71] (the doctrine of prompt complaint)[72]. Similarly, the ECtHR tends to assess the availability of State protection in a formalistic manner, rather than examining whether the options are reasonable and

[65] Lore Roels, 'How Protecting Your Daughter Can Lead You to Being Denied International Protection in Belgium: On Rape Mythology, Delayed Disclosure, and Asylum' (*Refugee Law Initiative Blog*, 11 May 2023) <https://rli.blogs.sas.ac.uk/2023/05/11/how-protecting-your-daughter-can-lead-you-to-being-denied-international-protection-in-belgium/> accessed 11 May 2023.
[66] ibid.
[67] *Salah Sheekh v The Netherlands* App No 1948/04 (ECtHR, 23 May 2007) para 137.
[68] Refugee Convention art 1A(2).
[69] Gerger and others (n 47) 440.
[70] Leverick (n 38) 257.
[71] International Commission of Jurists (ICJ), *Sexual Violence Against Women: Eradicating Harmful Gender Stereotypes and Assumptions in Laws and Practice* (2015) 12.
[72] Elaine Craig, 'The Relevance of Delayed Disclosure to Complainant Credibility in Cases of Sexual Offence' (2011) 36 Queen's Law Journal 1, 4; Skinnider (n 56) 89.

accessible in practice.[73] This is in stark contrast to the recommendation by the UN Committee on the Elimination of Discrimination against Women (CEDAW Committee) that any failure to contact authorities before fleeing should not prejudice one's asylum claim, especially when authorities systematically fail to respond to SGBV complaints.[74] Statistically, most sexual assaults are never reported at all.[75] By making assumptions about how genuine survivors/victims react,[76] the ECtHR overlooks the fact that SGBV-related State protection is often inaccessible due to gendered barriers (or even completely lacking).[77] Such barriers include family pressure, victim blaming leading to (internal/external) shame, or authorities' systematic passivity towards SGBV complaints.[78] The latter is of particular relevance to this analysis.

In *Izevbekhai and Others v Ireland*, a mother, fearing FGM/C (for her daughters) in Nigeria, explained that she had not reported this to the local authorities because the police would not interfere with family traditions.[79] This absence of legal action and prosecutions was backed up by country of origin information and explicitly recognized by the court[80]. However, the court eventually found the application to be inadmissible on the basis, *inter alia*, that '[n]o attempt was made … to report [the FGM/C] to the police'.[81] Three months later, in the similar matter of *Ameh and Others v United Kingdom*, the only information mentioned was that Nigerian authorities '[were] taking steps' to combat FGM/C and had outlawed the practice in 'several' States.[82] This appeared to be sufficient for the court to declare the application inadmissible, arguing that 'there was protection and support available … from the Nigerian authorities'.[83] A third FGM/C-related case, *RW and Others v Sweden*, was also declared inadmissible. Here, a mother refused to undergo FGM/C during an initiation ritual to her boyfriend's Mungiki sect, upon which she was beaten and raped by his friends. She had not reported this, fearing the sect's great influence on the authorities.[84] Indeed, the authorities had not succeeded in limiting Mungiki's influence or abuses.[85] Nonetheless, the court stressed the private nature of the criminal acts and the fact that there was 'no indication that the domestic authorities would be unwilling or unable to protect the applicant'.[86]

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[73] James C Hathaway and Michelle Foster, *The Law of Refugee Status* (2nd edn, CUP 2014) 311–12; Peroni (n 18) 355.
[74] CEDAW (n 26) para 29.
[75] European Union Agency for Fundamental Rights, *Violence against Women: An EU-Wide Survey: Main Results* (2014) 114–116; ICJ (n 71) 12.
[76] Baillot, Cowan, and Munro (n 61) 131.
[77] Heaven Crawley and Trine Lester, *Comparative Analysis of Gender-Related Persecution in National Asylum Legislation and Practice in Europe* (UNHCR 2004) 55; Peroni (n 18) 355.
[78] CEDAW (n 26) para 25; European Union Agency for Fundamental Rights (n 75) 114; Singer (n 8) 105; ICJ (n 71) 12; Peroni (n 18) 355; Skinnider (n 56) 17; Silvia Lamonaca and others, *Good Practice Tool for Police Hearings with Migrant, Applicant for International Protection, Refugee (MAR), Trafficked, and LGBT+ Victims of Sexual Violence* (Payoke & Ghent University 2021) 13–14.
[79] *Izevbekhai and Others v Ireland* App No 43408/08 (ECtHR, 17 May 2011) paras 55, 4, 7.
[80] ibid paras 51, 75.
[81] ibid para 80.
[82] *Ameh and Others v United Kingdom* App No 4539/11 (ECtHR, 30 August 2011) para 5.
[83] ibid para 14.
[84] *RW and Others v Sweden* App No 35745/11 (ECtHR, 10 April 2012) 2.
[85] ibid 4–5.
[86] ibid 9.

