

“No papers, no rights”: Access to documentation as a pathway to justice for migrants in the Global South

RESEARCH REPORT



Children resting in an Ethiopian community centre, Gqeberha (Port Elizabeth), South Africa. Photo by Heaven Crawley. CC BY-NC 4.0

SUMMARY

Access to documentation and a legal identity is key tool in realizing rights and protection for migrant communities in the Global South, and more generally. Drawing on research with Ethiopian families in South Africa, this report explores how the lack of documentation marginalizes children and provides action-based recommendations to address they injustices face.

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List of acronyms

CSO	Civil Society Organisation
DoH	South African Department of Health
DHA	South African Department of Home Affairs
FGD	Focus Group Discussion
ID	Identity Document
JCA	Justice Chain Analysis
MIDEQ	Migration for Development and Equality Hub
RRO	Refugee Reception Office
RSD	Refugee Status Determination
RSDO	Refugee Status Determination Officer
SDGs	Sustainable Development Goals
UNHCR	The UN Refugee Agency
UNICEF	The United Nations Children's Fund

INTRODUCTION

ACCESS TO JUSTICE FOR MIGRANTS IN THE GLOBAL SOUTH

Access to justice for all and effective, inclusive, and accountable institutions is a Sustainable Development Goal (SDG) in its own right and a critical enabler for other SDGs.¹ Equal access to justice is essential for protecting the rights of individuals, resolving disputes, and ensuring that vulnerable populations are not marginalized or mistreated. Indeed, justice is key to ensuring that no one is left behind, an undergirding principle of the 2030 Agenda. People are left behind when they experience exclusion, bias, or mistreatment in laws, policies, access to public services, and social practices due to their identity (ascribed or assumed, and primarily relating to their gender, but also age, income, ethnicity, caste, religion, disability, sexual orientation, nationality, as well as indigenous, refugee, displaced, or migratory status).² A growing body of empirical research also reveals that investing in accessible and affordable justice results in monetary, personal, social, and other benefits that outweigh the costs of the investment.³ This body of work supports the case for investing in justice as smart, transformative, and rewarding for governments, communities, not-for-profits, grassroots organisations, and individuals.

Despite the centrality of access to justice in the delivery of the SDGs, over two-thirds of the world's population, 5.1 billion people, lack meaningful access to justice.⁴ Of these, a quarter of a billion live in extreme conditions of injustice (they are, for example, stateless, victims of modern slavery, or living in a fragile state), 1.5 billion people have civil, administrative, or criminal justice issues they cannot resolve, and 4.5 billion people are excluded from opportunities and protections that the law provides.⁵

But this lack of access to justice - coined the "global justice gap"⁶ - does not affect everyone equally. Migrants and their children are much more likely to live in extreme conditions of injustice and be formally or practically excluded from the protections that the law provides. One of the main reasons why migrants are unable

¹ See the recent remarks by UN Secretary-General António Guterres to the Security Council: António Guterres, "Secretary-General's remarks to the Security Council on the Promotion and Strengthening of the Rule of Law in the Maintenance of International Peace and Security: The Rule of Law Among Nations," *United Nations*, 12 January 2023, <https://www.un.org/sg/en/content/sg/speeches/2023-01-12/secretary-generals-remarks-the-security-council-the-promotion-and-strengthening-of-the-rule-of-law-the-maintenance-of-international-peace-and-security-the-rule-of-law>

² UNDP, *What Does it Mean to Leave No-One Behind? A UNDP Discussion Paper and Framework for Implementation* (New York: UNDP 2018). Accessible at: https://www.undp.org/sites/g/files/zskgke326/files/publications/Discussion_Paper_LNOB_EN_Ires.pdf

³ Task Force on Justice, *Investing in Justice: A Literature Review in Support of the Case for Improved Access* (New York: Centre on International Cooperation, 2019). Accessible at: https://s42831.pcdn.co/wp-content/uploads/sites/3/2023/03/6c192f_e9722df602724ea8a74c619e726b778d.pdf

⁴ Task Force on Justice, *Justice for All – The Report of the Task Force on Justice* (New York: Center on International Cooperation, 2019). Accessible at: <https://www.sdg16.plus/resources/justice-for-all-report-of-the-task-force-on-justice/>

⁵ Ibid.

⁶ The 'justice gap,' as defined by the World Justice Project (WJP), can be "understood as the number of people who have at least one unmet justice need. These are people who are ultimately not getting the justice they need for both everyday problems and severe injustices." For more information: World Justice Project (WJP), *Measuring the Justice Gap: A People-Centered Assessment of Unmet Justice Needs Around the World* (Washington, DC: WJP, 2019), p. 4. Accessible at: <https://worldjusticeproject.org/our-work/research-and-data/access-justice/measuring-justice-gap>.

to access justice, or even the basic services to which they are entitled, is a lack of documentation and a legal identity.

Access to an identity, legal status, and associated documentation are the cornerstone of realizing rights and protections for migrant communities. Documentation can come in different forms and includes the following: a declaration of birth, a birth certificate, legal identity (which includes nationality) documents, or documents regularizing an individual's immigration status. These documents form the basis of an individual's legal identity and "[lay] the foundation for safeguarding civil, political, economic, social and cultural rights."⁷ They provide access to fundamental rights, facilitate legal status determination, and ensure access to essential services and protection.

THE IMPORTANCE OF DOCUMENTATION AND A LEGAL IDENTITY

A person's access to citizenship, legal status, and proof of identity, collectively called 'legal identity,' sits at the cornerstone of the rule of law and the relationship between state and individual.⁸ Broadly speaking, 'legal identity' refers to a human being's legal (as opposed to physical) personality and, in theory, allows an individual to enjoy the legal system's protection and to enforce their rights or demand redress for violations by accessing state institutions such as courts and law enforcement agencies. Without a legal identity, a person does not exist legally and does not have access to most rights, freedoms, and protections.

Everyone has the right to be recognized as a person before the law, as enshrined in the Universal Declaration on Human Rights (Article 6), and the International Covenant on Civil and Political Rights (Article 16). Several International human rights instruments, including the Convention on the Rights of the Child and the International Covenant on Civil and Political Rights also recognize a right to birth registration.

The importance of having a legal identity and being documented in order to access justice is reflected in SDG 16.9, which calls for everyone to have a legal identity by 2030. This includes recording and registering all births.⁹ This target acknowledges the crucial role that documentation plays in a person's ability to access a range of human rights, social services, and developmental opportunities. Being registered at birth - and especially having a birth certificate or other document that can prove one's identity - can make a huge difference in a person's life. A birth certificate is proof of legal identity and is the basis upon which children can establish a nationality, avoid the risk of statelessness, and seek protection from violence and exploitation. It is also often an enabler of access to the national systems that ensure

⁷ United Nations Human Rights Council, *Report of the Office of the United Nations High Commissioner for Human Rights: Birth registration and the right of everyone to recognition everywhere as a person before the law*, A/HRC/27/22, paragraph 4 p.3.

⁸ Florian Coulmas, "Citizenship, Legal Status, and Proof of Identity: Identity as a Legal Concept," *Identity: A Very Short Introduction* ed. Florian Coulmas (Oxford: Oxford Academic, 2019).

⁹ UNICEF, "Birth Registration," Briefing Note #15 (UNICEF, 2018). Accessible at: https://data.unicef.org/wp-content/uploads/2018/04/SDG-briefing-note-15_birth-registration.pdf.

economic, political, and social inclusion. In other words, legal identity is a right itself, and it is a stepping stone to acquiring an array of rights and benefits.¹⁰

Although there have been significant efforts made by States over recent decades to improve access to documentation, more than 1.1 billion people worldwide remain without official proof of identity and official documentation, the majority of whom live in low-income countries within Africa and South Asia.¹¹ Around half of this population are children.¹² Although the global birth registration rate for children under five increased from 60 per cent to 75 per cent between 2000 and 2019, an estimated 237 million children under five still lack a valid identity document.¹³ The lowest rate of registered births is in Eastern and Southern Africa (41 per cent). In sub-Saharan Africa, just over half (51 per cent) of children are registered by their fifth birthday, according to the latest figures from June 2023.¹⁴

A lack of legal identity and a lack of documentation, from birth registration to identity papers, prevents millions from reaching their full human potential. Those who are undocumented are isolated from the legal and administrative frameworks that exist to protect their economic, political, and social rights, exposing them to unfair or exploitative working conditions, abuse and exploitation, and unequal power dynamics when it comes to land and property. They also face obstacles to accessing key services, such as education, healthcare, social protection, and financial services. These individuals are often also without access to courts and police, tools needed to access justice and resolve justice problems. As a result, they are left vulnerable and without legal empowerment to access their full rights. This dynamic ultimately entrenches poverty, inequality, and other forms of injustice.

For those who move across international borders, establishing a legal identity and securing documentation can, for some, be even more challenging due to lost, damaged, or stolen documents, and because the processes for determining an individual's rights and entitlements in a country can be protracted. For those who have migrated irregularly, been displaced, or fled due to conflict, persecution, or human rights abuses, proving identity is not only a matter of having the right documentation — but also having the rights which the documentation affords. Alternatively, migrants may have the necessary documents, but they have not been translated or have expired, or they may require documents and certification from their country of origin which lacks the institutional capacity to provide it.

Migrants are frequently the subjects of discriminatory legislation and are often excluded or fearful of addressing injustices through State-led justice or administrative

¹⁰ Task Force on Justice, "Justice for All – The Report of the Task Force on Justice."

¹¹ See <https://www.globalgoals.org/goals/16-peace-justice-and-strong-institutions/>

¹² UNICEF, "Birth Registration."

¹³ UNICEF, "Birth Registration for Every Child by 2030: Are We On Track?" (UNICEF, 2019). Accessible at: <https://www.unicef.org/media/62981/file/Birth-registration-for-every-child-by-2030.pdf>.

¹⁴ Ibid. There is also good news to report. Bangladesh is an encouraging example. Despite historical challenges in registering children at birth, the country has made significant progress, with a registration rate of 56 per cent in 2019, compared to 12 per cent in 2006.

pathways.¹⁵ Children are often collateral to challenges in documentation. Irregular migrants or migrants without proof of legal identity may also experience serious challenges in establishing the legal identity of their children, either because parents are undocumented and/or may not want to avail themselves of the authorities, or because children born to migrants do not receive the documentation needed to access services, especially education. This undermines Objective 4 of the Global Compact for Safe, Orderly, and Regular Migration (GCM), an intergovernmental agreement adopted in 2018 by Member States at the United Nations General Assembly, to “ensure that all migrants have proof of legal identity and adequate documentation.”¹⁶ When documentation has an intergenerational impact on access to universal rights and social benefits, or the mechanisms by which to assure them, we create an enabling environment for cyclical injustice. On the other hand, improving access to documentation and utilizing justice services to ensure access to rights and benefits can be a key enabler of achieving interdependent development goals across the global agenda.

RESEARCH METHODOLOGY

This report builds on the findings of early work undertaken by the Migration for Development and Equality (MIDEQ) Hub.¹⁷ MIDEQ found that Ethiopian children in South Africa often lack access to documentation and a legal identity, which significantly impacts on their ability to access rights and justice as well as basic public services including education.¹⁸

The research was undertaken using a Justice Chain Analysis (JCA) approach, which employs a political economy analysis to better understand the political, institutional, and relational aspects of an identified justice issue.¹⁹ Reflecting the MIDEQ Hub’s overarching approach,²⁰ JCA begins with data and evidence on people’s justice needs and what justice solutions work, is outcome oriented, and context specific. The aim of JCA is to better understand how context-specific politics and power relations create justice barriers. It identifies context-specific enablers that can be harnessed to facilitate change; research that overwrites or fails to take seriously the experiences of migrants in proposing justice solutions may perpetuate existing injustices. Moreover, a bottom-up approach to migration justice is necessary

¹⁵ Caroline Nalule, Heaven Crawley, and Diana Zacca Thomaz, “Shrinking the Justice Gap: Rethinking Access to Justice for Migrants in the Global South” UNU-CPR Discussion Paper (New York: United Nations University, 2023). Accessible at: https://collections.unu.edu/eserv/UNU:9086/Access_to_Justice_UNUCPR.pdf.

¹⁶ See the Global Compact for Safe, Orderly and Regular Migration, July 2018. Accessible at:

https://refugeemigrants.un.org/sites/default/files/180713_agreed_outcome_global_compact_for_migration.pdf.

