

**Master of Laws: Advanced Studies in International Children's  
Rights**



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**Agency Rights of Unaccompanied Migrant Children in Türkiye**

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## Declaration statement



Date: 1 July 2024

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This thesis is dedicated to all migrant children in search of a place to call home.

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## List of Abbreviations

CRC	Convention on the Rights of the Child
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
LFIP	Law on Foreigners and International Protection
UMCs	Unaccompanied Migrant Children
UMD	Unaccompanied Minors Directive

## Executive Summary

The objective of this thesis is to examine the agency rights of unaccompanied migrant children (UMCs) within the frameworks of the Convention on the Rights of the Child (CRC), the European Convention on Human Rights (ECHR), and Turkish domestic law. It begins by conceptualising the abstract notion of agency rights by using the rights enshrined in the CRC and ECHR. It then analyses Turkish domestic law and its practical application concerning these agency rights, and finally, evaluates the compliance of Turkish law and practices with the obligations set forth in the CRC and ECHR.

Chapter 2 provides an overview of the CRC and ECHR. The CRC and its General Comments actively engage with the agency rights of children while balancing the need to protect UMCs, whereas the ECHR primarily focuses on vulnerability. Despite this difference, the ECHR remains a crucial tool for enforcing the rights enshrined in the CRC.

Evolving capacities are essential considerations in developing the right to agency, influencing and being influenced by agency rights and the power granted to UMCs. These capacities can change and develop, making it crucial to empower UMCs with agency rights to enhance their capacities to be active right holders. Participation rights are fundamental to enabling UMCs to act as active agents. To participate effectively, children must have the right to information, and effective communication requires audiences who understand the evolving capacities of UMCs. Guardians serve as crucial audiences and gatekeepers of the UMCs' agency.

Considering UMCs' precarious situation in the migration context, states need to protect them from violence, abuse, exploitation, and trafficking. However, the need for protection does not imply an absence of agency but embodies the child's right to agency. Furthermore, agency rights should be provided in balance with protection rights. The thesis reveals dilemmas concerning significant decisions made by UMCs under agency rights versus adult intervention and the need for protection.

The right to privacy is fundamental to protecting children's identity and agency. Confidentiality and privacy are crucial for adolescents; however, UMCs often accept privacy and agency rights violations due to perceived gratitude for protection, severely jeopardizing their agency. The right to education is a multiplier of other rights and crucial for developing UMCs' capacities and agency. It fosters socialization, integration, and language skills essential for child agency. However, UMCs sometimes refuse education and choose to work instead. Restricting a child's agency to protect their agency rights requires careful consideration to avoid severely limiting their overall development and capacities.

Chapter 3 explores the realisation of agency rights within Turkish law and practice, as developed in Chapter 2. It also evaluates the evolving capacities of UMCs in Türkiye. A prevailing perception of childhood dependency connected to cultural values often impedes the realisation of agency rights. Particularly in the context of privacy rights, UMCs are primarily viewed as beneficiaries requiring protection.

Significant legislative gaps and practical challenges exist concerning the right to participation and the right to privacy, leading to problems in realising UMCs' agency rights. One critical issue is not appointing guardians upon arrival. Guardians are pivotal for legal representation, evaluating capacities and giving due weight to UMCs' views. Furthermore, educational content does not effectively empower UMCs' ability to act as active agents in society. The protection of UMCs often prioritises vulnerability over agency, and although protection is important, agency rights are mostly overlooked.

Following these arguments, Chapter 4 compares the international frameworks with the Turkish system, drawing conclusions and offering recommendations where applicable. Finally, Chapter 5 presents the conclusions derived from the research findings and advocates for a nuanced approach to agency rights tailored to UMCs' diverse circumstances.



## **Keywords**

Unaccompanied Migrant Children – Convention on the Rights of the Child – European Convention on Human Rights – European Court of Human Rights – Agency rights – Active right holder position – Empowerment of children

## Overview of the Main Findings

This thesis explores the extent to which UMCs' agency rights are protected in Türkiye under the CRC and the ECHR. It develops the concept of the right to agency, recognising it as an emerging area without an established definition. The right to agency for UMCs is built upon evolving capacities, effective participation, holistic protection that encompasses agency, the right to privacy, and the right to education as an enabling right for other rights.

The thesis analyses UMCs as rights holders, focusing on Türkiye while acknowledging that the right to agency is a broader concept applicable to all children. Türkiye partially complies with each mentioned right, but the right to agency is often overlooked due to resource limitations from the influx of migrants. While the approach to vulnerability aligns partially with the European Court of Human Rights (ECtHR) and CRC Committee, there is a notable absence of investment in child agency beyond addressing vulnerabilities. This analysis highlights the necessity of balancing protection and agency since overprotective measures can severely limit agency. It is argued that only the type of protection that covers the empowerment of UMCs can effectively mitigate the risks attached to being vulnerable.

The tension between protection and agency presents dilemmas, such as whether children should make significant decisions or be guided by adults. Determining the extent to which the right to agency of children should be protected is challenging. Diverse migration trajectories of children in Türkiye should be considered, recognising that extreme measures or extreme agency might be necessary. Agency rights should be tailored according to the circumstances of UMCs in Türkiye. Traditional, non-individualistic upbringing necessitates more attention to respecting children's rights, especially in education and privacy. Child dependency on institutions can be leveraged to enhance agency rather than be seen as a barrier.

Investing in the development of UMCs' capacities is the key to facilitating UMCs' agency. It is argued that their capacities can be developed by utilising education. In this way, the need for external protection can diminish, as can their vulnerabilities. Supporting UMCs in developing their capacities and recognising them as rights holders enhances their autonomy. An effective guardianship system can further develop children's capacities, ensuring they are well informed and adequately represented. Immediate appointment of guardians upon arrival can allow them to impact decisions concerning them. These factors can ensure the comprehensive address of the UMC agency, whether it requires extreme protection measures or more freedoms.

Enhancing UMCs' agency through CRC and ECHR is crucial for effective child protection and mitigating risks associated with restrictive protectionist approaches. Despite the inherent risks of potentially increasing vulnerability, UMCs can fully develop their capacities only when empowered with agency rights. Therefore, it is imperative for Türkiye to align its domestic law and practice of agency rights with CRC and ECHR standards to the fullest extent possible.

## Chapter 1: Introduction

### 1.1. What is Agency?

Agency is the composition of a child's capacities, competencies and activities. This composition allows children to navigate their lives while fulfilling their economic, social, and cultural needs. It also allows them to make choices for a wide range of possibilities, covering from daily activities to future decisions.<sup>1</sup> It is a capacity to act and make a difference.<sup>2</sup> The word 'empowerment' of children also defines it well, as UN documents chose to use it.<sup>3</sup>

The agency requires children to be seen as beings rather than becomings. Seeing a child as becoming recognises childhood as a stage of lack of capacity and the children as not-yet-adults. CRC shifted the perspective of children from becomings to beings. They are taken on their own terms as humans with the same universal rights.<sup>4</sup> The right to agency of children thrives from this idea. Furthermore, the children are not simply beings but are also actors in their lives who are active rights holders and continuously have the authority to be the authors of their lives. This is supported by the CRC's approach, which sees them as agents rather than passive victims.<sup>5</sup>

### 1.2. What is Right to Agency?

While abstract in nature, the entitlements associated with the right to agency are practically applicable to children's lives through the combination of rights. The implementation of these rights, rather than an inherent and fixed capacity, plays a crucial role in this dynamic.<sup>6</sup> UMCs, a nuanced examination of their particular circumstances within the migration context, is imperative for conceptualising their entitlement to agency. The integration, interdependence, and interconnection of all human rights underscore that the explanation of individual provisions within the CRC necessitates a holistic perspective considering the entirety of rights enshrined in the Convention.<sup>7</sup> As living rights, CRC rights can dynamically evolve through proactive and innovative interpretations to establish the right to agency within the context of migration.<sup>8</sup>

In essence, the fusion of rights delineated in the CRC and ECHR can be leveraged to articulate the right to agency for children. Initially, the paramount consideration lies in the 'evolving capacities of children', as their heightened competencies necessitate corresponding agency rights. Therefore, the essential prerequisite prior to ascribing children as rights-bearing agents involves a comprehensive acknowledgement of their genuine capabilities. Furthermore, children can only assume the role of

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<sup>1</sup> Robson, Conceptualizing agency in the lives and actions of rural young people, 2007, p.135.

<sup>2</sup> Jerome & Starkey, Developing children's agency within a children's rights education framework: 10 Propositions, 2022, p.439.

<sup>3</sup> Ibid, p.441.

<sup>4</sup> Ibid, p.439.

<sup>5</sup> Bell & Payne, Young people as agents in development processes: reconsidering perspectives for development geography, 2009, p.1027.

<sup>6</sup> Jerome & Starkey, p.447.

<sup>7</sup> Lundy, Voice' is not enough: Conceptualising Article 12 of the United Nations Convention on the Rights of the Child, 2007, p.932.

<sup>8</sup> Hanson & Nieuwenhuys, Living rights theorizing children's rights in international development, 2013, p.6.

rights holders if they are effectively protected against potential rights infringements encountered during the migration trajectory. The 'right to protection' inherently encompasses the preservation of children's right to agency. Nonetheless, for enhanced protection, a judicious equilibrium must be struck between protective measures and participatory rights. 'Right to effective participation' is pivotal for the agency as children empowered to make informed decisions pertaining to their well-being are best positioned to exercise their rights genuinely. 'Right to privacy' is indispensable as it constitutes an integral facet of agency rights, underscoring the imperative of considering children as individuals with autonomy. Finally, the right to education plays a pivotal role for UMCs, enabling them to comprehend their agency rights and fostering the capacity to assert these rights. Therefore, within the confines of this study, these specific children's rights are singled out to construct the framework for agency rights of UMCs within the migration context.

### **1.3. Being an Unaccompanied Child in Migration**

Enjoyment of one's rights is contingent upon one's status as a citizen within a community, and the migrants abandon this communal membership upon embarking on their journeys.<sup>9</sup> The violation of fundamental rights is even more pronounced in the case of children, who lack the maturity to fully comprehend the rights they are relinquishing and are not yet equipped to exercise any of the individual rights granted to adults. Respecting the agency rights of UMCs is intricately intertwined with both possessing and exercising individual rights as rightful holders. The perilous decision to undertake hazardous voyages by unaccompanied minors necessitates the authorities in host countries to sustain special care and support.

Children should not be treated merely as objects in decision-making processes but as active participants entitled to rights on par with adults. Despite their age, children possess the capacity to understand their circumstances and make decisions that shape their present and future. Children, like adults, deserve to be taken seriously and must not face disproportionate deprivation of their rights.<sup>10</sup> Children, due to their physical and cognitive immaturity, are particularly vulnerable and should not be expected to express gratitude for basic necessities at the expense of their agency rights. Regardless of their legal status, UMCs have an inherent right to possess rights and should be afforded the same access to these rights as any individual.

### **1.4. Migration Problem in Türkiye**

Türkiye is an important host and transit country for migrants. The protection regime encompasses various statutes. In its recent Concluding Observations, the Committee emphasised that all children should enjoy rights under the CRC irrespective of their registration status.<sup>11</sup> Regarding agency rights, there is minimal disparity in the rights afforded to UMCs of different status holders. For clarity, simplified definitions of relevant terms are provided below.

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<sup>9</sup> Kerem, Border and journey experience of unaccompanied children under international protection in Turkey, 2022, p.300.

<sup>10</sup> Habip, A Comparative Study: Unaccompanied Minors in Turkey and Greece Protected or Neglected?, 2018, p.57.