These examples uncover the ECtHR's formalistic approach to the State protection requirement, dismissing any gendered justification for non-reporting of SGBV. This raises even more questions given that the court, in the (non-asylum related) domestic violence case of *Opuz v Turkey*, stated that States have a 'primary duty … to … [put] in place *effective* criminal-law provisions … backed up by law-enforcement machinery for the prevention, suppression, and punishment of breaches'.[87] According to Hathaway and Foster, when it comes to State protection, the relevant question is whether the State 'is *in fact* able to protect against a risk of serious harm'.[88] Nonetheless, the ECtHR upholds the SGBV myth that survivors/victims always can and should report SGBV to domestic authorities, regardless of the feasibility or effectiveness of doing so.

4.2 Interpersonal scope: the myth on existing private (male) support networks

The second SGBV myth identified is: the existence of a private (male) support network suffices to protect an applicant from SGBV. Here, the ECtHR demonstrates the belief that the mere presence of (male) acquaintances in the survivors'/victims' private surroundings suffices to protect them against SGBV upon return.[89] However, the private sphere is not necessarily a safe space for survivors/victims.[90] Most perpetrators of sexual violence are known to the survivor/victim;[91] the private sphere can be home to patriarchal power structures; and the SGBV-related stigma can damage the family's honour, leading to further victimization.[92] From this myth of the protective home, others are derived: 'rape only occurs between strangers in public places';[93] persons 'are almost never raped by their [partners]'; and 'rape almost never happens in the [person]'s own home'[94] (confirmed by the World Health Organization and the UN Office on Drugs and Crime (UNODC))[95].

In line with the above myths, the court has identified private (male) support networks as actors/facilitators of protection without verifying their assumed protective qualities.[96] In *AA and Others v Sweden*, the applicants fled Yemen in fear of domestic violence, forced marriages, and honour

[87] *Opuz v Turkey* App No 33401/02 (ECtHR, 9 September 2009) para 128 (emphasis added).
[88] Hathaway and Foster (n 73) 314.
[89] Peroni (n 18) 364–65.
[90] Patricia Hill Collins, 'It's All in the Family: Intersections of Gender, Race, and Nation' (1998) 13 Hypatia 62, 67–68.
[91] Jeffrey S Jones and others, 'Comparison of Sexual Assaults by Strangers versus Known Assailants in a Community-Based Population' (2004) 22 The American Journal of Emergency Medicine 454, 454.
[92] Susan Kneebone, 'Women within the Refugee Construct: Exclusionary Inclusion in Policy and Practice – The Australian Experience' (2005) 17 International Journal of Refugee Law 7, 41; Allen Kiconco and Martin Nthakomwa, 'Wartime Captivity and Homecoming: Culture, Stigma, and Coping Strategies of Formerly Abducted Women in Post-Conflict Northern Uganda' (2022) 46 Disasters 654, 654.
[93] Leverick (n 38) 257.
[94] Payne, Lonsway, and Fitzgerald (n 44) 49–50.
[95] WHO, *Caring for Women Subjected to Violence: A WHO Training Curriculum for Health Care Providers* (2021) 11–12.
[96] Wessels (n 31) 345, 353.

crimes.[97] The ECtHR concluded that they could be protected by the mother's brothers and sons,[98] thereby ignoring the fact that the sons had applied for protection themselves,[99] and that the brother's previous help led him to risk his own life.[100] The court has also disregarded the risk of further SGBV originating from such forced dependency.[101] In *RH v Sweden*, the applicant fled Somalia in fear of being forced into marriage or killed by her uncles.[102] Although she declared she had no network in Somalia, the private male support network identified by the court included the very uncles whom she feared.[103]

Private actors have no international legal obligation to protect applicants, and even if they would be willing and (in theory) able to do so, it is not a given that they will succeed.[104] There are no guarantees that an individual (or network) can oppose broader socio-cultural and institutional structures (such as ancestral customs, community pressure, or discrimination by law).[105] As mentioned in *AL v United Kingdom*, 'no [private support network] can offer twenty-four hour … surveillance',[106] and nor can the court expect applicants to live under such surveillance and 'avoid [their own] persecution'.[107] Similar arguments were raised in *AA*[108] and *Izevbekhai*,[109] where the applicants' first daughter had already died from FGM/C complications. While opposing FGM/C themselves, the family pressure was so strong that the parents felt forced to flee with their other daughters. Nonetheless, the court found the non-violation[110] and inadmissibility[111] of both applications, considering there to be an existing private support network. This case law contrasts with the recent decision of the Court of Justice of the European Union (CJEU) which found that, in asylum matters, mere social support (such as a family/clan) is, by definition, incapable of preventing, detecting, prosecuting, or punishing persecutors, and therefore cannot be considered protection.[112]