¹⁷ The MIDEQ Hub unpacks the complex and multi-dimensional relationships between migration and inequality in the context of the Global South by decentering the production of knowledge about migration and its consequences away from the Global North towards those countries where most migration takes place. More information at www.mideq.org.

¹⁸ Azwi Netshikulwe, Henrietta Nyamnjoh and Faisal Garba, “Pushed to the Margins: Ethiopian Migrants in South Africa,” *Zanj: The Journal of Critical Global South Studies*, Vol. 5 No. 1/2 (2022): 76–92. Available at: <https://www.jstor.org/stable/48676307>.

¹⁹ For more information on Justice Chain Analysis as a methodology for understanding the barriers and pathways to justice, see: John Doughty and Heaven Crawley “Unlocking the Justice Chains for Migrants in the Global South,” MIDEQ Policy Brief, Coventry, MIDEQ Hub, 2024. Available at: <https://www.mideq.org/en/resources-index-page/using-justice-chain-analysis-to-unlock-access-to-justice-for-migrants-in-the-global-south>

²⁰ See Caroline Nalule et.al, “Shrinking the Justice Gap.”

for any resulting recommendations or solutions to have meaningful applicability and legitimacy. The JCA approach shares many characteristics with a people-centred justice approach, which starts with an understanding of people's justice needs and designs tailored solutions in response.²¹

The research began with an in-depth desk review of available evidence on the experiences of migrants, and especially migrant children, in South Africa, focusing on access to documentation and a legal identity. Then, over a five-month period between February to June 2023, the authors conducted a total of 26 key informant interviews (KIIs), with members of four Ethiopian communities in the Eastern and Western Cape of South Africa, and representatives from the following organisations: Centre for Child Law; Scalabrini Centre of Cape Town; Lawyers for Human Rights; Somali Association of South Africa; Legal Resource Centre; Refugee Rights Clinic (Nelson Mandela University); Refugee and Migrant Support Centre; Somali Association of South Africa (SASA); and United Nations High Commissioner for Refugees (South Africa). In addition, the team conducted focus group discussions (FGDs) and interviews with the Ethiopian community, speaking with a total of 78 people, individually and in groups, to better understand their experiences and the impacts on their lives of being unable to access documentation and a legal identity.²²

As part of our analysis, we held several sessions using the JCA to build a collective understating of the evidence and to develop practical and action-based recommendations for a range of stakeholders, including the Government of South Africa, civil society, and Ethiopian migrant communities. These sessions served as a crucial compass for identifying appropriate interventions that would be meaningful, and which would also improve the justice landscape for marginalized and disadvantaged migrants if implemented.

Finally, between August and October 2023, a series of online validation sessions were held with selected members of the Ethiopian migrant communities and civil society organisations (CSOs) who had engaged in the research and are interested in taking forward the findings.

REPORT STRUCTURE

This report sets out the findings of the research and provides recommendations aimed at improving access to documentation and a legal identity for the children of Ethiopian migrants in South Africa, and migrant communities more generally. We begin by outlining the context of migration to South Africa, and more specifically, the background of Ethiopian migration to South Africa, explaining why the migration histories and experiences of Ethiopian migrants puts them at a particular risk of being or becoming undocumented.

²¹ Task Force on Justice, "Justice for All – The Report of the Task Force on Justice."

²² More than 60 per cent of those from within the Ethiopian community who participated in the research were women and girls.

To ensure that the perspectives and experiences of migrants are at the centre of the analysis, we draw on evidence provided by children to unpack the reasons why children are or become undocumented. We then explore the implications – for the children, their families, wider communities, and a range of other stakeholders. The biggest problem facing children from Ethiopia (and other countries) is a two-tier system of birth certification: one for South African citizens (and the children of permanent residents), and another for children born to foreign parents. This has significant implications for the ability of children in migrant households to access education and secure employment. Children are also at risk of becoming stateless.

In the section that follows, we draw on the tools available through the JCA approach to highlight additional barriers and enablers affecting children in the Ethiopian community, including capacity and resource constraints, procedural and administrative barriers, and a lack of trust in State-led institutions. These factors, we argue, contribute to creating a context where documentation and access to a legal identity remains elusive for many migrants living in South Africa and the migrant children who are born there.

The final section of the report provides a set of action-based recommendations for the Government of South Africa, civil society, and migrant communities that emerged from our analysis and from the validation sessions. They are intended to address the injustices that were identified through the research. We also draw out the broader implications of the research to inform broader efforts on the part of UN Member States, UN agencies and international organisations in other contexts to ensure that everyone has access to documentation and a legal identity, including migrants and their children living in the countries of the Global South.

ETHIOPIAN MIGRATION AND DOCUMENTATION IN SOUTH AFRICA

MIGRATION IN POST-APARTHEID SOUTH AFRICA

The history of migration to South Africa, as well as attitudes towards migrants, is deeply entwined with colonialism and apartheid, both of which displaced indigenous peoples and used racial segregation as a tool of control and oppression.²³ Although South Africa has a long history of migration, most existing research highlights increased migration to the country as a result of European colonization starting in 1652,²⁴ and migrants who were attracted to South Africa following the opening of the diamond mines in Kimberley and the discovery of gold in the Eastern Transvaal in

²³ See Jonathan Crush and Belinda Dodson, "Another lost decade: The failures of South Africa's post-apartheid migration policy," *Tijdschrift Voor Economische en Sociale Geografie* Vol. 98 No. 4 (2007): 436–454; and Jonathan Crush and Vincent Williams, "International Migration and Development: Dynamics and Challenges in South and Southern Africa," United Nations Expert Group Meeting on International Migration and Development (Population Division Department of Economic and Social Affairs 2005). Accessible at http://www.un.org/esa/population/meetings/ittmigdev2005/p05_crush&williams.pdf.

²⁴ South African Government, "History". Available at: <https://www.gov.za/about-sa/history>

the nineteenth century.²⁵ The apartheid regime also facilitated highly controlled and managed international migration, channelling migrants into mining and agricultural industries as cheap labour.²⁶ This migration was heavily regulated through the Pass Laws which limited the movement of Black African citizens,²⁷ and The Alien Control Act of 1991 which sought to control and restrict the entrance of foreign nationals into the country. The Act was marked by its discretionary powers, providing the Government with wide latitude in admitting and expelling foreign nationals, and has set the tone and trajectory of migration policies in South Africa despite post-apartheid reforms.²⁸

Since 1994, there have been progressive constitutional guarantees for freedom of movement, yet migration has remained a complex issue due to deepening inequalities and ongoing regional instability which has resulted in the arrival of large numbers of people from other African countries, including the Democratic Republic of Congo (DRC), Zimbabwe, Rwanda, Burundi, Ethiopia, Somalia, and Mozambique, among others. South Africa is the number one destination for African migrants.²⁹ It is estimated that 2.9 million migrants live in South Africa, including 67,000 refugees, 267,000 asylum seekers, and an unknown number of undocumented migrants.³⁰ This includes an estimated 642,000 migrant and refugee children.³¹

At the same time, the legacies of colonialism and apartheid have deeply impacted South African society, creating racial and spatial segregation which both reflect and reinforce inequality. Although South Africa has one of the most progressive constitutions in the world, which enjoys high acclaim internationally,³² it is the most unequal country in the world. Ten percent of the population own more than 80 per cent of the wealth and race continues to play a key role in determining life chances and outcomes.³³ This inequality has deep historical roots,³⁴ and has been shaped by slavery, colonialism, occupation, and capitalism.³⁵ In particular,

²⁵ Bethany Augliere, "Benchmarks: October 11, 1899: Second Boer War begins, fuelled by discovery of gold," *Earth Magazine*, 7 September 2018, <https://www.earthmagazine.org/article/benchmarks-october-11-1899-second-boer-war-begins-fueled-discovery-gold/>.

²⁶ Tara Polzer, "Migrant Employment in South Africa: New Data from the Migrant Rights Monitoring Project," *Migrants' Experiences with the South African Labour Market* ed. S. Gallo-Mosala (Scalabrini Centre of Cape Town, 2009), pp.35–52

²⁷ Loren B. Landau, *Exorcising the Demons Within: Xenophobia, Violence, and Statecraft in Contemporary South Africa* (Johannesburg: Wits University Press 2011).

²⁸ Ibid.

²⁹ Loren B. Landau, Caroline Wanjiku Kihato, and Hannah Postel, "The Future of Mobility and Migration within and from Sub-Saharan Africa," *Foresight Reflection Paper* (Brussels: European Political Strategy Centre, 2018).

³⁰ Jeanne Batalova, "Top Statistics on Global Migration and Migrants," *Migration Policy Institute*, 21 July 2023, <https://www.migrationpolicy.org/article/top-statistics-global-migration-migrants>. See also Migration Policy Institute Data Hub: <https://www.migrationpolicy.org/programs/data-hub/charts/total-immigrant-and-emigrant-populations-country>.

³¹ UNICEF, "UNICEF and The South African Red Cross Partner to Assist Migrant Children," UNICEF, 8 January 2020, <https://www.unicef.org/southafrica/press-releases/unicef-and-south-african-red-cross-partner-assist-migrant-children#:~:text=In%20this%20context%2C%20the%20United,migrant%20children%20in%20South%20Africa>.

³² Human rights are given clear prominence in the Constitution with human dignity, the achievement of equality and the advancement of human rights and freedom listed as one of the underlying values. The South African Constitution is accessible here: <https://www.gov.za/documents/constitution/constitution-republic-south-africa-04-feb-1997>

³³ Victor Sulla, Precious Zikhali, and Pablo Facundo Cuevas, *Inequality in Southern Africa: An Assessment of the Southern African Customs Union* (Washington, DC: World Bank Group, 2022). Accessible

at: <http://documents.worldbank.org/curated/en/099125303072236903/P1649270c02a1f06b0a3ae02e57eadd7a82>

³⁴ Sampie Terreblanche, *A History of Inequality in South Africa* (Durban: University of Natal Press, 2002)

³⁵ Colin Bundy, "Poverty and Inequality in South Africa: A History," *Encyclopaedia of African History* (Oxford, Oxford University Press, 2023).

colonialism and apartheid established and implemented racist and discriminatory structures that have “entrenched white wealth and privilege and intensified the poverty of black South Africans.”³⁶ Despite the African National Congress’ pro-poor policies since democratization in 1994, the gap between poor and marginalized communities and the rich has been growing rather than decreasing. In other words, “the legacy of colonialism and apartheid, rooted in racial and spatial segregation, continues to reinforce inequality.”³⁷

Alongside the increase in inequality, South Africa has experienced a stagnation in economic growth³⁸ as well as a very high level of unemployment which currently stands at 32.9 per cent.³⁹ Both of these factors are significant in that they contribute to a continued lack of revenue and funds for expenditure on public services such as schools and hospitals but also civil registration and immigration systems. Many Black South Africans face high unemployment and poverty, with limited prospects of improving their lives or those of their children.⁴⁰

In this context, the arrival of migrants, mainly from other African countries, has been viewed by many as a threat to socioeconomic opportunities, a burden on public services, and a threat to national security, jobs, and cultural values.⁴¹ The Government’s approach to migration has mostly been one of containment, with the political discourse becoming increasingly focused on security and control, especially since 2016.⁴² Research respondents reported that the migrant protection space has been gradually shrinking, with a significant increase in anti-immigrant rhetoric and behaviours, sometimes stoked by politicians to advance their own agendas, which can often lead to xenophobia and social tensions between South African nationals and migrants.⁴³ One respondent CSO, for example, provided an example of a Member of the Executive Council for Limpopo giving an interview outside a hospital in which s/he blamed Zimbabwean patients for the health department’s budgetary issues.⁴⁴

³⁶ Ibid.

³⁷ Victor Sulla, Precious Zikhali, and Pablo Facundo Cuevas, *Inequality in Southern Africa: An Assessment of the Southern African Customs Union* (Washington DC: World Bank Group, 2022). Accessible at: <https://documents.worldbank.org/en/publication/documents-reports/documentdetail/099125303072236903/p1649270c02a1f06b0a3ae02e57eadd7a82>.

³⁸ Ibid.

³⁹ Government of South Africa, *Quarterly Labour Force Survey, 1st Quarter 2023* (Johannesburg: Department: Statistics South Africa, 2023). Accessible at: https://www.statssa.gov.za/?page_id=1854&PPN=P0211&SCH=73571.