<sup>11</sup> CRC Committee, Concluding Observations of the Committee on the Rights of the Child: Turkey, 2023, para.44-45

- An unaccompanied minor is defined as a child who arrives in Türkiye without the accompaniment of an adult responsible for him or her by law or custom.<sup>12</sup>
- A conditional refugee is a foreigner who, because of events occurring outside European countries, is outside the country of his nationality and is unable or unwilling to return due to a well-founded fear of persecution.<sup>13</sup>
- Secondary protection refers to individuals who do not qualify as refugees or conditional refugees but face serious threats if returned to their country of origin or habitual residence.<sup>14</sup>
- Temporary protection is granted to foreigners who have been forced to leave their country, are unable to return, and who seek emergency and temporary protection by arriving at or crossing Türkiye's borders en masse or individually during periods of mass influx. This status is applied when their request for international protection cannot be individually assessed.<sup>15</sup>
- International protection encompasses refugee, conditional refugee, or subsidiary protection status.<sup>16</sup>

The majority of migrants in Türkiye originate from Syria. Syrian minors in Türkiye exemplify the category of "children under temporary protection." Approximately one-third of Syrian individuals under temporary protection are minors, among whom are those who have been or are at risk of being unaccompanied adolescents.<sup>17</sup> International protection considerations are reserved for UMCs who are not part of mass migration and who submit individual applications, thereby precluding UMCs under temporary protection from obtaining international protection statuses.<sup>18</sup>

In addition to mass migration, significant proportions of migrants entering Türkiye via Iran consist of Afghans, Pakistanis, and Iranians, whose numbers have surged in recent years.<sup>19</sup> They can be under a conditional refuge or secondary protection regime. Escalating security concerns and economic motivations underpin the rise in migrant influxes. Travel typically occurs irregularly via Iran and Doğu Beyazıt, with motivations varying based on migrants' countries of origin. While factors like poverty, conflict, and familial strategies drive Afghani migration, social exclusion, impoverishment, and violence predominantly influence Iranian migrants. Along the route, migrants confront diverse perils such as violence, lengthy treks, obscurity, injuries, fatalities, post-border detentions, malnutrition, and sanitation challenges.<sup>20</sup> The situation underscores the critical need for the protection of UMCs from children's rights violations.

## 1.5. Research Question

In light of the above, the research question is: **To what extent is the right to agency of UMCs as a right holders under CRC and ECHR protected in Türkiye?**

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<sup>12</sup> Aile ve Sosyal Politikalar Bakanlığı Çocuk Hizmetleri Genel Müdürlüğü Refakatsiz Çocuklar Yönergesi, 2015, Article 4(p). (Referred as 'UMD')

<sup>13</sup> UMD, Article 4(r).

<sup>14</sup> LFIP, Article 63.

<sup>15</sup> UMD, Article 4(j).

<sup>16</sup> Ibid, Article 4(ş).

<sup>17</sup> Arslan, The legal situation of unaccompanied minors in Turkish Law, 2023, p.98.

<sup>18</sup> UMD, Article 4(ş).

<sup>19</sup> Deniz, Türkiye İran sınırında düzensiz göç ve göçmenlerin sınır gecme pratikleri, 2022, p.255.

<sup>20</sup> Kerem, p.300.

To answer the research question, these are the supplementary research questions:

- What does the right to agency of UMCs as an active right holders under CRC and ECHR consist of?
- How does national law in Türkiye regulate all aspects of the right to agency of unaccompanied minors, and how does this translate into law in action?
- To what extent do Turkish Domestic Law and practice comply with the CRC and ECHR regarding the right to agency of UMC as an active right holder?

## 1.6. Methodology

This thesis research is desk-based and includes interviews with NGO fieldworkers from Mavi Kalem and İnsan Charity. The interviews are conducted remotely with the consent of the interviewees. The primary international legal sources of the research are the CRC, ECHR and Turkish Domestic Law. CRC and the Committee's approach to agency is used as the main ground for explaining the right to agency. ECHR is used to develop the concept of agency rights when it is relevant. ECHR was selected as a regional instrument because of two reasons. Firstly, Türkiye recognised the binding jurisdiction of the ECtHR in 1990.<sup>21</sup> Secondly, the ECtHR plays a significant role in Türkiye by enhancing human rights protections, and many of its rulings have prompted substantial legal and policy reforms.<sup>22</sup>

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<sup>21</sup> Özbudun, Impact of the ECtHR rulings on Turkey's democratization: An evaluation, 2013, p.985.

<sup>22</sup> Özbudun, p.986.

## Chapter 2: Right to Agency in CRC and ECHR

### 2.1. Introduction

International law, through the CRC and the ECHR, enshrines rights that support the agency of UMCs. The concept of children's agency is interdependent and abstract<sup>23</sup>, requiring consideration of their evolving capacities and the migration context to situate and develop the right to agency for UMCs accurately. The CRC, specifically Article 22, emphasises the necessity of recognising UMCs' vulnerabilities to ensure they receive appropriate protection and humanitarian assistance to enjoy their rights. Besides protection, they also have participation rights. The CRC underscores children's participation rights, shifting the conceptualisation of childhood from a process of becoming to a state of being.<sup>24</sup> Article 12 of the CRC highlights the right to participation, while Article 13 guarantees freedom of expression and the right to seek, receive, and impart information. Similarly, Article 10 of the ECHR addresses freedom of expression. These participation rights necessitate supervision by authorities for effective participation, with due weight given according to the evolving capacities of UMCs, as stipulated in CRC Article 5. The right to agency for UMCs is dynamic, influenced by their evolving capacities within the migration context. Furthermore, as UMCs' capacities develop, the importance of their privacy rights increases. The right to privacy is a fundamental aspect of all children's agency and must be protected, as outlined in CRC Article 16 and ECHR Article 8. Additionally, the right to education, essential for realising children's agency, is enshrined in Article 2 of Protocol No. 1 of the ECHR and detailed in Articles 28 and 29 of the CRC, which advocates for child-centred, child-friendly, and empowering education.

### 2.2. CRC and ECHR

Türkiye, having ratified the CRC, is obligated to adhere to its provisions. While the right to agency is not explicitly articulated in the CRC, it is derived from and developed through General Comments issued by the Committee on the Rights of the Child. These General Comments, although not legally binding, hold authoritative interpretative weight.<sup>25</sup> Consequently, the right to agency is binding, as it is fundamentally composed of the principles and articles enshrined in the CRC.

The ECHR is not specifically focused on children, mentioning them explicitly only twice.<sup>26</sup> However, its provisions are still highly relevant to children's rights.<sup>27</sup> Officially, there is no formal linkage between the ECHR/ECtHR and the CRC. Nevertheless, the ECtHR has acknowledged a reciprocal and harmonious relationship between these two conventions.<sup>28</sup> Over time, the ECtHR has developed case law that addresses and encompasses children's rights.<sup>29</sup>

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<sup>23</sup> Hanson & Nieuwenhuys, p.4.

<sup>24</sup> Jerome & Starkey, p.440.

<sup>25</sup> Liefwaard et al., A new perspective on international children's rights jurisprudence, 2019.

<sup>26</sup> Kilkelly, Protecting children's rights under the ECHR: The role of positive obligations, 2020, p.245.

<sup>27</sup> Council of Europe et al., Handbook on European Law relating to the rights of the child, 2015, p.30.

<sup>28</sup> Helland & Hollekim, The convention on the rights of the child's imprint on judgments from the European Court of Human Rights: A negligible footprint?, 2023, p.213.

<sup>29</sup> Florescu et al., Children's Rights and the European Convention on Human Rights, 2015, p.451.

Under the ECHR, the best interests of migrant children must be the primary consideration.<sup>30</sup> ECHR case law on Article 3 has been instrumental in protecting children from violence and abuse.<sup>31</sup> Additionally, Articles 8 and 10 are relevant for promoting child agency. However, in some instances, the ECtHR has been reluctant to acknowledge children as agents rather than mere objects of protection.<sup>32</sup> It has been noted that by relying excessively on children's vulnerability, the Court may either deny agency to children or create artificial distinctions between beneficiaries of human rights protection.<sup>33</sup> The ECtHR's approach to the right to agency is more limited compared to the CRC Committee's approach.

The ECtHR's jurisdiction extends to all matters concerning the interpretation and application of the ECHR and its Protocols.<sup>34</sup> As ECtHR judgments are binding on the Contracting States and given the absence of a similar enforcement mechanism at the United Nations level, the ECtHR is often regarded as the body capable of giving substantive effect to the rights of the child as enshrined in the CRC.<sup>35</sup>

### **2.3. Effect of Evolving Capacities of UMCs on Their Right to Agency**

Children's capacity to interpret, derive meanings, and influence the flow of events are essential forms of being active agents.<sup>36</sup> Various factors influence these skills and capacities. According to CRC Article 5, the persons legally responsible for the child should provide appropriate direction and guidance in the exercise of the child's rights recognised in the CRC in a manner consistent with the child's evolving capacities. The evolving capacities of the child are a cross-cutting factor that must always be considered when developing the concept of agency for UMCs in line with relevant CRC and ECHR rights. Understanding the evolving capacities of UMCs is crucial for a comprehensive and enlightened approach to their agency rights.

There is an interdependency between three concepts: the capacities of the child, power relations in the migration context, and holding an active right-holder position. Power and agency are interrelated, as more agency leads to more power, and more power enhances agency.<sup>37</sup> Evolving capacities can change depending on the power afforded to UMCs, which in turn affects their capacity to exercise agency and hold an active right-holder position. Children articulate themselves based on their identification within the broader social group.<sup>38</sup> Without control over their circumstances, they are often deemed incapable of making proper decisions.<sup>39</sup> Adults may misinterpret their evolving capacities,

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<sup>30</sup> Council of Europe et al., Joint note on Children in migration: fundamental rights at European borders., 2023, p.6.

<sup>31</sup> Kilkelly, p.248.

<sup>32</sup> Vandenhole & Ryngaert, Mainstreaming children's rights in migration litigation: Muskhadzhiyeva and others v. Belgium, 2012, p.68-92.

<sup>33</sup> Florescu et al., p.451.

<sup>34</sup> ECHR, Article 32.

<sup>35</sup> Florescu et al., p.451.

<sup>36</sup> Oswell, The agency of children from family to global human rights, 2013, p.44.

<sup>37</sup> Bell & Payne, p.1029-30.

<sup>38</sup> Ibid.

<sup>39</sup> Euro-Med Human Rights Monitor, Happiness Love and Understanding: The protection of unaccompanied minors in the 27 EU Member States, 2023, p.96.



considering their decisions unreliable.<sup>40</sup> If the persons legally responsible for UMCs do not recognise them as capable active right-holders, the children themselves will also fail to view themselves as agents. This self-underestimation of agency creates a spiral where UMCs perceive themselves as less capable and are treated as such. This misperception impairs the right to development under CRC Article 6, as it prevents UMCs from building their agencies in line with their evolving capacities. Viewing UMCs merely as vulnerable children needing help can disproportionately restrict their rights.<sup>41</sup>

Each child's exercise of agency varies due to evolving capacities. The right to agency is a fluid concept influenced by daily interactions, challenges, and realities.<sup>42</sup> The hardships UMCs face can make them more capable and mature enough to make significant life decisions.<sup>43</sup> Recognizing the diversity within the UMC population, particularly in age and gender, is crucial when considering their evolving capacities and developing their right to agency. Age is one determining factor of evolving capacities resolved by the age assessment process when needed. A study conducted in Europe revealed that the majority of UMCs are aged 16-17, and most are male.<sup>44</sup> While it is inaccurate to assume all UMCs possess the same level of capacity, this data suggests that participatory rights, which empower them to be decision-makers in their lives, should be a focal point in developing their agency. Conversely, environmental factors can increase adolescents' risk and vulnerability, limiting their ability to make healthy choices.<sup>45</sup> The migration process and lack of adult protection during initial interactions with government officials can make UMCs vulnerable, limiting their capacity to make informed decisions.<sup>46</sup> This vulnerability creates an additional dimension to consider when building the right to agency for UMCs.<sup>47</sup>

Children's capacity to exercise agency is temporarily situated and contextually specific.<sup>48</sup> There is no universal formula for determining their right to agency.<sup>49</sup> Both perspectives—viewing UMCs as survivors whose agency emerges from their 'survival strategies' and recognising their ongoing development of agency through day-to-day activities—must be considered without positioning agency in opposition to vulnerability.<sup>50</sup> Each UMC's situation requires a nuanced, case-by-case evaluation. While acknowledging their coping abilities is essential for fostering agency, it is crucial not to confine their agency solely to these capabilities.<sup>51</sup> Instead, UMCs should be recognised as children continuously developing their agency within their environments.<sup>52</sup> This perspective aligns more closely with the child's evolving capacities. States can mitigate vulnerability and risk factors by establishing a

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<sup>40</sup> Ibid.

<sup>41</sup> Smyth, *The common European asylum system and the rights of the child*, 2013, p.12.