Even setting aside private networks' lack of obligation, willingness, or ability to protect, the ECtHR's reasoning raises principled concerns. It reinforces the idea of dependency on male relatives,[113]

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[97] *AA and Others v Sweden* App No 14499/09 (ECtHR, 28 September 2012) paras 7–27.
[98] ibid paras 83, 90, 94.
[99] ibid para 61.
[100] ibid para 17.
[101] Wessels (n 31) 345; Christel Querton, 'Non-State Actors of Protection and the Sliding Scale of Protection for Refugee Women' (2022) 41 Refugee Survey Quarterly 1, 25.
[102] *RH v Sweden* App No 4601/14 (ECtHR, 1 February 2016) para 10.
[103] ibid para 73.
[104] Hathaway and Foster (n 73) 292; Thomas Spijkerboer, 'European Sexual Nationalism: Refugee Law after the Gender & Sexuality Critiques' (Keynote Address, Nordic Asylum Seminar, University of Uppsala, 8 May 2015) 4 <https://dx.doi.org/10.2139/ssrn.2607476> accessed 23 November 2021; Thomas Spijkerboer, 'Gender, Sexuality, Asylum and European Human Rights' (2018) 29 Law and Critique 221, 226; Querton (n 101) 12–13, 23.
[105] Middelburg and Balta (n 23) 446; Peroni (n 18) 361; Querton (n 101) 23.
[106] *AL v United Kingdom* App No 32207/16 (ECtHR, 13 March 2018) para 34.
[107] Querton (n 101) 23.
[108] *AA* (n 97) paras 83, 90, 95.
[109] *Izevbekhai* (n 79) paras 4, 80.
[110] *AA* (n 97).
[111] *Izevbekhai* (n 79).
[112] Case C-255/19 *Secretary of State for the Home Department v OA* ECLI:EU:C:2021:36, paras 46, 47.
[113] Kneebone (n 92) 8; Spijkerboer 2015 (n 104) 4; Spijkerboer 2018 (n 104) 227.

resonating with the myths that 'men hold ultimate power in interpersonal and family relations'[114] and 'are women's protectors'.[115] It upholds the idea that State protection can be replaced/facilitated by (patriarchal forms of) private protection,[116] and supports States condoning gendered subordination.[117] As Querton points out, from a human rights-based perspective, the reasoning violates the applicants' freedom of movement, association, and self-expression.[118] Moreover, regaining control is considered an essential step in recovering from SGBV.[119] In sum, by endorsing the myth that a private (male) support network suffices to protect survivors/victims against SGBV, the ECtHR contributes to reinscribing patriarchal power structures in its case law.

4.3 Personal scope: the myth on resourceful survivors/victims

A third myth consists of the idea that resourceful applicants do not need protection against SGBV.[120] The ECtHR tends to overemphasize applicants' (perceived) resourcefulness to cope with SGBV and weaponize it against them. This overshadows the broader social and institutional structures determining individual ability to deal with such ill-treatment.[121] As a result, the court constructs applicants with SGBV-related claims as being 'too knowing and too agentive to be innocent'[122] and to be protected. Also, this reasoning assumes that vulnerability to SGBV originates from a lack of individual strength (the neoliberal victim[123] or responsibilization[124] theory).[125] This counts even more for adult men, who are perceived as almost *a priori* invulnerable[126] and 'authors of their own destinies'.[127] These forms of victim blaming (for being either too strong or not strong enough) resonate with the myth that rape 'happens only to certain types of [persons]',[128] concretized as 'nice girls do not get sexually assaulted;