⁴⁰ World Bank Group, *Overcoming Poverty and Inequality in South Africa: An Assessment of Drivers, Constraints and Opportunities* (Washington DC: World Bank Group, 2018). Accessible at: <https://openknowledge.worldbank.org/entities/publication/7ae40441-e472-58d3-9b3c-b87b41ea3d4e>.

⁴¹ Jonathan Crush and Vincent Williams, “Criminal Tendencies: Immigrants and Illegality in South Africa,” Migration Policy Brief No. 10 (Waterloo, ON: Southern African Migration Programme, 2002), p.1–17.

⁴² Siindile Mlilo and Jean Pierre Misago. *Xenophobic Violence in South Africa: 1994–2018* (Johannesburg: African Centre for Migration and Society, University of the Witwatersrand, 2019); interview with the Scalabrini Centre, Cape Town, 24 February 2023; Interview with a migrant-led CSO, Cape Town, 3 March 2023; Interview with Lawyers for Human Rights, Virtual, 8 March 2023.

⁴³ See also Johannes Machinya, “Migration and Politics in South Africa: Mainstreaming Anti-Immigrant Populist Discourse.” *African Human Mobility Review* 8 (1) (2022): 59-78. Available at: http://www.scielo.org.za/scielo.php?script=sci_arttext&pid=S2410-79722022000100005

⁴⁴ See: “You are killing my health system: Limpopo MEC under fire for comments over Zimbabweans,” News 24, 2022. Accessible at: <https://www.news24.com/news24/southafrica/news/watch-limpopo-health-mec-under-fire-over-comments-blaming-zimbabweans-for-huge-strain-on-hospitals-20220824>.

Some commentators link community-level scapegoating of migrants to frustration and the anger that resulted from the failure of post-apartheid South Africa to redistribute wealth to marginalized and poor communities.⁴⁵ Others argue that the narratives of ‘them and us’ and ‘other’ cannot be understood “unless analysed in a wider continental context of post-colonial Afrophobia.”⁴⁶ Whatever the cause, it is clear that anti-immigrant sentiments and xenophobic violence have significant impacts on migrants living in South Africa, whilst also reducing the political space for policy interventions which ensure that migrants have access to documentation and a legal identity.

ETHIOPIAN MIGRATION TO SOUTH AFRICA

Socioeconomic, environmental, and political crises in Ethiopia over the last 50 years have led to significant levels of migration, both internally and across borders. The country has suffered extreme political turmoil, recurrent drought, famine, and devastating civil war. Notably, large-scale international emigration from Ethiopia has tended to occur during periods of political repression and changes of government.⁴⁷ Ethiopian migration to South Africa increased significantly when restrictions on international migration were eased after the fall of the Derg military regime in Ethiopia in 1991.⁴⁸ This allowed Ethiopians to access passports and travel documentation.⁴⁹ This happened at the same time as significant political changes in South Africa, leading to the formation of a democratic government in 1994.

Contemporary Ethiopian migration to South Africa is driven by a combination of political and economic factors, as well as a culture of mobility and spirituality, and facilitated through social networks.⁵⁰ Ethiopian migrants to South Africa mainly originate from the southern areas of Ethiopia, including Hosanna, Hadiya, and Gambetta, with many settling in Johannesburg and Durban and the Eastern and Western Capes, primarily in search of economic opportunities.⁵¹ Most have very limited education and arrive with little or no knowledge of English, and they often lack a basic understanding of the intricacies of the South African system. This poses

⁴⁵ Malemela Mamabolo, “Drivers of Community Xenophobic Attacks in South Africa: Poverty and Unemployment,” *Journal for Transdisciplinary Research in Southern Africa* Vol. 11 No. 4 (2015): 143–50.

⁴⁶ Moses E. Ochoonu, “South African Afrophobia in Local and Continental Contexts,” *The Journal of Modern Africa* Vol. 58 No. 4 (2020): 499–519.

⁴⁷ Girmachew Adugna, “Once Primarily an Origin for Refugees, Ethiopia Experiences Evolving Migration Patterns,” Migration Policy Institute, 5 October 2021, <https://www.migrationpolicy.org/article/ethiopia-origin-refugees-evolving-migration>.

⁴⁸ Yordanos Estifanos and Tanya Zack, *Migration Barriers and Migration Momentum: Ethiopian Irregular Migrants in the Ethiopia-South Africa Migration Corridor* (London and Nairobi: EU Trust Fund for Africa (Horn of Africa Window) Research and Evidence Facility, 2020). Accessible at: https://blogs.soas.ac.uk/ref-hornresearch/files/2020/07/Working-paper_Estifanos-and-Zack_Migration-Barriers-and-Migration-Momentum_July-2020.pdf.

⁴⁹ Asnake Kefale and Mohammed Zerihun, *Ethiopian Labour Migration to the Gulf and South Africa* (Addis Ababa: Forum for Social Studies, 2015). Available at: <https://www.jstor.org/stable/j.ctvh8r1f8>.

⁵⁰ MIDEQ research has shown that the decision to migrate from Ethiopia to South Africa should not only be understood in economic terms (absolute and relative deprivations) but through a lens of spirituality in which migration as perceived as of ‘right’. Specifically, Hadiya migration to South Africa is understood as a prophecy fulfilled and the enactment of a divine script. See Dereje Feyissa, “Beyond Economics: The Role of Socio-political Factors in Hadiya Migration to South Africa,” *Zanj: The Journal of Critical Global South Studies* Vol. 5 No. 1/2 (2022): 35–58. Available at: <https://www.jstor.org/stable/48676305>.

⁵¹ Dereje Feyissa and Faisal Garba, *Ethiopia-South Africa Migration Corridor Brief* (Coventry: MIDEQ, 2021). Accessible at: <https://www.mideq.org/en/resources-index-page/ethiopia-south-africa-migration-corridor-brief/>.

serious challenges in terms of navigating everyday life and official administrative processes, including securing legal status. Some migrants are susceptible to paying bribes for services that are free of charge or require a minimal fee. Many are subject to monthly protection fees from gangs operating in the townships where they run their businesses.

Although the exact size of the Ethiopian population living in South Africa is unknown, it is thought to be considerable. Although, according to the United Nations Department of Economic and Social Affairs, the number of Ethiopian migrants living in South Africa is approximately 44,000 individuals, this number is thought to be much higher. In 2017, for example, it was estimated that between 15,000 and 17,000 Ethiopians arrive in South Africa each year.⁵² Like other migrants in South Africa, Ethiopians live in conditions of structural and social marginality,⁵³ which excludes them from accessing basic services and fundamental rights while at the same time exposing them to violence and exploitation from within and outside their communities.⁵⁴ According to respondents, anti-migrant sentiment and negative migration narratives are associated with intra-community harassment and violence,⁵⁵ xenophobic attacks on migrant businesses, and harassment by public officials who sometimes deny them access to basic rights and services. Respondents reported that they often face harassment and violence from other communities and State actors, particularly the police. In this context, Ethiopian migrants living in South Africa try to limit their interactions with State institutions and public services, including the justice system. The lack of documentation also prevents them from engaging with these institutions. Additionally, Ethiopians without documentation cannot open bank accounts or apply for credit, and they cannot access the formal employment market. Virtually all of those who contributed to this research described a progressively deteriorating situation for Ethiopian migrants living in South Africa. This included children and young people who were acutely aware of the anti-migrant sentiments in the communities around them.⁵⁶ To a certain extent, the structural and social marginality is amplified for children as their fate is inextricably intertwined with that of their parents.

THE CHALLENGES OF SECURING DOCUMENTATION

Like many governments in the Global South, South Africa has grappled with the challenges of providing documentation and a legal identity for its own citizens. It is important to acknowledge that since the end of apartheid, South Africa's identification system has been transformed from a tool of oppression to one of

⁵² Regional Mixed Migration Secretariat, "Smuggled South." Briefing Paper 3 (Addis Ababa: Danish Refugee Council, 2017). Accessible at: <https://reliefweb.int/report/south-africa/regional-mixed-migration-secretariat-briefing-paper-3-smuggled-south>.

⁵³ Azwi Netshikulwe, Henrietta Nyamnjoh and Faisal Garba, "Pushed to the Margins: Ethiopian Migrants in South Africa," *Zanj: The Journal of Critical Global South Studies* Vol. 5 No. 1/2 (2022): 76–92.

⁵⁴ Yordanos Estifanos and Tanya Zack, *Migration Barriers and Migration Momentum: Ethiopian Irregular Migrants in the Ethiopia-South Africa Migration Corridor*.

⁵⁵ Silindile Mlilo and Jean Pierre Misago. "Xenophobic violence in South Africa: 1994-2018."

⁵⁶ FGD with Ethiopian children, Eastern Cape, February 2023.

inclusion and the delivery of social services.⁵⁷ Notable improvements include a significant increase in South Africa's birth registration rate, rising from a low base of 40 per cent in the early 1990s to more than 90 per cent coverage within a decade. This growth was facilitated by a large network of registration points, closely integrated civil registration and identification services, and access to social programmes as an incentive for registration.⁵⁸ Nonetheless, there remain significant challenges facing migrants in securing access to documentation for themselves and their children.

Despite significant migration from Ethiopia to South Africa, there are a limited number of legal and administrative pathways for Ethiopian migrants, and migrants more generally, to regularize their status in South Africa.⁵⁹ For most migrants,⁶⁰ the only option is either to apply for a work visa/permit⁶¹ or apply for asylum.⁶² According to our respondents, the work permit pathway is almost impossible. Instead, the majority of Ethiopian migrants travel to South Africa irregularly⁶³ and make a claim for asylum under the Refugees Act,⁶⁴ which allows individuals facing persecution to apply for refugee status.⁶⁵ Those seeking asylum are required to lodge a claim upon arrival in South Africa at a port of entry within five days. The majority of migrants fail or are unable to do so,⁶⁶ and are regarded as entering – and staying in – the country illegally. During the research CSO respondents told us that these narratives of illegality feed into and fuel anxieties about approaching the authorities to secure documentation.

⁵⁷ Prior to 1994, the country had separate population registers and identity documents for Blacks, Whites, Coloureds, and Indians.

⁵⁸ World Bank Group, *South Africa: ID Case Study* (Washington DC: International Bank for Reconstruction and Development/The World Bank, 2019).

⁵⁹ Roni Amit, *Queue here for corruption: measuring irregularities in South Africa's asylum system* (Johannesburg: Lawyers for Human Rights and the African Centre for Migration and, 2015).

⁶⁰ The only exception is those who are applying to study in South Africa or who have South African relatives. There is an immigration scheme that is specific to Zimbabwean migrants (the Zimbabwe Exemption Permit - and its former iterations) but this is not relevant for Ethiopians.

⁶¹ The work permit/visa route enables an individual to either be sponsored by an employer and apply for a corporate work permit, or alternatively to apply for a skilled workers permit. Both types of work permit are very restricted in practice and must be secured prior to an individual's arrival in South Africa.

⁶² Ethiopia currently has Bilateral Labour Agreements with a number of countries including Qatar, Jordan, Kingdom of Saudi Arabia, Bahrain, and Lebanon, and an MoU with Djibouti, Sudan, and South Sudan. See International Organization for Migration (IOM), *Bilateral Labour Migration Agreements (BLMAs): Rapid Assessment of the Southern Corridor (Ethiopia - Kenya - Tanzania - South Africa)* (Geneva: IOM, 2021). Accessible at:

<https://eastandhornofafrica.iom.int/sites/g/files/tmzbdl701/files/documents/blmas-rapid-assessment-southern-corridor-2021.pdf>.

Although BLMA's often fail to secure decent wages or working conditions for migrants they do at least provide for a regular migration pathway.

⁶³ IOM, *Migrating in Search of the Southern Dream: The Experiences of Ethiopian Migrants Moving Along the Southern Route* (Geneva: IOM, 2022). Accessible at:

https://eastandhornofafrica.iom.int/sites/g/files/tmzbdl701/files/documents/iom_rdh_southern-route-research_migrating-in-search-of-the-southern-dream.pdf.

⁶⁴ Refugees Act 130 of 1998 (Act No. 130 of 1998).