<sup>42</sup> Bell & Payne, p.1040.

<sup>43</sup> Ibid.

<sup>44</sup> Euro-Med Human Rights Monitor, p.10-11.

<sup>45</sup> CRC Committee, General comment No. 4: Adolescent health and development in the context of the Convention on the Rights of the Child, para.34.

<sup>46</sup> CRC Committee, General Comment 4, para.38.

<sup>47</sup> Crawley, ILPA policy paper: Child first, migrant second, 2006, p.10.

<sup>48</sup> Jerome & Starkey, p.447.

<sup>49</sup> Ibid.

<sup>50</sup> Bell & Payne, p.1041.

<sup>51</sup> Ibid.

<sup>52</sup> Ibid.

cost-effective system that promotes UMCs' development as active right-holders and independent agents in society.<sup>53</sup> This child-rights-oriented approach portrays UMCs holistically as subjects entitled to rights rather than merely as vulnerable victims of migration.

## 2.4. Participation Rights and Right to Agency

### 2.4.1. Outlines of Effective Participation

CRC Article 13 and ECHR Article 10 regulate the right to freedom of expression. Furthermore, CRC Article 12 protects the right to participation, stating that a child capable of forming views has the right to express them, and due weight must be accorded to those views.<sup>54</sup> Despite the case law of ECtHR on Article 10 being focused on protecting children from the negative effects of expression<sup>55</sup>, ECtHR protects the participation rights of children according to Article 8.<sup>56</sup> As children possess human rights, ECHR Article 10 also applies to them, granting the right to express their views.

The right to participation should be considered in every arrangement and every step of the asylum procedure.<sup>57</sup> Without their effective participation, policies and decisions that protect their rights cannot be appropriate and effective.<sup>58</sup> To participate, UMCs should know about the processes they will go through and their options. This makes the right to participation closely connected to<sup>59</sup> the right to information<sup>60</sup>, the right to guidance from adults considering their evolving capacities,<sup>61</sup> and the right to access to information<sup>62</sup>.

Establishing a safe and nurturing environment for meaningful and effective participation is essential to empower UMCs in cultivating and exercising their agency rights.<sup>63</sup> For meaningful and effective participation, children must be provided with 'space,' 'voice,' 'audience,' and 'influence.'<sup>64</sup> To ensure 'space,' children should have the opportunity to express their views.<sup>65</sup> An environment based on trust and information sharing must be created, meaning regulations and practices should mandate the child's participation.<sup>66</sup> Facilitating children to express their views provides them with a 'voice,' which

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<sup>53</sup> CRC Committee, General Comment 4, para.38.

<sup>54</sup> CRC Committee, General Comment No. 6: Treatment of Unaccompanied and Separated Children Outside Their Country of Origin, para.25.

<sup>55</sup> *Macatė v. Lithuania*, 2023; *Kuliś And Rózycki v. Poland*, 2009.

<sup>56</sup> *N.Ts. and Others v. Georgia*, 2016, para.78.

<sup>57</sup> CRC Committee, General Comment 6, para.25.

<sup>58</sup> CRC Committee, Joint General Comment No. 3 of the CMW and No. 22 of the CRC in the context of international migration: general principles, para.35.

<sup>59</sup> Lundy, p.932.

<sup>60</sup> CRC, Article 13.

<sup>61</sup> *Ibid*, Article 5.

<sup>62</sup> *Ibid*, Article 17.

<sup>63</sup> CRC Committee, General Comment 4, para.7.

<sup>64</sup> Lundy, p.933.

<sup>65</sup> *Ibid*.

<sup>66</sup> CRC Committee, General Comment 4, para.8.

can be achieved through education and by providing sufficient information about their rights.<sup>67</sup> An 'audience' is necessary to listen to them, requiring the capacity to understand adolescents and offer sound guidance.<sup>68</sup> The individuals legally responsible for the child are the primary audience, and according to Article 5, they must act in a manner consistent with the child's evolving capacities while prioritising the child's best interests. Finally, as stipulated in CRC Article 12, children's views should be acted upon or given due weight, thereby granting them 'influence'.<sup>69</sup> The 'influence' of child participation empowers UMCs to direct their lives through the choices they make as active right-holders.

#### 2.4.2. Right to Information as an Integral Part of Freedom of Expression

To have effective participation, UMCs should be provided with all relevant information.<sup>70</sup> ECHR Article 10 mentions that freedom of expression includes freedom of receiving and imparting information parallel to CRC Article 13(1). UMCs need to have access to information from diverse sources.<sup>71</sup> In the complex asylum procedures, proper information is key for effective participation. Relevant information includes UMCs' entitlements, available services, communication means, asylum process, family tracing, outcomes of processes and the situation in their country of origin.<sup>72</sup> UMCs should be informed about their rights and complaints mechanisms.<sup>73</sup> They should be informed about the arrangements made for them and their opinions about the care and accommodation<sup>74</sup> must be taken into consideration.<sup>75</sup>

The ECtHR emphasises in its decisions that the freedom to receive information extends to cultural expressions and entertainment, as illustrated in *Khurshid Mustafa and Tarzibachi v. Sweden*.<sup>76</sup> It is not only limited to events of public concern and reports.<sup>77</sup> ECtHR's approach is parallel to CRC Article 17(d), which requires mass media to have regard for the linguistic needs of the child. In this way, they will not be excluded from the information related to their culture and language.

The Children's Rights Committee's approach shows that facilitating meaningful participation and making adolescent UMCs feel like active right-holder agents are important. Adolescent UMCs must have access to information essential for their health and development to participate in decisions that can affect their health.<sup>78</sup> They should also be informed about how to protect their health and development.<sup>79</sup> This can include practising healthy habits and information on substances, abuse, and

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<sup>67</sup> Lundy, p.933.

<sup>68</sup> CRC Committee, General Comment 4, para.8.

<sup>69</sup> Lundy, p.933.

<sup>70</sup> CRC Committee, General Comment 6, para.25.

<sup>71</sup> CRC, Article 17; CRC Committee, General Comment 4, para.10.

<sup>72</sup> CRC Committee, General Comment 6, para.25; General Comment 12, para.124.

<sup>73</sup> CRC Committee, General Comment 22, para.35.

<sup>74</sup> CRC, Articles 20 and 22.

<sup>75</sup> CRC Committee, General Comment 6, para.40.

<sup>76</sup> ECtHR, Guide on Article 10 Freedom of Expression, para.151.

<sup>77</sup> Ibid.

<sup>78</sup> CRC Committee, General Comment 4, para.39.

<sup>79</sup> Ibid, para.26.

sexual health.<sup>80</sup> Education of safe and respectful sexual behaviours is vital.<sup>81</sup> The information provided to them should be in their own language, child-sensitive<sup>82</sup>, and appropriate to their maturity and understanding, thereby ensuring their effective participation and protection.<sup>83</sup> The information provided positively contributes to their capacity to participate.

#### 2.4.3. Audiences of Participation

Effective participation of UMCs in the asylum procedure hinges on clear and reliable communication.<sup>84</sup> This requires appropriate direction and guidance by adults considering the evolving capacities<sup>85</sup> and their voices to be heard by their audience. To facilitate this, interpreters should be readily available at all stages of the procedure, ensuring that UMCs can fully understand and participate in the process.<sup>86</sup> Specific attention should be given to migrant children who do not speak the majority language, recognising their right to expression.<sup>87</sup> The UMCs who do not know the majority language can get very limited information, which can seriously restrict their decision-making capacities, participation and agency.

Effective participation is linked to political and civil engagement, allowing UMCs to negotiate, advocate for their rights, and hold states responsible. In this way, adolescent UMCs can connect with peers and participate politically by participating in and forming organisations. Their ways of participation can be various, including digital media. This can increase their sense of agency to make informed decisions and choices.<sup>88</sup> For these political and civil engagements to happen, audiences must be knowledgeable about children's agency rights.<sup>89</sup> Caretakers, policymakers, decision-makers, and guardians play an important role in ensuring the right to agency as audiences. States should invest in training and raising awareness among audiences.<sup>90</sup>

#### 2.4.4. Guardian: Gatekeeper for Agency

The guardians who can sustain appropriate direction and guidance<sup>91</sup> are key to sustaining the effective participation of UMCs. The guardian acts as a link between the UMCs and agencies that provide care to children.<sup>92</sup> States should appoint a guardian immediately after identification of UMCs.

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<sup>80</sup> Ibid.

<sup>81</sup> Ibid.

<sup>82</sup> CRC Committee, General Comment 22, para.35.

<sup>83</sup> CRC Committee, General Comment 6, para.25.

<sup>84</sup> Ibid.

<sup>85</sup> CRC, Article 5.

<sup>86</sup> CRC Committee, General Comment 6, para.25.

<sup>87</sup> CRC Committee, General Comment No. 12: The right of the child to be heard., para.21.

<sup>88</sup> CRC Committee, General Comment No. 20: On the implementation of the rights of the child during adolescence, para.24.

<sup>89</sup> Ibid, para.25.

<sup>90</sup> Ibid.

<sup>91</sup> CRC, Article 5.

<sup>92</sup> CRC Committee, General Comment 6, para.33.

The guardianship arrangements should be maintained until the UMCs reach the age of majority or have permanently left the host country.<sup>93</sup>

Guardians safeguard the best interest of the UMCs while ensuring their overall well-being and exercising legal representation.<sup>94</sup> Most importantly, they complement the UMCs' limited legal capacity.<sup>95</sup> ECtHR points out the importance of the appointment of guardians to UMCs in its case law. ECHR Article 8 is litigated from children's perspective, and its case law touches on guardianship for all children to sustain representation of the child.<sup>96</sup> Besides, ECtHR states in its *Darboe and Camara v. Italy*<sup>97</sup> decision that UMCs should be appointed guardians without undue delay, regardless of their immigration status, to ensure that their best interests and rights are protected and considered in all relevant decisions and processes.<sup>98</sup> Furthermore, ECtHR also indirectly linked the need for a guardian to Article 3 in its *Rahimi v. Greece* decision. ECtHR says that the failure to appoint a guardian was one of the reasons why authorities failed to take care of the UMC, which led to inhuman or degrading treatment.<sup>99</sup>

According to the CRC Committee, to sustain effective participation, a guardian should be appointed, free of charge<sup>100</sup>, and they should be consulted on all actions that concern UMCs.<sup>101</sup> UMCs should be informed of guardianship arrangements, and their opinions should be taken into consideration.<sup>102</sup> Besides sustaining protection, guardianship also creates an environment that is responsive to UMCs' unique needs and wishes.<sup>103</sup> The guardian should be sustained with sufficient information about the child.<sup>104</sup> They also need to have expertise in childcare.<sup>105</sup> This way, they can effectively make evolving capacities and best interest assessments. So, they should not remain distant from the children during their decision-making.<sup>106</sup> Guardians can create a space for UMCs to exercise their agency and, given their importance for sustaining representation and effective participation, can be seen as gatekeepers for UMCs' agencies.

#### 2.4.5. The Influence of Participation

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<sup>93</sup> Ibid.

<sup>94</sup> Council of Europe, Joint note, 2023, p.9.

<sup>95</sup> Ibid.

<sup>96</sup> Kilkelly, *Protecting children's rights*, p.248. and ECtHR, Key Theme Article 8.

<sup>97</sup> *Darboe and Camara v. Italy*, 2022, para.142-150.

<sup>98</sup> Council of Europe, Joint note, 2023, p.9.

<sup>99</sup> *Rahimi v. Greece*, 2011.

<sup>100</sup> CRC Committee, General Comment 12, para.124.

<sup>101</sup> CRC Committee, General Comment 6, para.33.

<sup>102</sup> Ibid, para.37.

<sup>103</sup> Euro-Med Human Rights Monitor, p.95.

<sup>104</sup> CRC Committee, General Comment 6, para.33.

<sup>105</sup> Ibid.

<sup>106</sup> Euro-Med Human Rights Monitor, p.95.