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[114] Simone Cusack, *Eliminating Judicial Stereotyping: Equal Access to Justice for Women in Gender-Based Violence Cases* (OHCHR 2014) 21–22.
[115] Peroni (n 18) 364.
[116] ibid 365.
[117] Middelburg and Balta (n 23) 446.
[118] Querton (n 101) 25.
[119] Margaret J McGregor and others, 'Examination for Sexual Assault: Evaluating the Literature for Indicators of Women-Centered Care' (2009) 30 Health Care for Women International 22, 26.
[120] Lore Roels, 'How Joining a Majorette Group Can Lead You to Being Denied International Protection: On Rape Mythology in Asylum/Non-Refoulement Procedures' (*Völkerrechtsblog*, 7 March 2023) <https://voelkerrechtsblog.org/how-joining-a-majorette-group-can-lead-you-to-being-denied-international-protection/> accessed 7 March 2023.
[121] Peroni (n 18) 359, 361.
[122] Miriam Ticktin, 'Innocence: Shaping the Concept and Practice of Humanity' in Michael N Barnett (ed), *Humanitarianism and Human Rights: A World of Differences?* (CUP 2020) 193.
[123] Rebecca Stringer, *Knowing Victims: Feminism, Agency and Victim Politics in Neoliberal Times* (Routledge 2014) 9.
[124] Elizabeth Comack and Tracey Peter, 'How the Criminal Justice System Responds to Sexual Assault Survivors: The Slippage between "Responsibilization" and "Blaming the Victim"' (2005) 17 Canadian Journal of Women & the Law 283, 283–84.
[125] Peroni (n 18) 361.
[126] Sylvie Saroléa, Francesca Raimondo, and Zoé Crine, *Exploring Vulnerability's Challenges and Pitfalls in Belgian Asylum System* (Université catholique de Louvain 2021) 93.
[127] Noemi Magugliani, '(In)Vulnerable Masculinities and Human Trafficking: Men, Victimhood, and Access to Protection in the United Kingdom' [2022] Journal of Human Rights Practice 1, 4.
[128] Ben-David and Schneider (n 2) 386; Rebecca Stringer, 'Vulnerability after Wounding: Feminism, Rape Law, and the Differend' (2013) 42 SubStance 148, 161, 163; WHO (n 95) 5.

only a certain type of [person] does';[129] '[SGBV] is … the problem of certain neighborhoods … and certain types of people';[130] or 'usually, it is only [persons] who do things like hang out in bars[,] sleep around … [or] dress suggestively that are raped'.[131] The ECtHR seems to translate the latter as meaning only persons who lack material and/or personal resources.

As to material resources, the court firstly seems to assume that educated and/or professionally experienced applicants are less vulnerable (or even invulnerable) to ill-treatment.[132] It has judged fear of SGBV to be ill-founded, noting, *inter alia*, that the (parents of) applicant(s) have/had a (progressive) education and/or good employment records.[133] The court overlooks the fact that educated and/or professionally experienced persons can also be at risk of SGBV.[134] Applicants have backed this up by stating that their family or community could still trace and pressurise them;[135] they suffered from post-traumatic stress disorder (PTSD) or depression;[136] or they lacked any social network.[137] In FGM/C cases, for example, education has proven to be insignificant, since substantial proportions of educated families still practise it.[138] The court has also brought up financial resourcefulness, arguing that the applicant(s) had 'the ... financial means to leave';[139] 'a financially and socially privileged position ... [,] a large house, ... cars, [a] house help and [could] travel abroad'.[140] However, SGBV occurs across all socio-economic backgrounds.[141] Moreover, survivors'/victims' wealth is irrelevant when they for example face honour-related punishment[142] or when authorities treat domestic violence as a private issue.[143] In the CJEU case mentioned above, the court there ruled that 'any … financial support provided by private actors ... falls short of what is required ... to constitute protection'.[144] As Judge Power-Forde accurately concluded in a separate opinion in the *AA* case, 'the protection of a person's fundamental human rights cannot be reduced to a question of currency'.[145]

Regarding personal resources, the ECtHR has dismissed SGBV-related applications referring (among other elements) to gender, age, and able-bodiedness. For example, the court stated that the applicant 'is

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[129] James Lochhead and Pek Leng Tan, *Seeking Justice for Victims of Sexual Crime* (Women's Centre for Change 2009) 51.
[130] Miriam I Ticktin, *Casualties of Care: Immigration and the Politics of Humanitarianism in France* (University of California Press 2011) 156.
[131] Payne, Lonsway, and Fitzgerald (n 44) 49.
[132] Baillot, Cowan, and Munro (n 61) 114.
[133] *Izevbekhai* (n 79) para 80; *FN v United Kingdom* App No 3202/09 (ECtHR, 17 September 2013) paras 31–32; *Sow v Belgium* App No 27081/13 (ECtHR, 6 June 2016) para 68; *AL* (n 106) para 41; *MH* (n 1) para 58.
[134] Peroni (n 18) 361.
[135] *AL* (n 106) para 34.
[136] *FN* (n 133) para 24; *MH* (n 1) para 15.
[137] *FN* (n 133) para 24; *MH* (n 1) para 18.
[138] *RBAB and Others v The Netherlands* App No 7211/06 (ECtHR, 7 September 2016) para 44.
[139] *AA* (n 97) para 83; Spijkerboer 2015 (n 104) 4.
[140] *Izevbekhai* (n 79) para 80.
[141] Lori Heise, 'Violence Against Women: An Integrated, Ecological Framework' (1998) 4 Violence against Women 262, 266–67; Claudia Garcia-Moreno and others, 'Prevalence of Intimate Partner Violence: Findings from the WHO Multi-Country Study on Women's Health and Domestic Violence' (2006) 368 The Lancet 1260, 1265; WHO (n 95) 5.
[142] *AA* (n 97) para 59.
[143] *FN* (n 133) paras 14, 24; Peroni (n 18) 361.
[144] *Secretary of State for the Home Department v OA* (n 112) para 63.
[145] *AA* (n 97) Separate opinion of A Power-Forde, 29.