⁶⁵ In November 2023, as this report was being drafted, the DHA published a *White Paper on Citizenship, Immigration and Refugee Protection: Towards a Complete Overhaul of the Migration System in South Africa*, which seeks to establish a process for foreign nationals to obtain residency and citizenship in South Africa. The White Paper proposes South Africa temporarily withdraw from two international agreements on refugee protection, namely the 1951 United Nations Refugee Convention and the 1967 UN Protocol Relating to the Status of Refugees; the reason being that South Africa does not have the resources to grant the socioeconomic rights to refugees envisaged in the 1951 Convention. It also proposes the establishment of an interdepartmental Immigration Board aimed at managing immigration challenges in South Africa. See https://www.gov.za/sites/default/files/gcis_document/202311/49690gon4061.pdf.

⁶⁶ Lawyers for Human Rights, *A Handbook: The Rights & Realities of Forcibly Displaced Children & Youth in South Africa* (Pretoria: Lawyers for Human Rights, 2023). Accessible at: <https://www.lhr.org.za/lhr-resources/a-handbook-the-rights-realities-of-forcibly-displaced-children-youth-in-south-africa/>.

Once an application is made it is considered by a Refugee Status Determination Officer (RSDO) who also conducts an initial interview to determine whether to grant an Asylum Seeker Temporary Permit (the communities and activists we spoke to referred to this visa as a Section 22 permit). The Section 22 permit is generally valid for six months and provides temporary legal stay, a conditional right to work and study (for adults), as well as universal access to basic services.⁶⁷ As is usually necessary, the Section 22 permit can be renewed on application. If parents give birth to a child after their claim for asylum, they can ‘join’ the child to their application and will need to present a birth certificate.⁶⁸ In theory, after a temporary Section 22 permit is issued, an RSDO will set a date to conduct a hearing to determine the legitimacy of the asylum claim. Successful applicants receive a notice of Recognition of Refugee Status granting them a Section 24 permit, the ability to apply for refugee identification, and after ten years, permanent residence.⁶⁹ Although this process is supposed to take six months, well-documented delays in the system⁷⁰ mean that many Ethiopians remain undocumented even after many years living in the country, as do their children, including those born in South Africa.⁷¹

Once recognized as a refugee, both adults and children are entitled to obtain a refugee ID (referred to by the communities we spoke to as a “brown ID”). The refugee ID is valid for the same period as the refugee (Section 24) permit. Issuing this document is not automatic and requires a separate application to the civil registration services⁷² managed by the Department of Home Affairs (DHA). The communities we spoke to described significant challenges accessing proof of identity for themselves and their children, and they also reported delays in this stage of the process, which means that refugees effectively once again lack a legal identity.

⁶⁷ See Section 22, Refugees Act 1998 (as amended in 2008 and 2020). Available at: https://www.saflii.org/za/legis/consol_act/ra199899/ Further information on the general procedure when applying for asylum in South Africa is also available at <http://www.dha.gov.za/index.php/immigration-services/refugee-status-asylum>

⁶⁸ Section 3(c), Refugees Act 1998.

⁶⁹ Section 27(c), Refugees Act 1998. Note that prior to amendments to the Refugee Act 1998 brought in on 1 January 2020, it was possible to apply for permanent residence after five years.

⁷⁰ Under the 1998 Refugee Act, refugees live within the South African community rather than in camps, and enjoy substantial legal protections almost on a par with citizens, including full access to health care and education systems. However, these benefits only extend to those with refugee status. It is estimated that two-thirds of applicants have asylum-seeker status, and therefore do not have access to the full rights and privileges of a fully-fledged refugee. In recent years, South Africa’s asylum system has faced problems that have led to the claims of over 153,000 asylum-seekers becoming stuck in the system, some for up to a decade. See United Nations South Africa, “UNHCR and the Government Pledge to Clear the Asylum Backlog by 2024,” United Nations South Africa, 17 July 2021, <https://southafrica.un.org/en/136315-unhcr-and-government-pledge-clear-asylum-backlog-2024>

⁷¹ Teshome D. Kanko, Ajay Bailey, and Charles H. Teller, “Irregular migration: causes and consequences of young adult migration from Southern Ethiopia to South Africa.” Paper presented at the XXVII International Population Conference, Busan, 26–31 August 2013; Estifanos Yordanos, “The political economy of transnational social networks and migration risks: the case of irregular migrants from southern Ethiopia to South Africa,” Master’s thesis, University of Oldenburg, 2015; Estifanos Yordanos and Tanya Zack, “Migration barriers and migration momentum: Ethiopian irregular migrants in the Ethiopia-South Africa migration corridor,” Working Paper (The Research and Evidence Facility Consortium, 2020).

⁷² It should be noted that this is a separate service to the Immigration Services which manages the RSD system.

⁷³ All names are pseudonyms to preserve the anonymity of the research participants.

BOX 1. SELAM*

Having been a refugee continually for over five years**, Selam applied for permanent residence in 2018. However, the process was difficult and took a long time. Without the support of a South African friend, she told us, it would not have been possible. Selam was granted permanent residence in March 2020 and immediately applied for her South African ID document. But, more than three years later she is still waiting to receive it. Selam is frustrated and angry about the delays. Without it, she cannot move on or apply for permanent residency for her child, cannot access basic social support, or invest in her successful beauty salon.

*All names are pseudonyms to preserve the anonymity of the research participants

**Under the rules prior to changes in 2020. See footnote 68

An important dimension of the Refugee Status Determination (RSD) system from the perspective of children is the mechanism by which they are linked to their parent's claim and status. Under South African law, the legal identity of most children is inextricably linked to that of their parent(s) until they reach 18 years of age.⁷³ Other than through a complex and virtually inaccessible process of 'ministerial exemption',⁷⁴ it is only upon reaching 18 years of age that a person can claim to regularize his or her status, or apply for naturalization as a South African citizen. The system also places an onerous, and arguably unrealistic, evidential burden on the young adult in that situation who is seeking naturalization. The rules require a birth certificate as well as evidence of their parent's identity and status.⁷⁵

Importantly, this means that there is no provision for a separate asylum application for a child.⁷⁶ Instead, parents arriving in South Africa with children can name them as a dependent and 'join' them to their application. This process is referred to technically as 'family unification'⁷⁷ (known colloquially as 'family joinder') and allows an asylum seeker or refugee to join any dependents, including a spouse and children, to their claim. In the communities where the research was conducted, there was little awareness of the procedure to join parent's claims or add a child born in South Africa after the initial claim. We found that this often results in children being left in limbo throughout their childhood without a nationality or any documents. There were also many examples of one or both parents being undocumented, either temporarily or permanently at the time of birth, again resulting in their child not being documented. We discuss the challenges facing children in securing documentation, and specifically a birth certificate, in Section 3.

⁷³ This 'joinder' procedure is governed by section 3(c) Refugees Act 1998. Note that the legal framework and rights of unaccompanied and separated children are different and place responsibility for their legal identity on the State and in particular the Ministry of Social Development.

⁷⁴ For more information about the 'ministerial exemption' process under section 31(2)(b) of the Immigration Act 13 of 2002, see Lawyers for Human Rights, Scalabrini Centre of Cape Town and The Consortium for Refugees and Migrants in South Africa, *A Guide to Working with Vulnerable Children in South Africa* (Johannesburg: Lawyers for Human Rights, 2022). Accessible at: <https://www.lhr.org.za/wp-content/uploads/2020/06/A-Guide-To-Working-With-Vulnerable-Children-FINAL-21.pdf>, p.3.

⁷⁵ Section 4(3) The South African Citizenship Act of 1995

⁷⁶ There is a procedure for unaccompanied or separated children which is led by the Ministry of Social Development.

⁷⁷ Section 3(c) Refugee Act 1998.

TAB 1. BARRIERS AND ENABLERS IN ACCESSING A LEGAL STATUS AND PROOF OF IDENTITY

Barriers

Lack of birth registration excludes child from applying to regularize their status.

Child's application must be joined to a "principal applicant" file (often the father).

Parents are undocumented and child not able to apply for asylum in own right.

Enablers

Child's parents are documented.

Child has parents with a social network with experiences in navigating the system.

Child has a parent with support from well-connected CSOs.

It is clear then that Ethiopian migrant communities in South Africa struggle to "navigate and negotiate the structural (State-led) and social marginalities that they confront."⁷⁸ Research participants described a system that is often inaccessible, unhelpful, and very difficult to navigate without the support of a lawyer or paralegal.⁷⁹ As one respondent told us: "the system is difficult and causes pain, you must be strong. People give up because they don't have time and get frustrated."⁸⁰ Many respondents reported that the anti-migrant narratives, attitudes, and behaviours that exist in South Africa also permeate the civil registration and immigration systems. This has pushed Ethiopian migrants to seek other ways to regularize their stay. Some respondents reported paying bribes to DHA government officials who take advantage of their situation, an issue to which this report will return in Section 4.

Before exploring the challenges facing children in securing documentation and a legal identity, it is important to acknowledge that the processes described above are often deeply gendered.⁸¹ Women who participated in this research, both individually and in FGDs, told us that men in the community generally arrive first and that young women travel to South Africa to join or marry them. It is often the case that the man is undocumented (including temporarily), meaning there is no option for

⁷⁸ Azwi Netshikulwe, Henrietta Nyamnjoh and Faisal Garba, "Pushed to the Margins: Ethiopian Migrants in South Africa."

⁷⁹ Other research has similarly found that civil registration and immigration processes in South Africa have become increasingly inaccessible as a result of attitudes, policies and practices that create physical and procedural barriers to migrants engaging and successfully navigating the system. See, for example, Roni Amit, *Protection and Pragmatism: Addressing Administrative Failures in South Africa's Refugee Status Determination Decisions* (Johannesburg: University of Witwatersrand, 2010), and Roni Amit, *All Roads Lead to Rejection: Persistent Bias and Incapacity in South African Refugee Status Determination* (Johannesburg: University of Witwatersrand, 2012).

⁸⁰ Interview with an Ethiopian man, Eastern Cape, February 2023.

⁸¹ Azwi Netshikulwe, Henrietta Nyamnjoh, and Faisal Garba, "Pushed to the Margins: Ethiopian Migrants in South Africa."

the woman to use the family joinder procedure to regularize her status. Even when the man is documented, a woman can remain undocumented either because they are unaware of family joinder procedures or, as is often the case, regularizing her status is not considered a priority. It takes considerable time and resources to navigate the system and men prioritize running their businesses and managing day-to-day issues. Several community leaders acknowledged that a lack of access to documentation is the main problem facing Ethiopian women and children living in South Africa, and that they need to mobilize to address this issue.

THE IMPACTS OF A LACK OF DOCUMENTATION ON CHILDREN

WHY ETHIOPIAN CHILDREN ARE UNDOCUMENTED

It was suggested in the previous section that one of the main reasons why Ethiopian children are undocumented is that their legal identity is tied to that of their parents, many of whom are unable to secure access to documentation through the RSD process. Most of the children in the communities we spoke to were born in South Africa to migrant parents whose status fluctuates between being undocumented and having temporary asylum seeker or refugee permits (see numbers two and six in Table 2 below). Respondents described significant challenges in applying for, obtaining, and maintaining a regularized legal status: “documentation is the main concern. More than half the community is undocumented. It is so hard to get documentation the right way.”⁸² The ripple effects on children are clear. Although some parents had permanent residence (by virtue of being recognized as refugees), we identified just one Ethiopian family whose children had South African nationality. Indeed, many children were without any form of legal status or proof of identity. As one respondent commented: “generally speaking, children here don’t have papers.”⁸³ But our research has also identified an equally, if not more, significant issue undermining access to documentation for children who have migrant parents, namely the problem of birth registration, and more specifically, obtaining an official birth certificate.

⁸² FGD with Ethiopian community leaders, Eastern Cape, February 2023.

⁸³ Interview with an Ethiopian woman, Eastern Cape, February 2023.

TAB 2. MIGRANT CHILDREN AND RIGHTS TO CITIZENSHIP AND LEGAL STATUS

Child (group)	Rights to Citizenship	Legal Status
1 Child born in South Africa to at least one South African parent.	Automatically a South African citizen.	Not applicable.
2 Child born in South Africa to temporary residents.	No South African citizenship (until parents acquire citizenship through naturalization or the child reaches 18 years of age having resided continuously in South Africa). Possibly has citizenship from country of origin.	Entitled to temporary status at birth on an application linked to parents.
3 Child born in South Africa to permanent residents (post 2014).	No South African citizenship (until parents acquire citizenship or the child reaches 18 years of age having resided continuously in South Africa). Possibly has citizenship from country of origin.	Entitled to temporary and then permanent status on application linked to parents.
4 Child born to permanent residents (pre-2014).	Automatically a South African citizen provided birth was registered and child was given an ID number.	Not applicable.
5 Child born in South Africa to one or more undocumented parents.	No right to South African citizenship. Unless refugee or asylum seeker, possibly citizenship from country of origin.	No status or right to make a standalone application (i.e. without parents).
6 Child born abroad to at least one South African parent.	Can acquire citizenship on application.	Without citizenship would need to apply for status.
7 Child living in South Africa born abroad to at least one undocumented parent.	Not entitled to South African citizenship unless child or parents are naturalized as South Africans (see 2 above).	Can only acquire temporary status at birth if parents apply to regularize their status.