Giving due weight to UMCs views is dependent on their age and maturity.<sup>107</sup> It determines the influence of their participation. UMCs are mainly older children, and they have the capacity to form views on matters affecting them in the context of migration. ECtHR has a similar approach in the case of *Plaza v. Poland*, saying that the due weight given to child views and feelings should stem from CRC Article 12.<sup>108</sup> However, from the perspective of child agency, in addition to CRC Article 12, the due weight given can fall under ECHR Article 8, given that respect for private life is intrinsically linked to autonomy and decision-making.<sup>109</sup>

As the majority of UMCs are adolescents, the appropriate weight should be given to their views as they acquire understanding and maturity.<sup>110</sup> State parties should introduce measures to guarantee that adolescents have the right to express views on all matters concerning them and ensure that due weight is given.<sup>111</sup> While determining their best interests, the guardians need to consider UMCs views consistent with their evolving capacities.<sup>112</sup> If adolescents are of sufficient maturity, informed consent should be obtained from the adolescent.<sup>113</sup> Although younger children are not as persuasive as older children, they have the right to get into dialogue, which should be democratic and reciprocal with the adults who have power over them.<sup>114</sup> This approach acknowledges their agency and ensures that their best interests are always at the forefront of these arrangements.

Adults should act as mentors and facilitators, considering the evolving capacities so that UMCs can be active decision-makers in their own lives.<sup>115</sup> However, this obligation should not interfere with the right to freedom of expression.<sup>116</sup> Sometimes, children's wishes and views can lead to big life changes and decisions. For example, if UMCs want to return to their country of origin, their views should be given due weight. However, the views of the caretaker should also be taken into account, in addition to the views of the child.<sup>117</sup> Although they might need some degree of supervision, adolescents should be recognised as active right-holders while giving proper guidance and direction.<sup>118</sup> Effective participation should be sustained in cases where there will be a decision about their education, health, sexuality, family life and judicial and administrative proceedings.<sup>119</sup> There should be checks and balances to ensure that children's participation is sustained.<sup>120</sup> Overall, all UMCs should have a genuine

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<sup>107</sup> Jerome & Starkey, p.441.

<sup>108</sup> *Plaza v. Poland*, 2011, para.71.

<sup>109</sup> Mol, *Strengthening Child Participation Rights in the Case Law of the ECtHR*, 2022.

<sup>110</sup> CRC Committee, General Comment 20, para.22.

<sup>111</sup> *Ibid*, para.23.

<sup>112</sup> *Ibid*, para.22.

<sup>113</sup> CRC Committee, General Comment 4, para.32.

<sup>114</sup> Jerome & Starkey, p.441.

<sup>115</sup> CRC Committee, General Comment 20, para.25; CRC, Article 5.

<sup>116</sup> *Ibid*, para.42.

<sup>117</sup> CRC Committee, General Comment 6, para.84.

<sup>118</sup> CRC Committee, General Comment 4, para.7.

<sup>119</sup> CRC Committee, General Comment 20, para.23.

<sup>120</sup> Euro-Med Human Rights Monitor, p.94.

opportunity to express their views on all matters affecting them as an integral part of their right-holder position.<sup>121</sup>

## 2.5. Relationship Between Protection and UMC's Agency

### 2.5.1. Reinterpretation of Vulnerability in CRC

Entry into the country and involvement in migration procedures are precarious for UMCs, necessitating robust protection measures.<sup>122</sup> CRC Article 22 stipulates that UMCs shall receive appropriate protection and humanitarian assistance to ensure their enjoyment of rights as outlined in the CRC and other international instruments. At borders, UMCs can be subject to violence and arbitrary detention.<sup>123</sup> UMCs are particularly vulnerable to risks such as trafficking, exploitation, and abuse that affect their life, survival, and development.<sup>124</sup> NGOs working with UMCs face numerous challenges related to the need for enhanced protection.<sup>125</sup>

The need for protection due to their vulnerabilities and emphasis on protecting UMCs in CRC Article 22 should not be linked to children's absence of agency. Even though it might be motivated by high ideals of protecting UMCs, the position on the absence of UMCs' agency risks new problems in children's rights.<sup>126</sup> Restrictive protection is not in the best interest of the UMCs during all stages of the displacement cycle.<sup>127</sup> Sustaining agency rights while considering the best interests of the child requires dealing with what is right and wrong for children.<sup>128</sup> Despite there being no one-size-fits-all right or wrong for children's agencies, Article 22 indirectly leads to enshrining children with agency rights. According to Article 22, protection should aim at the enjoyment of other CRC rights. Rather than merely a protectionist perspective, Article 22 should be understood as having a more holistic approach to protection.

The 'protection' mentioned in Article 22 embodies protecting a child's right to agency. The CRC Committee's approach shows that protecting UMCs is not a merely restrictive and top-down act. The Committee says that UMC's views and wishes should be considered while adopting protective measures.<sup>129</sup> To find a durable solution for child rights violations, UMCs should be heard, and legal guardians should be appointed immediately to ensure they can be properly represented.<sup>130</sup> So, protecting UMCs under Article 22 indirectly extends to appointing a guardian, sustaining effective participation and eventually protecting children's agency rights.

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<sup>121</sup> CRC Committee, General Comment 4, para.8.

<sup>122</sup> CRC Committee, General Comment 20, para.22.

<sup>123</sup> Euro-Med Human Rights Monitor, p.94.

<sup>124</sup> CRC Committee, General Comment 6, para.23.

<sup>125</sup> Ibid.

<sup>126</sup> Hanson & Nieuwenhuys, p.5.

<sup>127</sup> CRC Committee, General Comment 6, para.19.

<sup>128</sup> Hanson & Nieuwenhuys, p.5.

<sup>129</sup> CRC Committee, General Comment 6, para.25.

<sup>130</sup> Stichting Vluchteling, Preparatory note for online roundtable discussion: Unaccompanied minors off the grid: Trafficking & Smuggling, 2024.

## 2.5.2. Vulnerability in ECHR and ECtHR

The ECtHR recognises that UMCs are a particularly vulnerable group. This approach of focusing on vulnerability and the need to care for UMCs is stated in the *Rahimi v. Greece* decision.<sup>131</sup> States need to sustain quick identification, placement, and support.<sup>132</sup> The ECtHR decides on violations of Articles 3 (prohibition of inhuman or degrading treatment) and 8 (right to respect for private life) when the state party does not sufficiently protect UMCs.

ECHR Article 3 needs a minimum level of severity to be applicable. ECtHR uses the vulnerability concept to analyse this requirement. This leads to lowering the threshold of Article 3 for migrant children.<sup>133</sup> The Court found a violation of Article 3 in the case *Khan v. France*<sup>134</sup> and highlighted that UMCs belong to the category of the most vulnerable persons in society. According to the Court, UMCs should not stay in an environment unsuited to their status as children and in a situation of insecurity.<sup>135</sup> In another case of *O.R. v. Greece*<sup>136</sup>, ECtHR held that there had been a violation of Article 3 since UMCs were placed in an environment that was unsuitable for children regarding security, accommodation, hygiene and access to food and care.<sup>137</sup>

ECtHR's approach to the protection of vulnerable UMCs does not create a new obligation; rather, it uses vulnerability to duly consider the context of the specific case.<sup>138</sup> The vulnerability can be defined with the 'magnifying glass' metaphor.<sup>139</sup> <sup>140</sup>The issue with the Court's approach to vulnerability lies in its potential to create a conceptualised group of UMCs<sup>141</sup> viewed solely as subjects of rights in need of protection, thereby overlooking the importance of recognising and fostering child agency. Overall, unlike the CRC Committee, the child agency is not clearly underlined in ECtHR decisions. However, there are some hints that connect the protection of UMCs to child agencies. In *Darboe and Camara v. Italy*<sup>142</sup>, there were shortcomings in the ability to file an asylum request, and UMCs were placed in an overcrowded adult reception centre. The ECtHR held that besides the violation of Article 3, shortcomings in procedural guarantees violate Article 8 of the Convention.<sup>143</sup> According to the Court, respecting private life requires the integrity of a person both psychologically and physically.<sup>144</sup> Procedural guarantees to file a request are seen as aspects that are connected to the integrity of

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<sup>131</sup> *Rahimi v. Greece*, para.87.

<sup>132</sup> Council of Europe, Joint Note, p.8.

<sup>133</sup> Beduschi, Vulnerability on trial: protection of migrant children's rights in the jurisprudence of international human rights courts, 2017, p. 80.

<sup>134</sup> *Khan v. France*, 2019.

<sup>135</sup> ECtHR, Factsheet: Protection of Minors, 2024, p.12.

<sup>136</sup> *O.R. v. Greece*, 2024.

<sup>137</sup> ECtHR, Factsheet, p.12.

<sup>138</sup> Baumgartel, Facing the challenge of migratory vulnerability in the ECtHR, 2020, p.28.

<sup>139</sup> Beduschi, p.82.

<sup>140</sup> ECtHR, Factsheet, p.12.

<sup>141</sup> Baumgartel, p.12.

<sup>142</sup> *Darboe and Camara v. Italy*.

<sup>143</sup> ECtHR, Factsheet, p.12.

<sup>144</sup> *Darboe and Camara v. Italy*, para.151.



UMCs. The obligation to protect the integrity of children can only be done if they are protected as active agents who can take action.

### 2.5.3. Balance Between Agency and Protection

There are also instances where protection requires agency restriction. The theory of thinning and thickening of agency can be used to explain the balance between protection and agency.<sup>145</sup> In the case of precarious situations such as trafficking, exploitation, abuse and violence, which the Committee highlights several times in the General Comment<sup>146</sup>, the agency can be thinned to protect UMCs. In situations where the agency should be thinned for the best interests of UMCs, individual experiences, evolving capacities, vulnerabilities, and risk factors should be assessed case-by-case. Even though agency gets thin sometimes, this does not mean there is a lack of agency. It should always be continuous.<sup>147</sup> As agency can be restricted at different levels, it can also get broadened at different levels. In 'thick agency', children have broad options to choose from. This can be explained as the situations where children's participatory rights weigh more importance than protection rights.<sup>148</sup> UMCs should have broad options to choose which recreational, artistic, and cultural activity they want to engage in.<sup>149</sup> The agency level can change, but it should be balanced and interpreted through a child rights-based lens.

In ECtHR case law, to balance the emphasis placed on protecting vulnerable groups, vulnerability should be assessed on a case-by-case basis rather than being regarded as an inherent characteristic of UMCs.<sup>150</sup> The CRC Committee's approach can also be used to build a bridge between protection and participation. The Committee says that practical measures should be taken to protect children. These include providing children with information about the risks they may encounter.<sup>151</sup> This shows that empowering children with information is a practical method for protection and realising the right in CRC Article 22. UMCs who are sustained with agency rights are more capable of protecting themselves, and fewer resources will be required to protect children from outside dangers. In that way, the exposure risks can be eliminated, and children can be more effectively protected.

### 2.5.4. Age Assessment: A Barrier to Protection

Age assessment is a prerequisite for UMCs to access the rights and protections enshrined in the CRC and ECHR. Accepting a false declaration of adulthood can strip away all protection specific to UMCs and render discussions on child agency meaningless. To prevent this, the CRC Committee advocates that UMCs should benefit from the doubt. An example is the case of *A.D. and A.D. v. Spain*<sup>152</sup>, where the Committee emphasised that children should be presumed to be minors and treated as such,

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<sup>145</sup> Bell & Payne, p.1029.

<sup>146</sup> CRC Committee, General Comment 6, para.50-53.

<sup>147</sup> Bell & Payne, p.1029.

<sup>148</sup> Ibid.

<sup>149</sup> CRC, Article 31.

<sup>150</sup> Baumgartel, p.12.

<sup>151</sup> CRC Committee, General Comment 6, para.24.

<sup>152</sup> *A.D. and A.D. v. Spain*, 2017.

benefitting from protections until it is definitively established that they are 18 years old.<sup>153</sup> Furthermore, age is a crucial factor in determining a child's capacities and in giving due weight to their views.<sup>154</sup> Therefore, states should refrain from using age assessment methods that have a wide margin of error.<sup>155</sup>

The ECtHR adopts an approach parallel to that of the CRC Committee. In cases such as *Darboe and Camara v. Italy*<sup>156</sup> and, more recently, *T.K. v. Greece*, the Court emphasised that not presuming the minority status of UMCs implicates the state's responsibilities under Articles 3 and 8 of the ECHR.<sup>157</sup> The Court asserts that the presumption of minority age is integral to protecting private life.<sup>158</sup> Additionally, the Court has highlighted the need to avoid unreasonable delays in age assessment procedures, as seen in *Mahamed Jama v. Malta*<sup>159</sup>, in which children reached the age of majority while awaiting age determination.<sup>160</sup> The falsified age of applicants or delays in assessment should not serve as a barrier to the provision of child-specific rights. Such barriers often stem from a discriminatory culture of disbelief against UMCs.<sup>161</sup>

## 2.6. Privacy and Right to Agency

### 2.6.1. Right to Privacy for UMCs

Despite facing similar human rights abuses as adults, UMCs encounter unique challenges in asserting their privacy rights due to their dependent and vulnerable position in the migration context.<sup>162</sup> The power dynamics they navigate during migration often exceed their capabilities, necessitating additional support to be recognised as agents with rights. This power dynamic with UMCs makes it challenging to protect their right to privacy in CRC Article 16 and respect for private life in ECHR Article 8.