now adult and any risk of being ill-treated if forced to marry upon return is hypothetical and unsubstantiated';[146] 'is now twenty-eight years old ... and cannot be considered a particularly vulnerable young woman';[147] 'is a healthy adult woman';[148] '[is now an adult and] the abuse by her stepfather occurred when she was a minor';[149] and that '[as] a 22-year-old adult ... single male, healthy and capable of work, the applicant cannot be considered particularly vulnerable.'[150] In addition, these personal resources have been identified in (the parents of) applicants' independence or assertiveness as such,[151] public opposition to FGM/C,[152] reaching out to domestic courts,[153] applying for asylum, and fleeing in itself.[154] As to the latter, the UN Committee on the Rights of the Child has pointed out that fleeing can equally be understood as an inability to resist social pressure surrounding SGBV.[155] The ECtHR fails to consider that (parental) freedom of choice is inherently chained to cultural attitudes,[156] community pressure,[157] and the gender-sensitivity of a legal system.[158] As such, the court refuses to recognize the multifaceted nature of the SGBV phenomenon, rooted in 'personal, situational, and sociocultural factors'.[159] By endorsing the victim precipitation myth that resourceful persons do not need protection from SGBV, the court constructs an image of the 'ideal [SGBV] victim'[160] as being uneducated, professionally unexperienced, poor, young, not able-bodied, dependent, weak, or a combination of these things. This essentialist[161] account of vulnerability not only risks excluding flight stories that do not fit the mould,[162] but it also contributes to the westernised colonial rhetoric of applicants as one-dimensional, passive, and underdeveloped third-world victims.[163]

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[146] *AA* (n 97) para 92.
[147] *Sow* (n 133) para 68.
[148] *RBAB* (n 138) para 58.
[149] *Muradi and Alieva v Sweden* App No 11243/13 (ECtHR, 25 June 2013) para 42.
[150] *MH* (n 1) paras 57–58.
[151] *IFW v Sweden* App No 68992/10 (ECtHR, 9 October 2012) 4.
[152] *Izevbekhai* (n 79) para 80; *Sow* (n 133) para 68; *RBAB* (n 138) para 56; *AL* (n 106) para 41.
[153] *AA* (n 97) para 83.
[154] Eva Brems, '"Strong Women Don't Need Asylum" (the European Court on FGM)' (*Strasbourg Observers*, 19 August 2010) <https://strasbourgobservers.com/2010/08/19/strong-women-dont-need-asylum-the-european-court-on-fgm/> accessed 13 June 2020; Peroni (n 18) 359.
[155] *IAM (on behalf of KYM) v Denmark*, UN doc CRC/C/77/D/3/2016 (25 January 2018) para 11.8.
[156] *RBAB* (n 138) para 25.
[157] ibid para 42; *AL* (n 106) para 12.
[158] Wessels (n 31) 345.
[159] Heise (n 141) 262.
[160] Nils Christie, 'The Ideal Victim' in Ezzat A Fattah (ed), *From Crime Policy to Victim Policy: Reorienting the Justice System* (Palgrave Macmillan 1986).
[161] Jaclyn Kelley-Widmer and Estelle McKee, 'Essentializing Cultures in US Asylum Law', Brooklyn Law Review (forthcoming).
[162] Peroni (n 18) 362.
[163] Chandra Talpade Mohanty, 'Under Western Eyes: Feminist Scholarship and Colonial Discourses' [1988] Feminist Review 61, 67; Georgina Firth and Barbara Mauthe, 'Refugee Law, Gender and the Concept of Personhood' (2013) 25 International Journal of Refugee Law 470, 470; Peroni (n 18) 363; Ticktin (n 130) 186; Karla Mari McKanders, 'Decolonizing Colorblind Asylum Narratives' (2023) 1 St Louis University Law Journal 1, 13.