As noted in the introduction to this report, rights to civil registration (birth registration in particular) and legal identity are enshrined in international human rights treaties, including Article 7 of the Convention on the Rights of the Child, and reflected in Goal 16.9 of the SDGs. The realization of other rights, including economic, social, and cultural rights, as well as civil and political rights, especially the right to nationality/legal identity, is often conditioned by birth registration and the provision of a birth certificate. Conversely, a lack of access to meaningful birth registration “has profound consequences for children’s enjoyment of rights with regard to protection, nationality, access to social and health services, and education.”⁸⁴

According to UNICEF, international efforts to increase the number of children registered at birth have paid off in the past decade, with the number of registered children globally rising to about 75 per cent, up from only about 60 per cent at the dawn of the new millennium.⁸⁵ However, that still leaves 166 million children aged five or under unregistered, more than half of whom are in sub-Saharan Africa. Even when children are registered, possession of a birth certificate is less common: 237 million children under five years of age globally, or slightly more than one in three, lack this official proof of registration. For example, in East Asia and the Pacific, 33 million children, including 7 million infants (under the age of one) do not have a birth certificate even if registered.⁸⁶ Lack of birth registration and certification for children is not specific to the countries of the Global South. For example, migrant children in Germany⁸⁷ and indigenous and other marginalized children in Australia⁸⁸ have been found to be without birth certificates.

Birth registration is a universal right under South African law. Section 28 of the Constitution of South Africa states that “every child has the right to a name and a nationality from birth.” In South Africa, these rights can only be brought to life through the possession of a birth certificate.⁸⁹ When a child is born in South Africa, the Department of Health (DoH) issues a ‘Notice of Birth’ on a prescribed form (Form DHA 24), which records the time and date of the child’s birth and the names of the child’s parent(s). The child’s parent(s) then have 30 days to apply to register the child’s birth with the DHA (Civic Services Branch). All applications require the parents to provide identification documents, proof of status, and a birth notice. Other evidence that must be produced depends on several factors, including whether the

⁸⁴ United Nations General Assembly, *Report of the Office of the United Nations High Commissioner for Human Rights Birth registration and the right of everyone to recognition everywhere as a person before the law*, A/HRC/27/22, paragraph 17 p.6.

⁸⁵ UNICEF, *Birth Registration for Every Child by 2030: Are We on Track?*

⁸⁶ Ibid.

⁸⁷ There are a number of initiatives to try to ensure that children born to refugees in Germany are registered at birth. See, for example, <https://www.recht-auf-geburtsurkunde.de/publikationen>.

⁸⁸ Nesha Balasubramanian, “Birth certification in Australia and the need for reform,” *Lawyers Weekly*, 7 June 2021, <https://www.lawyersweekly.com.au/biglaw/31545-birth-certification-in-australia-and-the-need-for-reform>.

⁸⁹ The Bill of Rights confirms other fundamental rights that can only be truly accessed with valid documentation (such as a birth certificate) that proves the person’s nationality, and therefore their legal and administrative existence in South Africa. For example, the right to equality (section 9), the right to freedom of movement (section 21), and the right to human dignity (section 10) are all affected if a child or an adult has no document to prove their nationality.

parents are married and the timing of the application. Applications made outside the 30-day limit require additional documentation and evidence which make the process inaccessible and the chances of successfully registering the child's birth unlikely without the support of a lawyer or paralegal.

Between 1991 and 2012, the Government of South African dramatically improved birth registration rates, from under 25 per cent to over 95 per cent.⁹⁰ Since that time, however, birth registration has hit a ceiling, remaining unchanged between 2011 and 2018.⁹¹ As a result, UNICEF estimates that 100,000 children in South Africa live without a birth certificate.⁹² Although there is evidence that some South African children do not have their births registered,⁹³ this problem is most common among migrant children, particularly children who were born abroad but do not have a birth certificate, migrant children who are unaccompanied, separated, or stateless, or the children of undocumented parents.⁹⁴ Recent research by Lawyers for Human Rights, for example, found that 71 per cent of the migrant children they interviewed in Johannesburg could not register their birth and did not possess a birth certificate.⁹⁵ Another study in 2019, found that 39 per cent of foreign children did not have a birth certificate.⁹⁶ As one Ethiopian community leader told us: “[A]lot of children don’t even have birth certificates, and this is a big problem.”⁹⁷

There are several different reasons why births within the Ethiopian migrant community are not registered (Table 3). First, we identified cases where parents were unable to register their child's birth because they were – or had become – undocumented due to their temporary status lapsing or expiring and delays in the system. Parents also reported that they feared engaging with DHA officials because of feelings of insecurity around their own status and negative experiences when dealing with DHA officials. It becomes increasingly difficult over time for parents to navigate the processes for regularizing their status, registering their child's birth, and joining the child in their claim for asylum. The chances of a child's birth being registered and acquiring status decreases as she or he gets older. We also found examples of children's births not being registered where the father had arrived earlier and was documented but the mother was not. Respondents told us that it is very difficult to register a birth using only the father's name. If a documented father tries to register a child's birth without the mother, he is required to prove paternity.

⁹⁰ Joseph Wong, Kim Skead, Anthony Marchese, Stephanie Lim, Kouroush Houshmand, and Aditya Rau, *Reaching the Hard to Reach: A Case Study of Birth Registration in South Africa* (Toronto: University of Toronto, 2016)

⁹¹ Statistics South Africa, *Statistical release P0305, Recorded Live Births* (2018): 2007–2011 = 89.2 per cent; 2011–2016 = 88.6 per cent, and 2017–2018 = 89.2 per cent.

⁹² UNICEF, “UNICEF and The South African Red Cross Partner to Assist Migrant Children,” *UNICEF*, 8 January 2020.

⁹³ See Save the Children, *The Invisible Children* (Save the Children, 2021). Accessible at:

<https://www.savethechildren.org.za/News-and-Events/blogs/The-invisible-children>.

⁹⁴ Joseph Wong, Kim Skead, Anthony Marchese, Stephanie Lim, Kouroush Houshmand, and Aditya Rau, “Reaching the Hard to Reach: A Case Study of Birth Registration in South Africa.” See also: Lawyers for Human Rights, “A Handbook: The Rights & Realities of Forcibly Displaced Children and Youth in South Africa.”

⁹⁵ *Ibid.*

⁹⁶ Scalabrini Centre of Cape Town, *Foreign Children in Care: South Africa Comparative Report of Foreign Children placed in Child and Youth Centres in Gaunteng, Lipopo and Western Cape Provinces of South Africa* (Cape Town: Scalabrini Centre of Cape Town, 2019). Note that this study focused on children placed in the care of child and youth centres.

⁹⁷ Interview with an Ethiopian community leader, Eastern Cape, February 2023.

Communities reported this process as complicated and expensive, and that DHA officials can be difficult and hostile towards them. According to a lawyer working exclusively on access to documentation cases for migrants, it is very unlikely the child's birth will be registered if either parent is undocumented or they apply outside the 30-day limit.⁹⁸

TAB 3. BARRIERS AND ENABLERS TO ACCESSING BIRTH REGISTRATION

Barriers

Children born to foreign parents are issued with a 'lesser' birth certificate.

Parents are undocumented (including temporarily).

Undocumented parents fear coming into contact with DHA officials.

Unmarried fathers are often required to undertake a paternity test.

Evidential burden is challenging if registration is after the 30-day limit.

Replacement birth certificates are not available for 'lesser' certificates of birth.

Enablers

Both parents (at least the mother) are documented at the time of birth.

Parents have access to information about the process and the child's rights.

In addition, our research suggests that there is a two-tier system of birth certification for those children who successfully registered their births: one for South African citizens (and the children of permanent residents), and another for children born to foreign parents. The former are enrolled on the national population register, given a lifelong 13-digit ID number and a replaceable, official, embossed, and tamper-proof certificate of birth. By contrast, children of migrants are not enrolled on the national population register,⁹⁹ do not receive a 13-digit ID, and are given a form that cannot be replaced, and which is often a black and white printed A4 paper with handwritten or typed details with a DHA stamp. The documents we saw for Ethiopian children ranged from unofficial photocopied forms with handwritten details to typed and printed documents with a DHA stamp. Parents consistently reported that DHA

⁹⁸ Validation interview with Scalabrini Centre, August 2023. It should be noted that as a result of COVID-19 the 30-day time limit has been extended to 12 months. However, it is understood that the rules will revert back to pre-COVID-19 conditions.

⁹⁹ The births of children born to non-South African parents are recorded in 'Copy Book Registries,' which are kept in local DHA offices. The records are handwritten and non-digitized, meaning there is no centralized database or record.

officials told them that these documents cannot be replaced if lost, damaged, or stolen.

BOX 2. BERHANE

Berhane was born in South Africa in 2019. At the time of her birth neither her mother nor her father were documented: her father had never been documented and her mother's asylum seeker status had expired. Although both of Berhane's parents now have refugee status, she still does not have a birth certificate or any form of legal status because her parents have been too afraid to go to the DHA and put their status at risk or get into trouble for not registering Berhane's birth earlier. The implications for Berhane's identity and access to justice are clear.

Why does this failure to issue migrant children with an official birth certificate matter? It matters because a birth certificate provides children with proof of legal identity and is considered a 'breeder document' necessary for applying for other documents. A birth certificate may be required to access social service systems, including health, education, and justice. It is also the basis upon which children can establish a nationality, avoid the risk of statelessness, and seek protection from violence and exploitation. For example, proof of age is needed to help prevent child labour, child marriage, and underage recruitment into the armed forces. One of the consequences of not having a birth certificate is that it results in a 'dead end' where the remaining elements of a child's legal identity cannot be established. It is impossible for that child, through his or her parents, to apply for nationality, legal status, or any proof of identity. In other words, until that child's existence is legally recognized by the State, no other building blocks that form a legal identity can be put in place. In the South African context, even if a child's birth is registered, we found that Ethiopian children face significant challenges regularizing their status and obtaining proof of identity and nationality, even if their birth is registered. Providing children with a birth certificate immediately after birth, rather than later in life, is essential to ensuring that they can claim their rights and access services.

ACCESS TO EDUCATION AND EMPLOYMENT

"No documents, no equality. Our children need papers, and they need education."¹⁰⁰

Under the South African Constitution, access to education is recognized as a fundamental and universal right, implemented through a set of statutes, regulations, and case law that confirm the right to non-discriminatory access to education.¹⁰¹ Despite this, migrant children in South Africa face challenges in accessing schools and often find themselves at risk of either never attending a school or of not

¹⁰⁰ FGD with Community elders. Eastern Cape, February 2023.

¹⁰¹ See Section 29 of the Constitution which states that "[e]veryone has the right...to a basic education, including adult basic education." The Constitution is accessible at: <https://www.justice.gov.za/legislation/constitution/saconstitution-web-eng.pdf>.

completing their studies.¹⁰² In line with other research, and contrary to a string of case law and circulars from the Department of Education,¹⁰³ this manifests itself in schools requiring parents to provide documentation for themselves and the child prior to enrolment.¹⁰⁴ These practices, and a general reluctance to enrol migrant children, could also flow from the fact that school funding is calculated ‘per learner’ and that lack of awareness and capacity within school administrations means that they do not know how to use the national school administration system¹⁰⁵ to register migrant and undocumented children.¹⁰⁶

Regardless of the cause, the impacts on children are significant and long-lasting. School attendance in the communities we spoke to varied: in one community with around 100 children, not a single child has been successfully enrolled in any of the local State primary schools¹⁰⁷; in another, children were enrolled in a State school but reported that undocumented parents would regularly get harassed by the school to produce documentation.¹⁰⁸ As one community leader told us: “[C]hildren find it hard to be registered in school even though the law says that everyone has the right. Parents often feel harassed when they don’t have papers. The school will keep asking them where their papers are, and when are they going to apply for them?”¹⁰⁹ A group of mothers reported that parents looking to enrol their children in local primary schools were regularly told by the school administrators to apply later in the year, only to then be told that the school was at capacity and not accepting any more students.¹¹⁰ As is often the case, Ethiopian migrants devise strategies to circumnavigate the injustices they face rather than engaging with any of the possible formal redress mechanisms; in this case finding the resources to pay for their children to attend private schools. In some cases, community members have also combined resources to fund private schooling for children.