ECHR Article 8 secures an individual sphere where people can freely pursue the fulfilment of their personality and development.<sup>163</sup> Any interference with the right to privacy must be in accordance with the law, have a legitimate aim and be necessary in a democratic society. ECtHR interprets 'private life' in Article 8 very widely, covering appearance, dress, lifestyle and sexual orientation, controlling persons seeing and touching the individual.<sup>164</sup> Furthermore, ECtHR's interpretation of privacy is

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<sup>153</sup> Doek, Individual communications submitted under the under the Optional Protocol to the CRC on a Communications Procedure and Admissibility, 2022, p.22.

<sup>154</sup> CRC, Article12(1).

<sup>155</sup> CRC Committee, Joint General Comment No. 4 of the CMW and No. 23 of the CRC in the context of International Migration: States parties' obligations in particular with respect to countries of transit and destination, 2017, para.4.

<sup>156</sup> *Darboe and Camara v. Italy*, para.153-154.

<sup>157</sup> *T.K. v Greece*, 2024.

<sup>158</sup> Raissan, *Unaccompanied Children and the Use of Age as a Barrier to Rights*, 2024.

<sup>159</sup> *Mahamed Jama v. Malta*, 2015, para.147 and *Abdullahi Elmi and Aweys Abubakar v. Malta*, 2016, para.143-148.

<sup>160</sup> Council of Europe, Joint note, p.9.

<sup>161</sup> Raissan.

<sup>162</sup> *Crawley*, p.18.

<sup>163</sup> ECtHR, *Guide on Article 8 Right to Respect for Private and Family Life*, 2022, para.562.

<sup>164</sup> Equalityhumanrights, *Article 8: Respect for your private and Family Life*.

strongly connected to child agency as it also requires the development of personal identity, forming relationships with others and the right to participate.<sup>165</sup>

The idea that UMC is 'helpless' and should be 'thankful' to be cared for is a misconception that fuels unlawful interference with their privacy.<sup>166</sup> Privacy is closely connected to UMC's sense of self, and unlawful interferences to their privacy should be avoided when recognising them as right-holder agents. The agency of UMCs is determined by what others perceive to be appropriate, often based on preconceived notions.<sup>167</sup> The migration system is adult-focused, leading to the misinterpretation of the vulnerability of UMCs as a lack of power and capacity. This results in UMCs remaining silent in situations when they wish to voice their criticisms of the system.<sup>168</sup>

To address this, the migration setting within the social context should encourage individual agency and balance it with the need for protection from external factors that can disrupt their private lives with unlawful interference. To maintain this, human and non-human arrangements and infrastructures should support agency.<sup>169</sup> This should include privacy-friendly facilities for UMCs and trained staff who respect their privacies. Considering the power dynamics, professional caretakers and authorities can easily underestimate the UMC agency and overestimate their own power.<sup>170</sup> The Committee emphasises the importance of space for adolescents and their belongings.<sup>171</sup> So, sustaining agency rights is not only about providing protection but also about eliminating the factors that interfere with their rights unlawfully, including re-arranging the settings in which UMCs will construct their private sphere. This nuanced approach is crucial to ensure UMCs are not only protected but also empowered to have a right-holder position.<sup>172</sup>

## 2.6.2. Privacy Rights of Adolescent UMCs

For adolescent health and development, the right to privacy is an integral part of the agency because the right to privacy takes on increasing significance during adolescence.<sup>173</sup> Adolescent UMCs should be able to get confidential services, counselling and treatments without the presence of an adult person who is legally responsible for them.<sup>174</sup> Considering their evolving capacities, they are mature enough to get these services alone and with confidentiality.<sup>175</sup> The confidentiality in receiving these services is an integrated part of their agency.<sup>176</sup> This requirement for confidentiality also extends to their correspondence and communications.<sup>177</sup> For adolescents, confidentiality and building up their

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<sup>165</sup> Ibid.

<sup>166</sup> Björklund, *Unaccompanied Refugee Minors: Findings from a Research Project*, 2016, p.12.

<sup>167</sup> Bell & Payne, p.1039.

<sup>168</sup> Björklund, p.12.

<sup>169</sup> Oswell, p.9.

<sup>170</sup> Wernesjö, *Unaccompanied asylum-seeking children: Whose perspective?*, 2012, p.501.

<sup>171</sup> CRC Committee, General Comment 20, para.46.

<sup>172</sup> Bell & Payne, p.1029.

<sup>173</sup> CRC Committee, General Comment 20, para.46.

<sup>174</sup> CRC Committee, General Comment 4, para.11.

<sup>175</sup> Ibid.

<sup>176</sup> Ibid.

<sup>177</sup> CRC Committee, General Comment 20, para.46.

agencies gain more importance than a protectionist and controlling approach. This change in weight given to freedom and agencies parallels their increasing maturity and capacities.

Confidentiality extends to data collection for UMCs. State parties are obliged to protect the confidentiality of information they collect in relation to every UMC in a way consistent with the right to privacy in CRC Article 16 for all settings, including health and social welfare.<sup>178</sup> Protecting personal data is also fundamentally important for respect for private life guaranteed by ECHR Article 8.<sup>179</sup> Although systematic data collection for adolescent UMC is necessary, it should be done in an adolescent-sensitive way, and when possible, they should be able to participate in the process.<sup>180</sup> The information legitimately collected and shared for one purpose should not be inappropriately used for another.<sup>181</sup> This information should only be accessible by third parties in compliance with due process and law authorisation.<sup>182</sup> The right to privacy entitles adolescents to have access to their records.<sup>183</sup> The records kept by educational, health care, childcare, protection and justice services should be accessible to adolescents. Effective and accessible procedures should be provided by law to enable UMCs to access any information concerning them, as ECtHR states in the *Yonchev v. Bulgaria* decision.<sup>184</sup> This is an integral part of their right to privacy.<sup>185</sup> Their control over the records, even though it is limited, is an important factor for developing the right to the agency when it is coupled with dialogue with adolescents where privacy breaches have occurred.<sup>186</sup> Adolescent UMCs who have knowledge or degree of control over their records, considering their evolving capacities and maturity, can have greater agency and control in their lives.

## 2.7. Right To Education to Develop Agency

### 2.7.1. Importance of Right to Education for Agency

The right to education, which is mentioned in CRC Article 28, CRC Article 29 and ECHR Protocol No:1 Article 2, is important to form children's agencies. It is one of the provisions of ECHR that mentions 'children'.<sup>187</sup> States should sustain access to education for all children during all stages of the displacement cycle.<sup>188</sup> It is both a substantive and enabling right because it works as a multiplier of other rights.<sup>189</sup> It enhances other rights and freedoms while positioning the child as a right-holder agent. From a child development perspective, agency is a practical achievement that is progressively

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<sup>178</sup> CRC Committee, General Comment 6, para.29.

<sup>179</sup> ECtHR, Guide on Article 8, para.206.

<sup>180</sup> CRC Committee, General Comment 4, para.13.

<sup>181</sup> CRC Committee, General Comment 6, para.29.

<sup>182</sup> CRC Committee, General Comment 20, para.46.

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

<sup>184</sup> ECtHR, Guide on Article 8, para.211; *Yonchev v. Bulgaria*, 2017, para.49-53.

<sup>185</sup> CRC Committee, General Comment 20, para.46.

<sup>186</sup> *Ibid.*

<sup>187</sup> Kil Kelly, p.247.

<sup>188</sup> CRC Committee, General Comment 6, para.41.

<sup>189</sup> Jerome & Starkey, p.440.

developed with schooling.<sup>190</sup> This developmental process overlaps with the child's increased capacity to be a right-holder agent and is recognised as such in the outside environment.

Right to education plays an important role in the life of adolescent UMCs as a venue for socialisation, learning and development.<sup>191</sup> The UMCs should be enrolled with appropriate school authorities quickly and get supervision to maximise their learning opportunities.<sup>192</sup> The states should guarantee the universality, high quality and inclusiveness for the development of adolescents in the long term.<sup>193</sup> Secondary education<sup>194</sup>, has a positive impact on adolescent development.<sup>195</sup> Following this, higher education should be accessible to all on the basis of capacity by every appropriate means.<sup>196</sup>

### 2.7.2. Content of Education

The content and purpose of education are vital for ensuring the rights holder position of UMCs.<sup>197</sup> Education should empower UMCs by developing their skills, human dignity, self-confidence, self-esteem and capacities.<sup>198</sup> As CRC article 29(1)(a) says education should be directed to a child's development of the fullest potential. States should ensure that children have the right to capacity building.<sup>199</sup>

Having more participatory and collaborative educational pedagogy is among the aims of education covered in CRC Article 29.<sup>200</sup> The right to agency is not a stand-alone concept a child can individually achieve. It has a more collective perspective because it enshrines situating UMCs as right holders in society. Firstly, they need to be effectively integrated into society. Education is one of the most powerful and important tools for integration.<sup>201</sup> UMCs should have early and effective access to inclusive, formal education.<sup>202</sup> The education should aim to prepare children for a responsible life in a free society<sup>203</sup> and develop respect for different values in society, including their own values<sup>204</sup>.

Although integration into the host country's society is important, this should not be misinterpreted as neutralisation of UMCs' own cultural values. Learning and preserving the culture and norms of the

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<sup>190</sup> Ibid.

<sup>191</sup> CRC Committee, General Comment 4, para.17.

<sup>192</sup> CRC Committee, General Comment 6, para.42.

<sup>193</sup> CRC Committee, General Comment 20, para.68.

<sup>194</sup> CRC, Article 28(1)(b).

<sup>195</sup> CRC Committee, General Comment 20, para.68.

<sup>196</sup> CRC, Article 28(1)(c).

<sup>197</sup> Jerome & Starkey, p.441.

<sup>198</sup> CRC Committee, General Comment No. 1: The Aims of Education and Jerome & Starkey, p.441.

<sup>199</sup> Jerome & Starkey, p.441.

<sup>200</sup> CRC Committee, General Comment 20, para.68.

<sup>201</sup> Hellenic Republic Special Secretariat for the protection of UAMs, Roadmap to adulthood: Milestones towards a Smooth Transition into Adulthood, 2021.

<sup>202</sup> Ibid.

<sup>203</sup> CRC, Article 29(1)(d).

<sup>204</sup> Ibid, Article 29(1)(c).

country of origin is also an inseparable part of the sense of self and agency. All UMCs have the right to sustain their values and cultural identity.<sup>205</sup> The host country should respect the values and norms<sup>206</sup> of UMCs while sustaining the right to education. Education should aim to develop respect for the child's cultural identity, language, and values, both for the country in which they live and where they originate.<sup>207</sup> The integration and respect for culture and norms should go together in a balanced way.

The wording of the CRC article directs state parties to adopt a balanced and inclusive approach to the aims of education. The education should aim to develop respect for different civilisations<sup>208</sup>, including the country of origin and the host country. The state should take measures to end discrimination against migrants, to access education and get culturally and religiously appropriate education.<sup>209</sup> This right also extends to the maintenance and development of their native language.<sup>210</sup> To be integrated into society and effectively participate, they need to have the right to get an education in the language of the host country. This shows that special attention should be given to guiding UMCs who have language, traditions, and norms different from those of the host country.<sup>211</sup>

The secondary education curriculum should be tailored to empower adolescent UMCs to participate actively, promote civic engagement, and prepare adolescent UMCs to lead responsible lives in a free society.<sup>212</sup> The design of the learning environments should be considered to develop adolescent UMCs' full potential and make them continue to school.<sup>213</sup> The education should aim to facilitate adolescents' capacity for learning and motivation for peer work, and it should focus on learning with experience, exploration, and limit testing.<sup>214</sup> However, within the maximum extent of the available resources<sup>215</sup> of the host country, this quality of education may not be achieved. This can cause UMCs to move away from public education and look out for other opportunities to pursue the development of their agencies, which they cannot do via the public education system.