4.4 Narrative scope: the myth on vagueness, incompleteness, or inconsistency

The fourth myth discussed is: any vagueness, incompleteness, or inconsistency in SGBV disclosures indicates a false or exaggerated story (the consistency heuristic[164]). The ECtHR on multiple occasions framed these phenomena as proof of fabrication, instead of trauma. This reasoning shows strong parallels with the myths that: '[a real] victim does not change [the] account of what happened';[165] '[a real] victim is absolutely certain about the details of the [SGBV]';[166] '[alleged victims] lie or exaggerate';[167] 'many [persons] tend to exaggerate the problem of [SGBV]';[168] 'rape accusations are often used as a way of getting back at [the accused]';[169] and 'false allegations due to revenge or regret are common'[170] (confirmed by UNODC[171]). The ECtHR tends to deduce general non-credibility of SGBV-related applications from inconsistency,[172] vagueness,[173] as well as incompleteness[174] of both substantial and non-substantial elements of the flight narrative. It thereby overlooks both internal (related to the memory itself[175]) and external (related to fear, shame, stigma, isolation) explanatory factors for such narrative 'deficiencies'.

Internally, without effects of trauma or stress, even well-functioning memory inevitably becomes distorted.[176] SGBV survivors/victims often must rely on a memory that, next to these natural limits, is tainted by traumatic experiences.[177] This damage can lead to distorted information about the traumatic event,[178] such as timelines[179], names, or dates.[180] The amount of information available depends on attentional disturbances in coding, storage, and retrieval of the memory.[181] However, precisely the brain

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[164] Pär Anders Granhag and Leif A Strömwall, 'Repeated Interrogations: Stretching the Deception Detection Paradigm' (1999) 7 Expert Evidence 163, 163.
[165] Kimberly A Lonsway and others, *False Reports: Moving Beyond the Issue to Successfully Investigate and Prosecute Non-Stranger Sexual Assault* (End Violence Against Women International 2009) 4.
[166] ibid.
[167] Ben-David and Schneider (n 2) 386.
[168] Gerger and others (n 47) 439.
[169] Payne, Lonsway, and Fitzgerald (n 44) 49.
[170] Leverick (n 38) 257.
[171] Skinnider (n 56) 25–26, 92.
[172] *HN and Others v Sweden* App No 50043/09 (ECtHR, 24 January 2012) 14; *RW* (n 84) 8; *Sow* (n 133) paras 56, 66; *MT and Others v Sweden* App No 47058/16 (ECtHR, 6 December 2016) paras 6–7; *AG and MM v The Netherlands* App No 43092/16 (ECtHR, 26 June 2018) para 29.
[173] *VF v France* App No 7196/10 (ECtHR, 29 November 2011) 13; *HN* (n 171) 14; *RW* (n 84) 8; *AA* (n 97) paras 86, 88.
[174] *IFW* (n 151) 4.
[175] Tanja van Veldhuizen, 'Effectief Horen in Asielzaken: Niet Inperken Maar Uit Laten Weiden' (2017) 16 Journaal Vreemdelingenrecht 48, 49.
[176] Hilary Evans Cameron, 'Refugee Status Determinations and the Limits of Memory' (2010) 22 International Journal of Refugee Law 469, 469, 510.
[177] Lamonaca and others (n 78) 8, 18–19; Sandra Pertek, Jenny Phillimore, and Lisa Goodson, *Forced Migration and Sexual and Gender-Based Violence: Findings from the SEREDA Project in the UK* (University of Birmingham 2021) 19.
[178] Eric Vermetten, Wijnand Raaijmakers, and Berthold Gersons, 'Trauma, dissociatie en het geheugen: neurobiologische aspecten' (1998) 18 Directieve therapie 275, 283.
[179] Skinnider (n 56) 25–26.
[180] Rousseau and others (n 64) 49; Sara L McKinnon, 'Citizenship and the Performance of Credibility: Audiencing Gender-Based Asylum Seekers in US Immigration Courts' (2009) 29 Text & Performance Quarterly 205, 214.
[181] Vermetten, Raaijmakers, and Gersons (n 178) 283; Evert Bloemen and Riëtte Mellink, '"Ik Kan Niet Alles Vertellen …" Asielzoekers Met Psychische Problemen in de Asielprocedure' (2008) 11 Maandblad geestelijke volksgezondheid 890, 894; Lamonaca and others (n 78) 21–22.

part regulating attention is impaired when the brain's defence circuitry is activated (such as during traumatic experiences).[182] Traumatic memories (and SGBV, in particular[183]) differ from 'normal' narrative memories[184] in that they are affected by 'sensory encoding, dissociation, circumscribed memory retention, recall deficit, avoidance, and poor concentration',[185] all of which are symptoms of PTSD if they persist for over one month.[186] The concrete bits of information left are often sensory fragments without time or place stamps (such as the sound of a ticking clock), also called tunnel memory.[187] These are accurate but may be disorganized and incomplete.[188] Inconsistencies when retrieving memories also tend to increase with the length of time between interviews, especially for contextual elements.[189] This makes the consistency heuristic a strategy to use with great caution.[190] Therefore, the ECtHR should take into account that a lack of detail, completeness, or consistency in applicants' SGBV stories may result from memory limitations, rather than mendacity.[191]