The negative impacts of a lack of documentation on access to education continue as children move into adolescence and adulthood, significantly affecting their chances of enrolling for tertiary education or entering the formal economy. We were told that many young people are unable to access university or the formal job market because they are undocumented, either intermittently or permanently. Indeed, even young Ethiopians who have refugee status and permanent residence reported not being able to enrol at university or apply for jobs because they do not have the 13-digit ID number noted above and because online application forms do not recognize

¹⁰² Marilze Akerman, “Unaccompanied and Separated Children in South Africa: is Return the Only Option?” African Human Mobility Review, Volume 3, Issue 3. Available at: <https://epubs.ac.za/index.php/ahmr/article/view/834/621>

¹⁰³ For details of relevant law and policy see: Sonke Gender Justice, “Do Non-South African Children Have the Right to Education in South Africa?,” *Sonke Gender Justice*, last accessed on 23 February 2024, <https://genderjustice.org.za/card/access-to-education-for-non-national-children-in-south-africa/do-non-south-african-children-have-a-right-to-education-in-south-africa/#:-:text=Yes..outlined%20in%20section%20%20above>.

¹⁰⁴ Lawyers for Human Rights, “A handbook: The rights & realities of forcibly displaced children and youth in South Africa.”

¹⁰⁵ The system is the *South African School Administration and Management System (SA-SAMS)*.

¹⁰⁶ Interview with Legal Resource Centre, Virtual, 8 March 2023.

¹⁰⁷ FGD with women from Ethiopian community, Eastern Cape, February 2023.

¹⁰⁸ FGD with women from Ethiopian community, Eastern Cape, February 2023

¹⁰⁹ Interview with community leader, Eastern Cape, February 2023.

¹¹⁰ FGD with women from Ethiopian community, Eastern Cape, February 2023.

their refugee ID number.¹¹¹ During a FGD, young people described being unable to register for public secondary school or to matriculate without having papers, and expressed frustration, bordering on anger, at the fact that they had not been given a 'brown ID'¹¹² or a 13-digit ID number.

"It is not possible to matriculate without a brown ID.... some of us can't get into high school... it is very difficult to get into university or apply for jobs..."¹¹³

BOX 3. JOY

Joy arrived in South Africa in 2010, at the age of eight, to join her parents who were both living in the country. Initially, Joy was undocumented and unable to get a school place, but she was eventually enrolled in grade three. Joy was joined to her mother's application, and they were both given temporary refugee status for four years in 2011. However, their permits expired in 2015 and have not been renewed. Moving between being documented and undocumented has been very difficult for Joy, a situation made more complicated by her parents' lack of understanding of the South African education system and their limited English language ability, which meant important administrative milestones were missed and her education was disrupted. Eventually, Joy and her mother secured permanent refugee status as well as a 'brown ID.' Despite this, Joy experienced challenges when enrolling at university and navigating the formal job market.

Despite the clear frustration and sense of injustice voiced by the children and young people we spoke to, most described themselves as being South African with an Ethiopian heritage. For example, Joy described a sense of feeling equally South African and Ethiopian but being angry that despite having refugee status she did not have the same rights, freedoms, and opportunities as most of her friends from school and university. Joy is an example of a young person who has, against the odds, successfully navigated the system, obtained documentation, attended university, and is now seeking a professional qualification. But she was keen to point out that not all children in her community are as lucky as she has been. Many do not have birth certificates, documentation, or parents who are motivated or able to resolve the injustices they face.¹¹⁴

THE RISK OF STATELESSNESS

Statelessness is defined in international law as affecting "a person who is not considered as a national by any State under the operation of its law."¹¹⁵ In other words, a stateless person does not have nationality. The number of stateless people is estimated at 10 million, of whom one-third are children. Although being undocumented is not the same as being stateless, research undertaken for the Office of the United Nations High Commissioner for Refugees (UNHCR) argues that

¹¹¹ Interviews with Ethiopian young adults, Eastern Cape, February 2023.

¹¹² The term 'brown ID' is used by the migrant communities who participated in the research to describe an identity document that is given to refugees (as opposed to asylum seekers).

¹¹³ FGD with Ethiopian children, Eastern Cape, February 2023.

¹¹⁴ Interview with an Ethiopian woman, Eastern Cape, February 2023.

¹¹⁵ Convention Relating to the Status of Stateless Persons, Conference of Plenipotentiaries convened by Economic and Social Council resolution 526 A (XVII), Article 1 (1954),

a lack of birth registration can put people at risk of statelessness; a birth certificate provides proof of where a person was born and their parentage – key information needed to establish a nationality.¹¹⁶ Universal birth registration is therefore critical and a birth certificate provides vital information for determining a child/person's citizenship. Birth registration and the right to nationality in South Africa are inextricably linked to preventing statelessness amongst children born to foreign parents.¹¹⁷ The South African Constitution¹¹⁸ protects the universal right for every child to a name and nationality at birth.¹¹⁸ Moreover, there is statute and case law that goes further and states that any children in South Africa who would otherwise be stateless should be granted South African citizenship.¹¹⁹

It is clear from the findings of our research that despite these commitments, many Ethiopian children who are born to asylum seekers, refugees, and undocumented migrants, often lack access to birth registration and other civil registration rights. Poorly functioning, and in some cases, exclusionary civil registration systems are a primary cause of childhood statelessness in South Africa and across the region.¹²⁰ If a child's parents are refugees or asylum seekers, they are unable to apply for birth certificates or citizenship at the Ethiopian embassy. This is because South African and international law states that if a person who has been granted asylum or refugee status contacts or re-enters their country of origin, they are *de facto* no longer deemed to require protection and cease to be asylum seekers or refugees.¹²¹ As a result of a lack of knowledge, the fluctuating nature of parents' status, and barriers in the civil registration and immigration systems, Ethiopian children are at high risk of statelessness. Moreover, the children of undocumented parents can often be excluded from applying for nationality because they do not have a birth certificate or other identity document.

The situations described above result in many children being trapped in an exclusionary legal vacuum, absent from the formal acknowledgement and guarantees of any sovereign State. The communities we spoke to were aware of the risk of statelessness but felt helpless and disempowered to do anything about it.

“What about the children born here? They don't have South African papers and they don't have Ethiopian papers either. Nothing.”¹²²

¹¹⁶ Anette Bayer Forsingdal, Dianne Hubbard, and Adrijana Corluca, *Birth Registration and Statelessness in the Member States of the Southern Africa Development Community* (Regional Bureau of UNHCR, 2022). Accessible at:

<https://data.unhcr.org/en/documents/download/97772>.

¹¹⁷ Lawyers for Human Rights, “A Handbook: The Rights & Realities of Forcibly Displaced Children & Youth in South Africa.”

¹¹⁸ Section 28(1)(a) of The Constitution of the Republic of South Africa.

¹¹⁹ Lawyers for Human Rights, “A Handbook: The Rights & Realities of Forcibly Displaced Children & Youth in South Africa,” footnote 71. See section 2(2) of The South African Citizenship Act and *Minister of Home Affairs v DGLR and Another* CCT115/21 [2021] ZACC 50.

¹²⁰ Anette Bayer Forsingdal, Dianne Hubbard, and Adrijana Corluca, *Birth Registration and Statelessness in the Member States of the Southern Africa Development Community*.

¹²¹ This is referred to as the principle of ‘re-availment’ under Section 5(1)(a) of the Refugee Act 130 of 1998. See also Article 1(C)1, UN Refugee Convention 1951.

¹²² Interview with an Ethiopian woman, Eastern Cape, February 2023.

ADDRESSING ADMINISTRATIVE AND PROCEDURAL BARRIERS

This report has presented evidence of structural issues which undermine access to documentation and a legal identity for migrant children in South Africa. Although the research was undertaken with the Ethiopian community, many of the findings apply to other African migrant communities in South Africa for whom there are few, if any, regular migration routes. In particular, we have highlighted the barriers facing Ethiopian parents in securing official birth certificates for children, which in turn limits access to education and employment, potentially putting children at risk of statelessness. In this section we highlight a number of administrative and procedural barriers which further serve to undermine access to documentation as a pathway to justice for Ethiopian migrants and their children, as well as migrants from other countries outside of South Africa.

CAPACITY AND RESOURCES FOR ASYLUM DECISION-MAKING

Although the Global Compact on Refugees¹²³ emphasizes the importance of greater responsibility and burden-sharing, when it comes to hosting refugees, the weight is not equally shared. The costs of hosting refugees are overwhelmingly borne by low- and middle-income countries, who hosted 73 per cent of refugees at the end of 2022, with financing needs growing in line with increases in the number of forcibly displaced people.¹²⁴ There are an estimated 250,250 refugees and asylum-seekers living in South Africa, alongside larger numbers of economic migrants. Countries of origin of refugees and asylum-seekers include Burundi, the DRC, Rwanda, South Sudan, Somalia, and Zimbabwe. The costs of hosting these refugees falls largely on the national Government which must draw on domestic budgets and Official Development Assistance to cover the associated costs.¹²⁵ As noted earlier, this is at a time of crippling economic crisis.¹²⁶

Despite its commitments to integrate refugees and ensure their rights to protection, there is extensive evidence that refugees and asylum seekers continue to face significant access barriers.¹²⁷ In many cases, refugees and asylum seekers are denied access to education, documentation, and employment, and experience

¹²³ The Global Compact on Refugees is a framework for more predictable and equitable responsibility-sharing, recognizing that a sustainable solution to refugee situations cannot be achieved without international cooperation. It provides a blueprint for governments, international organizations, and other stakeholders to ensure that host communities get the support they need and that refugees can lead productive lives. See: <https://www.unhcr.org/media/global-compact-refugeesbooklet>.

¹²⁴ UNHCR, *Global Trends Report 2022* (Geneva: UNHCR, 2023). Accessible at: <https://www.unhcr.org/global-trends-report-2022>.

¹²⁵ Heaven Crawley and David Passarelli, "Reforming the Global Financial Architecture to Address the Challenges of Refugee Hosting as a Global Public Good," UNU-CPR Technical Note (New York: United Nations University, 2024). Accessible at: <https://unu.edu/sites/default/files/2024-01/Reforming%20the%20Global%20Financial%20Architecture.pdf>.

¹²⁶ World Bank, "The World Bank in South Africa," Last accessed on 23 February 2024, <https://www.worldbank.org/en/country/SouthAfrica/overview>; South Africa Team, IMF African Department, "South Africa's Economy Loses Momentum Amid Record Power Cuts", International Monetary Fund, 15 June 2023, <https://www.imf.org/en/news/articles/2023/06/15/CF-South-Africas-economy-loses-momentum-amid-record-power-cuts>

¹²⁷ See, for example, Roni Amit, *All Roads Lead to Rejection: Persistent Bias and Incapacity in South African Refugee Status Determination*; and Amnesty International, *South Africa: Living in Limbo: Rights of Asylum Seekers Denied* (Johannesburg, Amnesty International, 2019). Accessible at: <https://www.amnesty.org/en/documents/afr53/0983/2019/en/>.

limitations to free movement and health care due to their status. Research by Amnesty International found that the asylum process is not explained properly to asylum seekers when they arrive, and translation is either lacking or of poor quality.¹²⁸ Respondents reported that this is compounded by the fact that most asylum seekers do not have legal representation to assist them with their claims if they are rejected. Evidence from research in 2011 suggests that poor decision-making, including mistakes of fact and lack of sound reasoning, led to a 96 per cent rejection rate, resulting in a massive backlog of appeals and reviews.¹²⁹ This has kept some asylum seekers in the asylum system for as long as 19 years. As noted earlier in this report, there are reports of institutional xenophobia and anti-migrant bias which could exacerbate the already vulnerable position of asylum seekers.