### 2.7.3. Obstacles to Education and Agency

Children should continue to school until they are equipped to face hardships and get ready to be confronted with life.<sup>216</sup> However, the lack of opportunities to access secondary and higher education can impair agency rights from different perspectives in the long run. For UMCs, the transition to

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<sup>205</sup> CRC Committee, General Comment 6, para.42.

<sup>206</sup> CRC Committee, General Comment 4, para.16.

<sup>207</sup> CRC, Article 12(1)(c).

<sup>208</sup> Ibid.

<sup>209</sup> CRC Committee, General Comment 20, para.70.

<sup>210</sup> CRC Committee, General Comment 6, para.42.

<sup>211</sup> CRC Committee, General Comment 4, para.16.

<sup>212</sup> CRC Committee, General Comment 20, para.72.

<sup>213</sup> Ibid.

<sup>214</sup> Ibid.

<sup>215</sup> CRC, Article 4.

<sup>216</sup> CRC Committee, General Comment 4, para.17.

adulthood is uncertain and dangerous.<sup>217</sup> This transition is challenging because of the lack of a clear pathway about their future and a safety net.<sup>218</sup> Lack of access to secondary and higher education makes this transition more challenging. These problems can be mitigated if the UMCs can be recognised as active right-holder agents by education and training. So, they can be more aware of their rights, form social networks and feel connected to the community.<sup>219</sup> For this purpose, some practices aim to prepare UMCs to transition to adulthood with special interviews when they are 17 years old.<sup>220</sup> Despite the fact that these special interview methods can be practically useful, they can be insufficient alone to empower adolescent UMCs as right-holders. The development of the right to agency through education can bring more positive and long-term benefits to adolescent UMCs in the transition to adulthood.<sup>221</sup>

Education must be directed to the development of a child's personality, talents and mental and physical abilities.<sup>222</sup> UMCs' need to build up a life in the labour market can overcome the interest they can get from classic education. This raises the question of whether UMCs can refuse public education as a part of their exercise of agency. During adolescence, many children leave school to start working with financial worries to support themselves and existing families.<sup>223</sup> Some state parties support the involvement of UMCs in the labour market. German Federal Employment Agency designed programmes to facilitate UMCs' integration into the labour market. It aims to support UMCs who have difficulties accessing the labour market due to a lack of school attendance caused by language and cultural barriers before or during their escape from the origin country. With the help of career information centres, they sustain vocational training and transitional programs.<sup>224</sup> If it is in accordance with international standards and does not jeopardise the enjoyment of other rights, participation in work activities can be beneficial for the development of the adolescent<sup>225</sup> and empowering their agency rights. However, it should not prevent the enjoyment of the right to education.<sup>226</sup>

Besides voluntarily moving away from the provided education services, UMCs can also be excluded from the right to education due to external factors. Continuous education may not always be possible due to practical and logistical barriers that may prevent them from attending school.<sup>227</sup> As a result of this, UMCs may not even be able to get formal education until the age of majority. Delays in enrollment, limited classes for upper secondary schools, lack of access to remote learning, limited internet connection and equipment, and lack of transportation are among the barriers children can face in attending schools. Furthermore, if the local community of the host country is reluctant to accept

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<sup>217</sup> Council of Europe, A compendium of good practices: The transition of unaccompanied migrant children to adulthood, 2023, p.8.

<sup>218</sup> Council of Europe, Building futures, sharing good practices: Migrant children's transition to adulthood, 2022.

<sup>219</sup> Jerome & Starkey, p.445.

<sup>220</sup> Hellenic Republic Special Secretariat.

<sup>221</sup> Jerome & Starkey, p.445.

<sup>222</sup> CRC, Article 29(1)(a).

<sup>223</sup> CRC Committee, General Comment 4, para.18.

<sup>224</sup> Hellenic Republic Special Secretariat.

<sup>225</sup> CRC Committee, General Comment 4, para.18.

<sup>226</sup> Ibid.

<sup>227</sup> Hellenic Republic Special Secretariat.

migrant children, this creates an important barrier for UMCs to continue school.<sup>228</sup> These obstacles that UMCs can face can decrease their motivation to continue learning.

## 2.8. Conclusions

The rights under the ECHR and CRC foster the development of the right to agency. The CRC and General Comments proactively engage with the agency rights of children while balancing the need to protect UMCs. Whereas the ECHR primarily focuses on vulnerability,<sup>229</sup> UMCs' capacities can change and develop, so it is essential to empower them with agency rights to foster their growth and enhance their capabilities.<sup>230</sup> Evolving capacities are cross-cutting factors to consider while developing the right to agency. The age determination is a prerequisite for accessing agency rights granted to UMCs. Correctly determining the age is crucial as it also relates to evolving capacities and the due weight given to a child's views. They may not get protection if they are incorrectly recorded as majors due to a discriminatory approach.

Participation rights can enable UMCs to act as active agents. To participate effectively, UMCs should have access to diverse and child-friendly information.<sup>231</sup> Effective communication requires audiences who understand the evolving capacities of UMCs.<sup>232</sup> Guardians, as crucial audiences and gatekeepers of agency, create space for UMCs to exercise their agency.<sup>233</sup> Guardians play a key role in ensuring that due weight is given to their views.<sup>234</sup> When a child's decisions have significant consequences, even though they have the right to exercise agency in major life decisions, appropriate supervision may be necessary.<sup>235</sup>

Despite the dichotomy between agency and protection rights, these two are intrinsically connected to each other. Protecting the physical and psychological integrity of UMCs requires procedural guarantees that inherently empower children.<sup>236</sup> Similarly, according to CRC, the need for protection does not imply an absence of agency but embodies the child's right to agency.<sup>237</sup> However, the dilemma arises whether children should be allowed to make significant decisions under their agency rights or be prevented by adults. Furthermore, this poses the question of whether a child should be free to cross a dangerous bridge. One approach to address this is through the thickening and thinning of continuous agency, which requires careful consideration of what is right or wrong for children.<sup>238</sup>

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<sup>228</sup> Ibid.

<sup>229</sup> Vandenhole & Ryngaert, p.68-92; Rahimi v. Greece, para.87; ECtHR, Factsheet, p.12.

<sup>230</sup> Oswell, p.44.

<sup>231</sup> CRC, Article 13(1); ECHR, Article 10; CRC Committee, General Comment 12, para.124; ECtHR, Guide on Article 10, para.151

<sup>232</sup> CRC Committee, General Comment 6, para.25; CRC, Article 5.

<sup>233</sup> Council of Europe, Joint note, p.9.

<sup>234</sup> CRC Committee, General Comment 12, para.124.

<sup>235</sup> CRC Committee, General Comment 4, para.7.

<sup>236</sup> Darboe and Camara v. Italy, para.151.

<sup>237</sup> CRC Committee, General Comment 20, para.22; General Comment 6, para.25.

<sup>238</sup> Bell & Payne, p.1029; Hanson & Nieuwenhuys, p.5.



Protection is inherently linked to the need to empower children with agency rights and develop their capacities.<sup>239</sup> Restricting a child's agency to protect their agency rights requires careful consideration to avoid severely limiting their overall development and capacities. Using the bridge metaphor, it can be argued that UMCs should be allowed to cross a dangerous bridge but should be provided with safeguards, information about potential risks<sup>240</sup> and the capacity to handle dangers. To support this, the right to education, which is regarded as a multiplier of other rights<sup>241</sup>, can be used to solve the problem of undermining the importance of privacy rights, which is fundamental for UMC's agencies.<sup>242</sup>

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<sup>239</sup> CRC Committee, General Comment 20, para.22; General Comment 6, para.25.

<sup>240</sup> CRC Committee, General Comment 6, para.24.

<sup>241</sup> Jerome & Starkey, p.440.

<sup>242</sup> Björklund, p.12; Equalityhumanrights, Article 8: Respect for your private and Family Life.

## Chapter 3: Turkish Domestic Law Regulations and Practices Regarding UMCs' Right to Agency

### 3.1. Introduction to Turkish Domestic Law Regulations Regarding Right to Agency

Türkiye is party to both CRC and ECHR. UMCs in Türkiye, irrespective of their reason for entry, must be treated first and foremost as "children," stripped of all other distinctions.<sup>243</sup> This mandates their recognition as individuals entitled to rights. Although the concept of agency rights is not explicitly mentioned in any legislation; the protection, participation, education, and privacy rights of children are governed by domestic law and its supplementary provisions. While the Constitution of the Republic of Türkiye establishes fundamental principles, the regulations specifically concerning UMCs are detailed in secondary laws. Furthermore, the cultural norms and the operational methods of institutions and personnel greatly shape the practical application of these rules.

### 3.2. Evolving Capacities of Children in Türkiye

Despite the absence of systematic data collection on the ages of UMCs, it is estimated that those arriving in Türkiye generally fall within the 11-17 age range, with the majority being aged 15-17 and male.<sup>244</sup> These older adolescent males constitute a significant demographic whose agency rights require prioritised regulation and protection. They endure various dangers, such as violence, long journeys, malnutrition, and hygiene challenges, and persevere through these adversities to reach Türkiye.<sup>245</sup> The act of migrating alone, facing the loss of family members, and making migration decisions independently are indicators of their agency.<sup>246</sup> Their experiences may enhance their understanding of situations and enable them to make reasoned decisions about their futures, underscoring the importance of granting them greater participation and decision-making space as active right-holders. However, alongside their agency, UMCs also require protection, and their best interests must be safeguarded.<sup>247</sup> There are calls for enhanced protection of UMCs in Türkiye, the country's Concluding Observations issued in 2001, 2012, and 2023.<sup>248</sup> However, they have not sufficiently highlighted the need to recognise and support child agency and capacities.

Considering the cultural and social structures of Türkiye and the countries of origin of UMCs while evaluating their evolving capacities is crucial. The majority of UMCs in Türkiye originate from Syria, Afghanistan, and Iran.<sup>249</sup> These countries have cultural and social structures that traditionally emphasise collective values over individualisation<sup>250</sup>, which may influence UMCs to be more passive, less autonomous and reliant on adult supervision. In Hatay, Türkiye, the notions of agency and independence are not prominent concerns for Syrian children.<sup>251</sup> Traditionally, children rely on their

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<sup>243</sup> Çiçek, Ulusal ve uluslararası göç hukukunda refakatsiz çocukların yeri, 2021, p.44.

<sup>244</sup> Altıntop, Zorunlu göçte refakatsiz çocuk olmak: türkiye ve italya örnekleri, 2022, p.72.

<sup>245</sup> Kerem, p.300.

<sup>246</sup> Ibid.

<sup>247</sup> Ibid.

<sup>248</sup> CRC Committee, Concluding observations of the Committee on the Rights of the Child: Turkey, 2001, 2012, and 2023.

<sup>249</sup> Altıntop, p.72.

<sup>250</sup> Kerem, p.300.

<sup>251</sup> Bulat & Al-Houssami, Interview with İnsan Charity, 2024.

families for guidance and support. When unaccompanied, this dependency shifts to the institutions caring for them.<sup>252</sup> This cultural context significantly impacts the assessment and recognition of UMCs' evolving capacities, potentially resulting in limited acknowledgement of their agency rights.

### 3.3. Participation Rights of UMCs In Turkish Domestic Law

#### 3.3.1. Outlines of effective participation

Two distinct scenarios arise concerning domestic legislation and its practical application. In the first scenario, although existing legislation may support effective participation, ineffective implementation ensues due to information gaps and a lack of expertise. Conversely, the second scenario illustrates a situation where domestic legislation neglects to address the pivotal role of participation and the imperative to consider children's perspectives.

The scattered provisions for the international protection application process, age determination procedures, institutional services, and communication with organisations and siblings include providing information and facilitating participation.<sup>253</sup> Even though legislation sustains a space for participation, it is not effectively applied in practice. Law on Foreigners and International Protection (LFIP) Article 123(2)(a) says that the placement of accommodation services should be done according to the child's opinion.<sup>254</sup> However, without the information provided, effective participation cannot be sustained. Despite NGO efforts, there are problems informing children about the placement procedure.<sup>255</sup> The interviews conducted with UMCs show that they did not know if they were going to be deported or placed in a dormitory on the way.<sup>256</sup> This shows that there are instances when children cannot effectively participate or get information in practice despite the regulations.