Externally, shame,[192] stigma, fear of rejection or reprisals,[193] distrust in authorities,[194] and social isolation[195] can inhibit free-flowing narration and justify late or partial disclosure. Rather than exaggerating, survivors/victims may be reluctant to reveal the true extent of their experiences.[196] In cases of trafficking, applicants face substantial difficulties to denounce the networks in which they are/were recruited in fear of breaking moral promises.[197] In cases of social isolation, vague responses may also be caused by a lack of experience in public spheres. Some applicants are condemned to social seclusion, especially in communities where they are expected to behave deferentially[198] and illiteracy rates are

[182] Skinnider (n 56) 25–26.
[183] Diana Bögner, Jane Herlihy, and Chris R Brewin, 'Impact of Sexual Violence on Disclosure During Home Office Interviews' (2007) 191 The British Journal of Psychiatry 75, 75; Baillot, Cowan, and Munro (n 61) 120.
[184] Bessel A van der Kolk and Onno van der Hart, 'Het Binnendringend Verleden: De Flexibiliteit van Het Geheugen En de Inprenting van Trauma's' (1992) 8 ICODO–INFO 1, 1.
[185] Evelyne Josse, '"They Came with Two Guns": The Consequences of Sexual Violence for the Mental Health of Women in Armed Conflicts' (2010) 92 International Review of the Red Cross 177, 190; UNHCR (n 7) 61.
[186] American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* (5th edn, APA Publishing 2013) 271–72; UNHCR (n 7) 61–66.
[187] Jane Herlihy and Stuart Turner, 'Should Discrepant Accounts Given by Asylum Seekers Be Taken as Proof of Deceit' (2006) 16 Torture 81, 86; Bloemen and Mellink (n 181) 894.
[188] Skinnider (n 56) 25–26; Ines Keygnaert and Leni Linthout, *Triage Tool for Identification, Care and Referral of Victims of Sexual Violence at European Asylum Reception and Accommodation Initiatives* (Ghent University 2020) 22; Lamonaca and others (n 78) 22.
[189] Jane Herlihy, Peter Scragg, and Stuart Turner, 'Discrepancies in Autobiographical Memories – Implications for the Assessment of Asylum Seekers: Repeated Interviews Study' (2002) 324 British Medical Journal 324, 324; Jane Herlihy, Laura Jobson, and Stuart Turner, 'Just Tell Us What Happened to You: Autobiographical Memory and Seeking Asylum' (2012) 26 Applied Cognitive Psychology 661, 671.
[190] Granhag and Strömwall (n 164) 170.
[191] UNHCR, 'Note on Burden and Standard of Proof in Refugee Claims' (16 December 1998) para 9.
[192] Bögner, Herlihy, and Brewin (n 183) 75; Jane Herlihy, 'Psychological Barriers to Fair Refugee Status Determination related to Our Understanding and Expression of Gender' in Arbel, Dauvergne, and Millbank (n 8) 117–19.
[193] UNHCR (n 7) 72; Singer (n 8) 109.
[194] Helen Baillot, Sharon Cowan, and Vanessa E Munro, '"Hearing the Right Gaps": Enabling and Responding to Disclosures of Sexual Violence within the UK Asylum Process' (2012) 21 Social & Legal Studies 269, 281; Middelburg and Balta (n 23) 443; Lamonaca and others (n 78) 13–14; Pertek, Phillimore and Goodson (n 177) 18.
[195] Josse (n 185) 177–86; Saroléa, Raimondo, and Crine (n 126) 80–81.
[196] UNHCR, 'Guidelines on International Protection No 1: Gender-Related Persecution within the Context of Article 1A(2) of the 1951 Convention and/or Its 1967 Protocol Relating to the Status of Refugees', HCR/GIP/02/01 (7 May 2002) para 35.
[197] *VF* (n 173) 10–11; *LO v France* App No 4455/14 (ECtHR, 26 May 2015) para 5; Lamonaca and others (n 78) 14.
[198] UNHCR (n 7) 70; Singer (n 8) 108.

high.[199] Nonetheless, in *MT v Sweden*, the ECtHR found the applicant's brief account of the disappearance of her husband to undermine her credibility. While the applicant explained that she, as a woman, could not participate in the procedure and search for him, the court substantiated its decision by simply stating that 'women in the cities [like the applicant] had greater freedom of movement than other women'.[200]