These concerns are reinforced by our research, which found that Ethiopian asylum seekers are often unable to access the system and/or face significant challenges in availing themselves of its protection. This, in turn, undermines the possibilities of Ethiopians and their children securing access to documentation and a legal identity. It was clear during our interviews that many Ethiopian migrants cross the border and subsequently make their initial asylum applications at the Refugee Reception Office (RRO) in Johannesburg, regardless of their intended destination. Their case file is opened and remains in Johannesburg, creating a significant obstacle for individuals residing in other regions. Although we heard anecdotally that there is a procedure for an applicant to transfer their file to a local RRO,¹³⁰ those we spoke to seemed unaware or reluctant to do this.¹³¹ In any case, those in the Western and Eastern Cape were unable to transfer their files due to the long-standing closure of the Cape Town RRO.¹³² Although the Cape RRO reopened in March 2023, many applicants had to travel to Johannesburg to attend meetings and file documents during the asylum process, with considerable time and resource implications. It also seems likely that these applicants will be more likely to let their temporary asylum or refugee permits lapse.

There are also problems in the determination process once a claim is made. Civil society respondents reported that there are an insufficient number of RSDOs, and that they often lack the training and knowledge needed to do their work. They also face significant time constraints. Many asylum seekers are unable to speak and understand English, which puts them at a major disadvantage in being able to claim refugee status without prejudice. Although the RSD system provides for translators and interpreters, the service has been centralized, and an interviewee complained

¹²⁸ Ibid.

¹²⁹ Roni Amit, "No Refuge: Flawed Status Determination and the Failures of South Africa's Refugee System to Provide Protection," *International Journal of Refugee Law* Vol. 23 Issue 3 (2011): 458–488. Accessible at: <https://academic.oup.com/ijrl/article-abstract/23/3/458/1518655>.

¹³⁰ This is despite the Refugee Act 2019 explicitly stating that asylum visa renewals must be done at the RRO where the initial application was made (see section 12(8)).

¹³¹ FGD with community leaders, Eastern Cape, February 2023.

¹³² The Cape Town RRO was closed in 2012 and only reopened in March 2023 following significant and drawn-out litigation.

that it is overwhelmed, often resulting in no one being available for interviews.¹³³ CSOs reported that interpreters receive little or no training, are often not aware of their role and responsibilities, and are not familiar with the RSD process. Additionally, the centralized system for booking interpreters is unreliable and inefficient.¹³⁴ Some participants we spoke to said that they got the impression that the translators and interpreters were not accurately representing what they were saying and that they appeared to be more interested in telling RSDOs what they thought they should hear.¹³⁵ This often results in unlawful or unfair decisions that either go unchallenged or have to be taken through a complex and expensive appeal or judicial review process.¹³⁶

As noted earlier in this report, there are significant delays in both initial decision-making and appeals, with severe impacts for those navigating the system. We found examples of people being offered initial status determination appointments (i.e., to obtain a temporary asylum visa) up to 18 months after lodging their initial application. This means they must stay in the country with only a letter confirming an appointment as evidence that they have applied. Research participants reported waiting for multiple days in the queue outside RROs and not being successful in seeing anyone to address their claim. One young person told us: “We get in line, and we never get in.”¹³⁷ We saw cases of people being offered status determination appointments months after their temporary status expired. Individuals who have been persistent and proactive in pushing their claim through the system without any appeals have taken as long as 18 years to obtain permanent refugee status. One research participant waited 11 years for refugee status, but three years later is still waiting to receive the associated identity documentation.

Although there is a vibrant and active network of CSOs in the Western and Eastern Capes that can offer specialist support to children and their families facing issues with access to documentation, demand dramatically outstrips supply. Organisations we spoke to unanimously reported that funding for CSOs working on migrants’ rights issues has been in steady decline over the past decade at the same time that xenophobia and anti-migrant sentiments have increased. One organisation in the Eastern Cape has had to reduce the number of case workers from seven to two because of funding cuts.¹³⁸

The Government of South African is acutely aware of the problems associated with the RSD process, and in 2021 UNHCR and the DHA signed a landmark agreement to clear the backlog in the asylum system.¹³⁹ Under the Asylum Decisions

¹³³ Interview with Scalabrini Centre, Cape Town, August 2023.

¹³⁴ Fatima Khan, “Interpreting for Refugees: ‘Where Practicable and Necessary Only?’” *Refuge: Canada’s Journal on Refugees*, Vol.28 Issue 22, (2011): 93–106. Accessible at: <https://www.jstor.org/stable/48648635>

¹³⁵ Interview with Ethiopian woman, Eastern Cape, February 2023.

¹³⁶ Interview with the Scalabrini Centre, Cape Town, February 2023.

¹³⁷ FGD with Children, February 2023.

¹³⁸ Interview with a CSO, March 2023.

¹³⁹ UNHCR, “Work to revamp the asylum system begins in South Africa,” 8 March 2021. Accessible at: <https://reliefweb.int/report/south-africa/work-revamp-asylum-system-begins-south-africa>.

Backlog Elimination Project, it was intended that 153,000 cases would be processed by 2024. The Government recognises that eliminating the backlog carries positive knock-on effects for social cohesion in fragile, refugee-hosting communities, not least because those who have documentation and a legal identity can embark on fresh enterprises and become job creators, contributing to the local and national economies. To date, however, there is little evidence that the initiative is having its intended effect.¹⁴⁰

ADMINISTRATION OF JUSTICE

The principle of administrative justice in South Africa is enshrined in law¹⁴¹ and guarantees that everyone has the right to administrative action (which would include decisions made during quasi-judicial immigration processes) that is lawful, reasonable, and procedurally fair. In addition to the delays described above, we found evidence that basic principles in the administration of justice are routinely not followed as part of birth registration and RSD processes. One of the main principles is that anyone whose rights have been adversely affected by administrative action has the right to be given written reasons.

Despite this, there is evidence from our research that RSD officials often fail to provide asylum applicants with receipts of attendance, written notices, or acknowledgments of online submissions. This means that there is no paper trail evidencing the progress of the case, creating problems for migrants who need retrospective proof of their engagement with the system. CSOs also reported that RSDOs regularly fail to give written reasons for decisions and that when they do, the reasons are often ‘copy and pasted’ from other cases recording incorrect facts and misapplying law and policy.¹⁴² These observations reflect those of other research which has found evidence that RSDOs often fail to give written reasons, misapply basic protection principles, and use inaccurate and flawed country of origin assessments.¹⁴³

ALLEGATIONS OF CORRUPTION DURING THE RSD PROCESS

There is a significant body of evidence on corruption at several stages of the civil registration and refugee determination processes,¹⁴⁴ which align with wider evidence

¹⁴⁰ Al Jazeera, “South Africa’s asylum backlog worsens the suffering of applicants,” video, 2023. Accessible at: <https://www.youtube.com/watch?v=YsSRZFYdGc>

¹⁴¹ Article 33 of the Constitution of The Republic South Africa and Section 33 of the Promotion of Administrative Justice Act 3 of 2000.

¹⁴² Author interviews with civil society organizations, Eastern Cape, February 2023.

¹⁴³ See, for example, Roni Amit, *Protection and Pragmatism: Addressing Administrative Failures in South Africa’s Refugee Status Determination Decisions*; Roni Amit, *All Roads Lead to Rejection: Persistent Bias and Incapacity in South African Refugee Status Determination*; Roni Amit, “No Refuge: Flawed Status Determination and the Failures of South Africa’s Refugee System to Provide Protection,”; Caroline Nalule, “Refugee Recognition Regime Country Profile: South Africa”, RefMig Working Paper No. 2 (2023), available at: <https://www.rsc.ox.ac.uk/publications/refugee-recognition-regime-country-profile-south-africa>

¹⁴⁴ Roni Amit, Queue here for corruption: measuring irregularities in South Africa’s asylum system; Roni Amit, Paying for Protection: Corruption in South Africa’s Asylum System; Lawyers for Human Rights, Costly Protection: Corruption In South

about corruption in many aspects of civil and political systems.¹⁴⁵ Evidence gathered from Ethiopian migrants reflects those findings, with multiple allegations of corruption during the RSD process, most notably in the form of demands for payments.¹⁴⁶ Respondents reported having to pay bribes of up to R10,000 (\$530) to gain access to RROs, followed by smaller amounts to officials throughout the day at different stages of the process.¹⁴⁷ For example, one respondent told us: “I went to Pretoria with my six-month-old baby to renew papers. They made me wait in line all day and wouldn’t let me into the building without using a ‘connection.’ I cried and they still said I couldn’t come in. What am I supposed to do? I had to pay.”¹⁴⁸

Respondents also described corrupt demands for payments within the civil registration processes (for example, applications to register births, and applying for identity documents and marriage certificates). One respondent, an Ethiopian pastor, told us that despite his resistance to pay the officials, he was obliged to pay R7,000 (\$370) in order to obtain his official marriage certificate. Parents reported having to pay as much as R30,000 (\$1,600) to get a copy of a birth registration document (even though this was an official version). One Ethiopian woman estimated that she had made over R100,000 (\$5,300) in corrupt payments to government officials.¹⁴⁹ Respondents were angry about the requirement to pay bribes but felt they had no alternative to secure access to, and progress through, the asylum system. Corruption within the justice system can perpetuate distrust in institutions and undermine access to justice for all.

CHALLENGING DECISIONS

Access to justice is a basic principle of the rule of law. To guarantee that every individual has meaningful access to justice, mechanisms and systems need to be available for fair resolution of disputes, redress for human rights violations, and accountability for wrongdoings. People need to be aware of their rights, empowered to claim them, and be free to make their own choices along the process. Access to knowledge and information about rights, systems, and justice facilitators are key enablers in accessing rights and justice. In the absence of information about how access to justice, and the resources to make this happen, can be secured, people are unable to raise their voices, exercise their rights, challenge discrimination, or hold decision makers accountable.

Africa’s Asylum System (Johannesburg: Lawyers for Human Rights, 2020). Accessible at: <https://www.lhr.org.za/wp-content/uploads/2020/09/Corruption-Report-V4-Digital.pdf>.

¹⁴⁵ Transparency International, “Global Corruption Barometer Africa 2019: Citizens’ Views And Experiences Of Corruption (Berlin: Transparency International 2019). Accessible at: https://images.transparencycdn.org/images/2019_GCB_Africa3.pdf;

¹⁴⁶ See the brief but comprehensive analysis and diagram prepared by Corruption Watch, *How the Asylum System Works* (Johannesburg: Corruption Watch, 2016). Accessible at: <https://www.corruptionwatch.org.za/wp-content/uploads/2016/11/How-the-Asylum-System-Works.pdf>.

¹⁴⁷ FGD with Ethiopian women, Eastern Cape, February 2023.

¹⁴⁸ Ibid.

¹⁴⁹ Interview with Ethiopian migrant, Eastern Cape, February 2023.

In the context of South Africa, migrants can technically apply for judicial reviews of DHA decisions. Indeed, the use of strategic litigation is creating a body of jurisprudence that advances the rights of migrants, addresses some of the individual injustices, whilst highlighting the structural and systemic failures of the RSD process. There are many examples of cases where the courts have upheld the rights of migrants to a fair and transparent process. Some of these cases have resulted in individual wins while others have required a change in discriminatory rules and regulations.

Despite the courts being an important source of accountability for migrants, we found them to be largely inaccessible to the Ethiopian community. There was no evidence of the courts being used to challenge unjust or unlawful decisions during RSD or birth registration procedures or in applications for identity documents. There are a number of reasons for this. Firstly, there is limited awareness and understanding within the Ethiopian community, in general, regarding their rights in relation to RSD and birth registration systems. Knowledge of these systems is based largely on individual and community experiences as opposed to legal information advice or support. Indeed, the Ethiopian community appears to be largely unaware that judicial review is a potential avenue to address the injustices that they face. Language barriers and a lack of trust are both significant contributors to a lack of knowledge and awareness. Secondly, the law and procedures underpinning judicial review are highly technical and inaccessible to those not trained as lawyers.¹⁵⁰ Although there are lawyers providing pro bono advice and representation, they are unable to meet potential demand and there is no legal aid available for migrants.¹⁵¹

Only one of the three communities we worked with had connections with lawyers able to launch cases and represent them. Thirdly, judicial review proceedings are lengthy, expensive, resource intensive, and take place in geographically inaccessible places for most migrants (i.e. federal administrative centres).¹⁵² Finally, all of the communities we spoke to feared the courts, citing the perceived risks of engaging with State systems as the primary reason for their decision not to challenge unjust or unlawful decisions. As noted in Section 2, Ethiopian migrants often live on the margins of South African society in informal, insecure, and violent spaces. Their day-to-day experiences with other State-led systems, such as the police, create a lack of trust and fear of engaging with any State system unless absolutely necessary.¹⁵³ These communities do not feel empowered or have the time and energy required to address documentation issues through the judicial system. These findings highlight the importance of people-centred justice and legal empowerment approaches that

¹⁵⁰ Michelle Rufaro Maziwisa, "Access to Justice for African Migrants in South Africa." *ESR Review: Economic and Social Rights in South Africa* Vol. 20 Issue 44 (2019): 4–8.