There are also instances when the child's participation is omitted in the legislation. Although the first placement of children in an accommodation requires taking the child's views into consideration, the replacement procedure lacks such regulation. During their stay, they can be relocated and moved to different institutions with stricter rules. This means relocation can happen without listening to UMCs' views.<sup>257</sup> Interviews with children reveal that they are 'asked' in an imperative manner whether they are content with relocating to another city. Children often accept changing cities without knowing their destination.<sup>258</sup> This demonstrates that their input is largely invisible at the discretion of facility administrators in the absence of binding regulation across all facilities.

#### 3.3.2. Right to Information as an Integral Part of Freedom of Expression

There are various regulations scattered in domestic law that aim to sustain UMCs with sufficient information. An example can be the basic information brochure, which will be reproduced and made available in sufficient numbers at the application authorities or at the units likely to receive applications

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<sup>252</sup> Ibid.

<sup>253</sup> Akgül, Devletler özel hukukunda refakatsiz çocuklar, 2023, p.51.

<sup>254</sup> Altıntop, p.223.

<sup>255</sup> Ibid.

<sup>256</sup> Ibid.

<sup>257</sup> Altıntop, p.226.

<sup>258</sup> Ibid.

at border gates.<sup>259</sup> This can help UMCs be aware of their rights, possibilities and procedures they need to follow. They are also informed about the purpose and process of the age determination process. This is important because these procedures may have physical and psychological effects, and their opinion should be taken to recognise them as active agents.<sup>260</sup> Furthermore, the applicants and status holders have the right to be informed during the status determination procedure.<sup>261</sup> At every stage of procedures, the applicant should receive written and oral notification.<sup>262</sup> The written and oral notification should be in the language UMCs understand.<sup>263</sup> Besides the multilingualism in the information provided, it should also be considered that some UMCs may be unable to read. To solve this problem, they are provided with oral and written notifications.

The right to be informed about the status determination extends to benefiting from the interpreter and lawyer services.<sup>264</sup> Besides ensuring that children get sufficient information about the decision to be taken and the procedures to be carried out during the status determination procedure for effective participation; they also ensure that their opinions are listened to.<sup>265</sup> Children who cannot effectively communicate and express opinions due to some barriers, such as language and understanding of legal terms, can take advantage of interpreters and lawyers. The same rule applies during the interviews conducted for status determination. Furthermore, these interviews are conducted with qualified personnel. A psychologist or child development specialist takes place during the interviews.<sup>266</sup> With the help of the specialised personnel involved in the procedure, the children can understand the ongoing procedure and decisions better. Furthermore, these experts can sustain that UMCs have a voice in the process because they can understand and look out for children's wishes and interests. Although the regulations promise to provide effective participation, the content of information given and the specific expectations from interpreters and experts are vague.

### 3.3.3. Audiences of Participation

The importance of an appropriate audience is stated in Article 123 of the LFIP. It says that the interviews of children shall be conducted in the most appropriate environment for them and that experts may be present during these interviews. The experts are child development specialists, social workers, psychologists, and legal representatives. It is stated that the opinion of the relevant expert should be included in the decisions taken regarding the child and that the child's inability to express all his/her requests clearly should be considered at the decision-making stage. Article 70(2) of the LFIP says that the assistance of an interpreter may be provided if needed in the procedures related to UMCs. The language knowledge and training of the audience are very important, considering the diverse languages spoken by UMCs. Despite the national and widely spoken language being Turkish, the UMCs may not know this language, especially the first time they are identified.<sup>267</sup>

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<sup>259</sup> İçişleri Bakanlığı Emniyet Müdürlüğü Uygulama Yönetmeliği, 2006, p.7. (Referred as 'Application Directive')

<sup>260</sup> Arslan, p.107.

<sup>261</sup> Ibid, 103.

<sup>262</sup> Application Directive, p.8.

<sup>263</sup> Ibid.

<sup>264</sup> Arslan, p.103.

<sup>265</sup> Ibid.

<sup>266</sup> Ibid.

<sup>267</sup> Akgül, Devletler özel hukukunda refakatsiz çocuklar, 2023, p.51.

There is a lack of trained personnel in the field.<sup>268</sup> The personnel who know how to deal with UMCs suffering from war trauma and stress disorders are very limited.<sup>269</sup> This inhibits the effective participation and respect for agency rights. Because of their personal experiences, their ways of expressing themselves can be different, and they need an audience who can understand and recognise them as active agents. Most UMCs lack an appropriate audience that respects their agency rights within the health system. While UMCs have access to health services, most of their health issues are addressed by dormitory infirmaries.<sup>270</sup> They lack sufficient information to exercise agency rights effectively.<sup>271</sup> The most significant obstacle is the absence of interpretation services.<sup>272</sup> Consequently, UMCs are unable to comprehend what health practitioners are saying or articulate their own health issues due to the language barrier. Under these circumstances, they are deprived of a voice to express their concerns and cannot understand the health practitioner's intended actions.

### 3.3.4. The Guardianship System

The guardian essentially represents the minor under guardianship in all legal proceedings.<sup>273</sup> As the UMCs are staying in Türkiye, Turkish Domestic Law applies to the process of appointing guardians.<sup>274</sup> The domestic law does not differentiate UMCs from Türkiye from UMCs outside Türkiye. In this sense, the management of the guardianship system institution in domestic law and its suitability for UMCs will be addressed.

The guardianship is regulated by public institutions. It is not autonomous. The general rule in the Turkish Civil Code says any child who is not under custody is to be placed under guardianship.<sup>275</sup> Article 404 of the Turkish Civil Code states that every minor who is not under parental authority shall be placed under guardianship, and officials who learn of the existence of a situation requiring guardianship while performing their duties are obliged to notify the competent guardianship authority immediately. So, not appointing guardians to UMCs in practice violates national law.<sup>276</sup>

Under the Child Protection Law, the Turkish Court has the discretion to decide on a guardian. It is in the court's discretion whether or not it is necessary. The court can decide on it with an injunction decision.<sup>277</sup> However, there is no fixed time limit, which can take time due to a backlog of cases. While deciding, the court applies the legislation scattered in the domestic law. The provisions of the Turkish Civil Code regarding the guardianship law<sup>278</sup> and the Regulation on Child Support Centers, which say

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<sup>268</sup> Koruyucu Aile Evlat Edinme Derneği, Refakatsiz sığınmacı çocuklar çalıştayı sonuç raporu, 2017, p.9.

<sup>269</sup> Ibid.

<sup>270</sup> Altıntop, p.229.

<sup>271</sup> Koruyucu Aile Evlat Edinme Derneği, p.13.

<sup>272</sup> Altıntop, p.229.

<sup>273</sup> Nalçacıoğlu Erden, Refakatsiz çocukların hukukî temsili: Seçilmiş Avrupa ülkeleri ve Türkiye açısından bir değerlendirme, 2023, p.40.

<sup>274</sup> Ibid.

<sup>275</sup> Nalçacıoğlu Erden, p.40.

<sup>276</sup> Çiçek, p.44.

<sup>277</sup> Çocuk Koruma Kanunu, 2005, Article 7(7).

<sup>278</sup> Türk Medeni Kanunu, 2001, Article 396.

that a guardian will be appointed primarily for those with no legal representative<sup>279</sup> are for all children. They are not tailored specifically for UMCs.<sup>280</sup> As the officials from the General Directorate of Child Services state, the primary target for UMCs is not appointing a guardian.<sup>281</sup> This makes it hard for the guardianship system to reply rapidly to the needs and specific conditions of UMCs. In Turkish law, there is no regulation stating that a guardian/representative must be appointed from the moment UMCs are found.<sup>282</sup> However, studies reveal that UMCs do not know their rights in Türkiye.<sup>283</sup> They also don't know how they can access these rights and the legal assistance available to them in exercising these rights.<sup>284</sup> This is caused by the lack of guardian. Considering the practical problems, regulations in guardianship institutions are insufficient<sup>285</sup> in answering the needs of UMCs.

Despite the Turkish Civil Code and Child Protection Law being silent in the appointment of guardians for UMCs, within the framework, it can be legally argued that they must be represented by a guardian as quickly as possible. Detailed provisions about consultancy exist in the administrative scheme. Only the Unaccompanied Minors Directive<sup>286</sup> and the Regulation on Child Support Centers<sup>287</sup> say a consultant shall be appointed. The 'consultant' is a person who does not have guardian powers and responsibilities.<sup>288</sup> The consultant is defined as "the professional staff member responsible for ensuring the adaptation of each child admitted to the institution, making follow-up, and monitoring the implementation and professional work plans."<sup>289</sup> Their appointment is done by the director of the institution where the UMCs are placed.<sup>290</sup> The term "representation" is not mentioned in the directive.<sup>291</sup> The consultant whom the UMCs meet every day may only be appointed as guardian if the court deems it necessary, such as in situations of family unification.<sup>292</sup> The consultant's duty includes planning the child's accommodations in the centre and educational and social activities. The consultant is also responsible for sustaining and informing the child about daily functions in the centre. This shows that a consultant is an important agent for sustaining effective child participation. Consultant's duties are, in fact, the duties that should be under the guardian's authority. However, as mentioned, there needs to be a court decision for a guardian and without this decision, a consultant follows these duties with fewer powers and responsibilities.<sup>293</sup> This creates a problem regarding the effective representation and participation of UMCs.

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<sup>279</sup> Ibid, Article 9(2).

<sup>280</sup> Nalçacıoğlu Erden, p.39.

<sup>281</sup> Ibid, p.40.

<sup>282</sup> Arslan, p.107.

<sup>283</sup> Çiçek, p.44.

<sup>284</sup> Ibid.

<sup>285</sup> Arslan, p.107.

<sup>286</sup> UMD, Article 10(1)(d).

<sup>287</sup> Ibid, Article 7(1)(d).

<sup>288</sup> Nalçacıoğlu Erden, p.39.

<sup>289</sup> UMD, Article 4(1)(ı).

<sup>290</sup> Çiçek, p.44.

<sup>291</sup> Ibid.

<sup>292</sup> Nalçacıoğlu Erden, p.40.

<sup>293</sup> Ibid, p.39.

### 3.3.5. Influence

There is a lack of meaningful regulation in the Unaccompanied Minors Directive, Turkish Civil Code, Child Protection Law, and the Regulation on Child Support Centers on the due weight that should be given to the opinions of the UMCs. According to the Application Directive of the Ministry of Interior, the application status for international protection of UMCs is subject to the decision of the adult who is obliged to take care of UMCs unless the child requests otherwise.<sup>294</sup> This shows that the child's requests are primary consideration for the status and application for international protection. However, there is no solid legal document underlining the importance of the child's views and how they are to be taken into consideration.

In practice, caretakers working in the care houses give special importance to the child's wishes and take their opinions seriously.<sup>295</sup> On the other hand, in the disaster regions stricken by the 6 February Earthquake, the emergency conditions coupled with the concept of childhood in the Middle East do not allow for taking UMCs' views seriously.<sup>296</sup> Among the various cultural backgrounds of the people of the Middle East, children are mostly seen as objects that need protection rather than subjects of rights.<sup>297</sup> The influence of the opinions and views of the UMCs on their status depends on the audience because of the absence of a general rule on child participation.

## 3.4. Protection of UMCs in Turkish Domestic Law

### 3.4.1. Approach to Vulnerability in Turkish Domestic Law

Domestic law aims to protect UMCs. This is stipulated in the Constitution of the Republic of Türkiye as the obligation to take measures to protect children against violence and abuse.<sup>298</sup> Reports indicate that the main threats faced by UMCs entering illegally include smuggling and trafficking.<sup>299</sup> Smugglers may confine them in unhealthy conditions, subject them to abuse, deprive them of liberty, or exploit them for illegal labour.<sup>300</sup> A field study in Türkiye shows that the experiences during migration negatively affect the level of UMCs' well-being.<sup>301</sup> Besides, it affects their development, mental health, relationships and social roles.<sup>302</sup>

The regulations to protect UMCs are scattered in the legislation. The Unaccompanied Minors Directive (UMD) is dedicated to safeguarding UMCs by regulating methods and principles related to the services and rights they can benefit from. Furthermore, LFIP includes UMCs in the list of those with special needs<sup>303</sup> in Article 66. The process of sending children to support centres is designed to be as fast as possible. Depending on the child's age, UMCs are placed in Social Services Child Protection

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<sup>294</sup> Application Directive, p.8.