It could be argued that the examples above still concern substantial elements of the story. However, even in cases where these elements were not questioned,[201] the court still pointed to the vagueness of non-substantial elements, such as how official documents were obtained, the actor of ill-treatment's delay in reporting the absence of the applicants,[202] the payment for travel costs,[203] difficulties in proving a paternal link of descent, or the way rumours of a child's extramarital status had spread.[204] By contrast, in other cases, the court has stated that non-substantial inconsistencies cannot discredit the credibility of an entire flight story.[205] Similarly, UNHCR has stated that the ECtHR (in theory) 'accepts a certain degree of inconsistency ... as long as th[is] … do[es] not undermine the overall credibility of [the] story'.[206] Negative credibility assessments based on minor vagueness, incompleteness, or inconsistency demonstrate a certain culture of disbelief[207] in such procedures, and especially in SGBV-related ones.[208] In conclusion, in the case law sample, the ECtHR endorsed the belief that vagueness, incompleteness, or inconsistency equals false or exaggerated experiences or fear of SGBV. It thereby upholds the myth that a real SGBV survivor/victim is always accurate, complete, and consistent.[209]

5. CONCLUSION

While rape myth acceptance in the criminal justice system has been extensively researched, its existence in the asylum/*non-refoulement* context seems to have fallen through the cracks, until now. More than 10 years after the introduction of provisions on gender-sensitive asylum/*non-refoulement* assessments, such as included in the Istanbul Convention, the exact meaning and implications of the term remain

[199] Middelburg and Balta (n 23) 442.
[200] *MT* (n 172) paras 4, 19.
[201] *HN* (n 172) 13; *AA* (n 97) paras 77, 81, 86.
[202] *AA* (n 97) paras 81–82, 85.
[203] ibid paras 88, 90.
[204] *HN* (n 172) 14.
[205] *RC v Sweden* App No 41827/07 (ECtHR, 9 March 2010) para 52; *AA v France* App No 18039/11 (ECtHR, 15 April 2015) para 54; *AF v France* App No 80086/13 (ECtHR, 15 April 2015) para 56.
[206] UNHCR, 'Avis Du HCR Relatif à l'évaluation Des Demandes d'asile de Personnes Ayant Des Besoins Particuliers et En Particulier de Personnes Qui Ont Subi Des Tortures, Des Viols Ou d'autres Formes Graves de Violence Psychologique, Physique Ou Sexuelle' (May 2012) 3.
[207] Jubany (n 64) 87.
[208] Baillot, Cowan, and Munro (n 61) 131.
[209] Wendy Larcombe, 'The "Ideal" Victim v Successful Rape Complainants: Not What You Might Expect' (2002) 10 Feminist Legal Studies 131, 131.

unclear.[210] A holistic theoretical framework of SGBV mythology not only has the potential to identify specific types of gender-insensitive reasoning, but, in the long term, to objectify the level of acceptance thereof and generate training modules tailored[211] to the asylum/*non-refoulement* setting.[212] Such trainings have already proven to be successful in debunking rape myths and improving attitudes towards SGBV survivors/victims in the criminal justice setting.[213] In view of developing this framework, further research into SGBV myths in assessments of gender-related asylum/*non-refoulement* applications is encouraged.

This article uncovered four SGBV myths in the ECtHR's *non-refoulement* case law, namely: (1) the myth on non-reporting of SGBV in the country of origin (institutional scope); (2) the myth on existing private (male) support networks (interpersonal scope); (3) the myth on resourceful survivors/victims (personal scope); and (4) the myth on vagueness, incompleteness, or inconsistency (narrative scope). Not only do these myths miss an imperative basis, but they also reveal a remarkable lack of insight into the nature of SGBV and survivors'/victims' need of protection. The *de jure* recognition of SGBV as worthy of protection from *refoulement* has been established. However, access in practice to this protection is still made illusory by decision makers' SGBV myth acceptance in assessments of gender-related *non-refoulement* applications.

[210] Querton (n 5) 380; Anderson and Foster (n 5) 60.
[211] Rich (n 36) 31.
[212] Jane Herlihy and Stuart Turner, 'Untested Assumptions: Psychological Research and Credibility Assessment in Legal Decision-Making' (2015) 6 European Journal of Psychotraumatology 1, 3; Jenny Skrifvars and others, 'Psychological Assumptions Underlying Credibility Assessments in Finnish Asylum Determinations' [2022] Nordic Psychology 1, 1; Amnesty International Nederland and instituut voor Mensenrechten en Medisch Onderzoek, *Slachtoffers seksueel geweld: blinde vlek in asielprocedure?* (2023) 93.
[213] Rich (n 36) 30; Smith and Skinner (n 55) 445; Skinnider (n 56) 143.