¹⁵¹ Interview with the Scalabrini Centre, Cape Town, February 2023.

¹⁵² Interview with Legal Resource Centre, March 2023.

¹⁵³ FGD with Ethiopian community elders, Eastern Cape, February 2023.

can make access to justice meaningful for Ethiopian and other migrant communities living in South Africa.

CONCLUSION AND WAY FORWARD

Like many other countries in the Global South, South Africa is grappling with the challenges of hosting a large and growing migrant population and meeting the development needs of its own population whilst facing an economic downturn. The findings of this research suggest that despite its strong legal and human rights framework on the rights of refugees and asylum seekers, South Africa's asylum management system is not working as intended, leaving hundreds of thousands of applicants without proper documentation. Our research suggests that migrants living in South Africa face a range of barriers to accessing justice, including cost, complexity, lack of language skills, remoteness, and discrimination. The failings of the asylum system are also fuelling xenophobia and anti-migrant sentiment and behaviours.¹⁵⁴

Moreover, it is clear that despite South Africa having one of the most progressive and respected child rights legal frameworks in the world and the Government of South Africa ratifying important international conventions which aim to protect and advance the rights of children, including the Convention on the Rights of the Child¹⁵⁵ and the African Charter on the Rights of the Child,¹⁵⁶ children who originate from countries outside of South Africa, or who are born to migrant parents, are often unable to benefit from their provisions. Although there has been significant progress in advancing children's rights since the mid-1990s, there remain significant challenges for children born to migrant parents living in South Africa in accessing birth registration, a legal identity, and associated documentation. The consequences of being undocumented are significant and far-reaching: because Ethiopian children do not have access to documentation, and in particular, a meaningful birth certificate, they cannot access education or other basic rights, cannot access the formal economy when they reach the age of majority, and are at risk of becoming stateless.

Strategically and consistently addressing access to documents and legal identity – and in turn access to basic services and essential rights – both for migrants and populations at large presents clear benefits for the countries to which people migrate, including South Africa. Strengthened immigration and border management, visa facilitation, family reunification, assistance with voluntary return, diaspora voting,

¹⁵⁴ This is acknowledged in the South African Government's recent *White Paper on Citizenship, Immigration and Refugee Protection: Towards a Complete Overhaul of the Migration System in South Africa* in which the Minister of Home Affairs Dr P.A. Motoaledi states that: "The policy and legislative gaps within the SHA have created a fertile grounds for violent clashes between foreign nationals and citizens". Available at:

https://www.gov.za/sites/default/files/gcis_document/202311/49690gon4061.pdf

¹⁵⁵ UN General Assembly, Convention on the Rights of the Child, United Nations, 20 November 1989, Treaty Series, Volume 1577, p. 3. Accessible at: <https://www.refworld.org/docid/3ae6b38f0.html>. The CRC requires that the best interests of the child be "a primary consideration."

¹⁵⁶ Organization of African Unity (OAU), *African Charter on the Rights and Welfare of the Child*, 11 July 1990, CAB/LEG/24.9/49 (1990). Accessible at: <https://www.refworld.org/legal/agreements/oau/1990/en/13798>.

and assistance to vulnerable migrants all ensure that migrants are able to contribute to the process of economic development.

Despite efforts by the Government of South Africa to improve the RSD process, there remain significant challenges in ensuring that migrant communities living in the country have access to the rights and justice to which they are entitled under international and South African law. The fact that Ethiopian and other migrant communities in South Africa often live on the margins of society with a profound mistrust of State-led systems creates additional challenges in identifying justice 'enablers' and ensuring that all migration, including migrant children and those born in the country to migrant parents, have access to documentation and a legal identity. Nonetheless, several factors appear to increase the chances of a child's birth being successfully registered. First and foremost, children are much more likely to be registered and have a legal identity if one or both parents are documented at the time of birth (either with temporary or permanent status) and have proof of identity. Under these circumstances communities reported that the birth registration process is reasonably straightforward, albeit that they may still be asked to make for payments to DHA officials for services which are otherwise free. This finding reinforces the need for improvements to the RSD process and reduction of delays to ensure that parents are documented, and that the negative ripple effects for children are reduced.

Secondly, there is some evidence that the more established a migrant community is the more likely community members are to be aware of their rights and the responsibilities of DHA officials in the context of birth registration. The longest standing of the four Ethiopian communities we worked with has a more established communal experience of navigating the civil and RSD systems, and respondents there spoke with greater confidence about how to navigate the challenges of ensuring that their children are documented. This community also has greater connections with CSOs that focus on migrant's rights and offer legal and paralegal services. This finding reinforces the important role of legal empowerment for displaced populations. Legal empowerment refers to the increased capacity of people, particularly those who are marginalized, to understand and use the law and justice systems to protect and advance their rights and interests.¹⁵⁷ Legal empowerment is a cornerstone of access to justice for all; empowering people and communities is a critical first step towards improving people's justice journeys. This is particularly true for child migrants and refugees because of the marginalization and deprivation of power they experience. Limited legal empowerment efforts for refugees pose a major barrier to achieving justice for refugees — and thus justice for all as envisioned by SDG 16.

¹⁵⁷ Emily E. Arnold-Fernández, *Legal Empowerment: From Accompaniment to Justice* (NYU Centre for International Cooperation, 2022). Accessible at: https://s42831.p1622.sites.pressdns.com/pathfinders/wp-content/uploads/sites/3/2023/03/legal_empowerment- from_accompaniment_to_justice-27th_april.pdf.

We conclude with three sets of recommendations which build on the findings of the research and are intended to support the efforts of the Government of South Africa to meet its development objectives in relation to SDG 16 and its commitments as a signatory to the GCM. Whilst these recommendations are tailored to the specific context of South Africa, they are broadly relevant to other States in the Global South with migrant populations who lack access to documentation and a legal identity.

Design and deliver people-centred migration systems and processes

- In its National Development Plan published more than a decade ago, the Government of South Africa acknowledges that migration is likely to increase in South Africa and that it should be harnessed for development.¹⁵⁸ More recently, the DHA's White Paper on International Migration for South Africa, published in 2017, contends that it is neither desirable nor possible to stop or slow down international migration. The paper argues that international migration, in general, is beneficial if it is managed in a way that is efficient, secure, and respectful of human rights.¹⁵⁹
- The Government now needs to translate these commitments into action and develop people-centred migration systems and processes which appropriately respond to anticipated future increases in migration, reflect the diverse drivers of migration, and are based on human rights and protection-focused principles. It also needs to show political leadership, highlighting the importance of migration for development, centring access to justice and human rights, and challenging xenophobic and anti-migrant narratives and behaviours.
- To harness the potential economic benefits of migration, the Government of South Africa could enter into a bilateral labour agreement with Ethiopia which would regulate and formalize the legal status of Ethiopian migrants and their children. This could include a mechanism regularizing the status of undocumented Ethiopian migrants already in South Africa and Ethiopian children born in South Africa.
- The DHA needs to urgently address the major challenges in the asylum system identified in this and other research. The quality and speed of asylum decision-making needs to be significantly improved. Having a fair, efficient, and properly functioning asylum system is in the interests of both the South African State and applicants themselves. It ensures that those in need of protection receive it quickly and that those who are deemed as not being in need of protection are dealt with appropriately.

¹⁵⁸ National Planning Commission, *Our Future, Make it Work: The National Development Plan 2030* (Republic of South Africa, 2012). Accessible at: https://nationalplanningcommission.files.wordpress.com/2015/02/ndp-2030-our-future-make-it-work_0.pdf

¹⁵⁹ Specifically, the White Paper on International Migration for South Africa states that "[w]hat South Africa urgently needs in a highly connected world is a robust, progressive vision of the benefits of well-managed international migration. This vision must be based on the crucial contribution inward and outward migration makes and will make to growing our economy and to the transformation of Africa. The White Paper contends that it is neither desirable nor possible to stop or slow down international migration. What is argued is that international migration in general is beneficial if it is managed in a way that is efficient, secure and respectful of human rights. Accessible at: <http://www.dha.gov.za/WhitePaperonInternationalMigration-20170602.pdf>.

- All children should be able to apply for asylum in their own right. Connecting a child's legal identity to that of their parents results in children remaining undocumented by no fault of their own and perpetuates the problems they face. The Government should also consider creating a streamlined and accessible pathway for all children born to foreign parents so they can be granted legal status upon birth, notwithstanding the status of their parents. This approach is child-centred and ensures that children's best interests are prioritized.

Improve the provision of birth registration and certification

- Governments can offer the first line of protection to children by providing birth registration and certification at birth. Birth registration systems give children the right to claim vital social services, equitable justice systems, and other forms of child protection. Birth registration is a fundamental right and should not be contingent upon parents' legal status. Regardless of their parent's migration status, all children should be able to have their births registered.
- The Government of South Africa should respect critical court judgments that remove barriers to registering the births of migrant children. Court judgements that establish the right of migrant children to have their births registered should be consistently implemented and enforced across all relevant federal jurisdictions and government ministries. This will contribute to the elimination of discriminatory practices and ensure equal access to birth registration for all children.
- The Government should remove the barriers to late birth registration and simplify the late birth registration process and streamline the procedures and requirements for late birth registration to ensure that children not registered at birth can quickly rectify their situation.
- All migrant children born in South Africa, irrespective of their parents' nationality, should be granted the same birth certificate as South African nationals. Furthermore, they should be accounted for on the national population register and provided with a 13-digit ID number from birth. This could be practically implemented and budgeted by including birth registration for children born to foreign parents in DHA's ongoing digitalization process. This measure does not confer South African citizenship but is a foundation for accessing fundamental rights and protections.

Empower migrant communities to access effective legal remedies

- Data and evidence should be collected as a starting point to understand the specific justice challenges facing migrants and their children so these can be addressed in ways that are people centred. It is also important to deepen understanding of what strategies 'work' to meet the diverse legal and justice needs of migrants in an affordable and sustainable way through identifying

existing available evidence of what works and establishing evaluative processes to address evidence gaps.

- It is important to build stronger connections between Ethiopian and other migrant communities and key CSOs specializing in documentation issues, migrant rights, and child protection. This could create referral pathways and platforms to enhance knowledge of rights and the processes that need to be navigated to access documentation. For example, CSOs could actively engage with, and support, Ethiopian communities in the Eastern and Western Cape to provide legal awareness, legal support, and advocacy assistance. CSOs working with migrant communities should consider designing awareness-raising material in appropriate languages, in this case Amharic, so that this information is accessible to everyone in the community and does not reinforce gender norms that limit women's access to documentation (and have significant implications for their children).
- Ethiopian and other migrant communities could facilitate community-led initiatives and campaigns to increase awareness about the importance of documentation. They could also promote CSO-led community dialogues, workshops, and information-sharing sessions to inform individuals about their rights, available resources, and strategies to overcome documentation-related challenges.
- Ethiopian and other migrant communities could identify and empower community facilitators who can advocate for, and support, their peers in navigating administrative and legal pathways. Community facilitators can be crucial in bridging the gap between community members and relevant authorities and forging connections with key CSOs. Ethiopian and other migrant communities could pool financial resources to provide training and capacity-building opportunities to community facilitators, equipping them with the necessary knowledge and skills to effectively navigate administrative procedures and advocate for the rights of community members. Training should focus on legal awareness, community organizing, and engagement with/referrals to CSOs.
- The legal aid law should be amended to allow children to access legal aid in cases where they are at risk of being left behind as stateless. Donors and philanthropies should be mobilized to provide legal empowerment/legal aid funding to CSOs to support migrants and children of migrants.

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Cover image: Children resting in an Ethiopian community centre, Gqeberha (Port Elizabeth), South Africa. Photo by Heaven Crawley. CC BY NC 4.0.

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Case study: Coventry University.

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Coventry University, 2024

Heaven Crawley, John Doughty, Azwi Netshikulwe and Henrietta Nyamnjuh (2024) *“No Papers, No Rights”: Access to Documentation as a Pathway to Justice for Migrants in the Global South*, Coventry: MIDEQ Hub.