<sup>295</sup> Bulat & Baycılı, Interview with Mavi Kalem, 2024.

<sup>296</sup> Bulat & Al-Houssami.

<sup>297</sup> Ibid.

<sup>298</sup> Türkiye Cumhuriyeti Anayasası, 1982, Article 41(4). (Referred as 'Constitution of the Republic of Türkiye')

<sup>299</sup> Çiçek, p.49.

<sup>300</sup> Ibid.

<sup>301</sup> Silav, Refakatsiz çocukların iyilik hallerini etkileyen faktörlerin incelenmesi, 2022, p.119.

<sup>302</sup> Seyitoğlu, Refakatsiz çocukların göç deneyimlerinin araştırılması ve sorunlarının incelenmesi, 2023, p.218.

<sup>303</sup> Yabancılar ve Uluslararası Koruma Kanunu, 2013, Article 3(l). (Referred as 'LFIP')

Dormitories or Nurseries immediately or after the procedures.<sup>304</sup> They will be given priority in the International Protection Applications.<sup>305</sup> In the case of asylum or asylum applications of UMCs, the Ministry will be informed immediately, and procedures will be initiated immediately in coordination with the Provincial Directorate of Social Services and or Child Branch Directorates.<sup>306</sup> Considering the vulnerabilities, promptness and simplification of the procedures are the primary aims of sustaining effective protection.

#### 3.4.2. Imbalance Between Agency and Protection

Imbalances between agency and protection rights arise due to the chaotic process and limited guidance. Despite procedural simplifications, the journey to a care house remains chaotic and even traumatic for UMCs.<sup>307</sup> NGOs closely monitor this process, providing children with adequate information and facilitating their meaningful participation.<sup>308</sup> UMCs are more likely to seek help from NGOs and civil institutions rather than security forces. NGOs try to provide UMCs with information and a platform to express themselves throughout the process.<sup>309</sup> Furthermore, it is challenging for UMCs to have a legal advisor who can follow procedures and offer legal advice.<sup>310</sup> To benefit from the right to representation, a lawyer must be given a procuration.<sup>311</sup> If UMCs cannot present a valid ID or passport, it is impossible to grant procuration and benefit from the right to representation. The involvement of NGOs and their guidance to UMCs are crucial in balancing protection and agency rights.

The balancing of rights for UMCs in Türkiye is challenging due to their diverse purposes and varying levels of vulnerability. Some UMCs view Türkiye as their final destination, while others see it as a transit country.<sup>312</sup> Facilities providing care to these children operate under an open-door policy, allowing UMCs to leave and return during regulated periods throughout the day.<sup>313</sup> While this policy might support agency rights, it can also be problematic because UMCs can leave the institution permanently if they choose.<sup>314</sup> When UMCs do not return, they may find themselves in dangerous situations, as they often lack safe places to go.<sup>315</sup> Many may become involved in illegal activities. During their absence, UMCs may face rape, abuse, bullying, forced labour, or human trafficking.<sup>316</sup> Thus, while the open-door policy provides the basics of agency rights, it significantly increases the vulnerability of UMCs.

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<sup>304</sup> Application Directive, p.12.

<sup>305</sup> LFIP, Art. 67.

<sup>306</sup> Application Directive, p.12.

<sup>307</sup> Bulat & Baycılı.

<sup>308</sup> Ibid.

<sup>309</sup> Ibid.

<sup>310</sup> Habip, p.64.

<sup>311</sup> Ibid.

<sup>312</sup> Çocuk Hizmetleri Genel Müdürlüğü, Çocuk Destek Merkezleri Evleri Hakları.

<sup>313</sup> UMD, Article 8.

<sup>314</sup> Bulat & Baycılı.

<sup>315</sup> Ibid.

<sup>316</sup> Ibid.



### 3.4.3. Age Assessment

The Provincial Directorate of Migration Management investigates and confirms the child's unaccompanied migrant status.<sup>317</sup> An age determination report is required for children who lack identity documents to verify their age and whose physical development does not align with their declared age.<sup>318</sup> This process may involve medical examinations and bone assessments as requested by the prosecutor's office.<sup>319</sup> During this period, the child's situation remains uncertain, necessitating support and protection.

After an age determination request is made, children are to be accommodated in facilities established by the Directorate General of Migration Management.<sup>320</sup> However, there is a risk that a child may remain in a detention centre for an extended period before being placed in appropriate accommodation.<sup>321</sup> NGOs play a crucial role at this stage, communicating with the police to prevent prolonged detention of children.<sup>322</sup> They offer transportation or translation support to the police and maintain communication to monitor the procedures' progress and the child's well-being.<sup>323</sup> NGO workers may even provide meals to children in police centres, inquire about their conditions, and check for any signs of mistreatment or abuse.<sup>324</sup> During the age determination procedure, UMCs often lack protective mechanisms, and NGOs try to bridge this gap through constructive dialogue and proactive measures.

Age can be inaccurately documented prior to the commencement of age-determination procedures. There are instances where security forces may register individuals as adults above 18 years of age without conducting a thorough age assessment.<sup>325</sup> Additionally, certain minors may deliberately misrepresent their age to circumvent protective measures afforded to UMCs. Some migrants whose official documents indicate an age of 18 or older are, in fact, minors under the age of 18.<sup>326</sup>

## 3.5. Privacy Rights of UMCs

### 3.5.1. Domestic Legislation and Practice

The privacy rights of UMCs are largely underregulated in domestic legislation. This leads to inconsistent practices across different provinces and institutions.<sup>327</sup> The approaches of administrators

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<sup>317</sup> UMD, Article 6(1).

<sup>318</sup> Ibid.

<sup>319</sup> Bulat & Baycılı.

<sup>320</sup> UMD, Article 6(1).

<sup>321</sup> Bulat & Baycılı.

<sup>322</sup> Ibid.

<sup>323</sup> Ibid.

<sup>324</sup> Ibid.

<sup>325</sup> Asylum Information Database, Country Report: Türkiye, 2022, p.107.

<sup>326</sup> Ibid.

<sup>327</sup> Altıntop, p.225.

and staff significantly influence the privacy rights of children residing in care homes.<sup>328</sup> Additionally, the non-uniform architecture and physical facilities of institutions affect the respect for UMCs' physical space and agency rights.<sup>329</sup> Emergency conditions and available resources further impede the realisation of privacy rights. In such emergencies, NGOs focus on addressing the most urgent needs of UMCs. The privacy of adolescent UMCs is not prioritised during crises, such as the 6 February Türkiye-Syria Earthquake.<sup>330</sup>

The requirement for the confidentiality of information collected about the UMCs is regulated under LFIP and secondary legislation. The confidentiality of all information and documents of international protection applicants and status holders and the best interests of children are essential in sharing information on children. The security of information collected from UMCs should be sustained. The obligation to protect confidential information extends to sharing the information with third parties. It is only permitted to share this information and documents with third parties in cases allowed by the law. These exceptions are included because, in some cases, sharing information about UMCs with relevant institutions or international organisations may be in the best interests of the UMCs.

The requirement for the confidentiality of information collected about UMCs is regulated under LFIP and secondary legislation. The confidentiality of all information and documents of international protection applicants and status holders, as well as the best interests of children, are paramount when sharing information about UMCs.<sup>331</sup> The security of information collected from UMCs must be maintained.<sup>332</sup> The obligation to protect confidential information extends to sharing it with third parties, which is only permitted in cases authorised by law.<sup>333</sup> These exceptions are included because, in certain situations, sharing information about UMCs with relevant institutions or international organisations may be in the best interests of the children.<sup>334</sup>

### 3.5.2. Perception of UMCs and Right to Privacy

There is a prevailing perception of UMCs as helpless individuals who should feel gratitude for receiving government services.<sup>335</sup> This attitude, held by adults in contact with UMCs, influences the children's expectations of the facilities. Research indicates that UMCs have very low expectations upon arriving at these facilities.<sup>336</sup> During interviews, many children expressed gratitude for basic utilities and services, such as regular meals.<sup>337</sup> This attitude causes them to remain silent in instances when their privacy rights are violated.<sup>338</sup>

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<sup>328</sup> Ibid.

<sup>329</sup> Ibid.

<sup>330</sup> Bulat & Al-Houssami.

<sup>331</sup> LFIP, Article 94; Application Directive, Article 116.

<sup>332</sup> Akgül, p.55.

<sup>333</sup> LFIP, Article 94.

<sup>334</sup> Arslan, p.86.

<sup>335</sup> Altintop, p.225.

<sup>336</sup> Ibid.

<sup>337</sup> Ibid.

<sup>338</sup> Björklund, p.12.

Prevailing perceptions of UMCs lead to a misguided assumption shared by both UMCs and the institutions that provide for them. Dormitory facilities, care houses, and other institutions often believe that addressing the immediate needs of UMCs, such as food and clothing, is generally sufficient.<sup>339</sup> For UMCs, this misconception stems from the poor conditions they come from and a lack of proper awareness of their agency rights. Institutions suffer from this fallacy due to mismanagement, inadequate funding, and insufficient understanding of UMCs' psychology.<sup>340</sup> However, this perception of adequacy does not align with the principle of the best interest of the child<sup>341</sup>, nor does it ensure the protection of privacy and agency rights.

### 3.6. Right to Education

#### 3.6.1. Domestic Law

Education is a constitutional right enshrined in the Constitution of the Republic of Türkiye Article 42. It proclaims that no person can be deprived of their right to education. Primary education is compulsory and free in public schools.<sup>342</sup> The constitution regulates the right to education's framework and says that further regulations will be made by law. According to Law on Education and Training Article 2, compulsory primary education covers children aged 6-14.<sup>343</sup> Education and training are compulsory for all children in this age group, regardless of their status.<sup>344</sup> Children of compulsory education age will be enrolled in schools, and their school attendance will be ensured.<sup>345</sup> The enrollment and attendance of children in schools are provided in coordination with the National Education Directorates and in cooperation with non-governmental organisations.<sup>346</sup>

Considering the foreigner's right to receive education in Türkiye, there are some limitations. The regulations are codified in the Constitution of the Republic of Türkiye Article 16 and LFIP. The Constitution of the Republic of Türkiye declares that fundamental rights can be limited with law for foreigners in line with international law.<sup>347</sup> UMCs who are international protection applicants or status holders and are registered in the protection system in Türkiye can benefit from education services.<sup>348</sup> The registered UMCs benefit from the education services depending on the institutions where they are placed in Türkiye.<sup>349</sup> Article 29 of Regulation on Secondary Education Institutions states that migrant children, regardless of status, do not need an education visa.<sup>350</sup> The residence permits issued by

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<sup>339</sup> Altıntop, p.225.

<sup>340</sup> Bulat & Al-Houssami.

<sup>341</sup> Altıntop, p.225.

<sup>342</sup> Constitution of the Republic of Türkiye, Article 42.

<sup>343</sup> Application Directive, p.22.

<sup>344</sup> Ibid.

<sup>345</sup> Çiçek, p.41.

<sup>346</sup> Application Directive, p.22.

<sup>347</sup> Constitution of the Republic of Türkiye, Article 16.

<sup>348</sup> Çiçek, p.41.

<sup>349</sup> Ibid.

<sup>350</sup> Ibid.

security authorities for at least six months are deemed sufficient for enrollment<sup>351</sup> to make education more accessible.

The details about providing education for UMCs are asserted in LFIP.<sup>352</sup> Although LFIP does not specifically regulate the right to education of UMCs, these rules are also applicable to UMCs through the principle of analogy.<sup>353</sup> According to Article 89 of the LFIP on access to assistance and services for international protection, “the applicant or international protection status holder and his/her family members shall benefit from primary and secondary education services”. To receive these services, they need to submit a document showing their status to the relevant educational institution.<sup>354</sup> Furthermore, according to the Regulation on Child Support Centers, the education of the child, including vocational training, will be planned by education officers and counsellors in the centres established for UMCs. Furthermore, the necessary procedures will be carried out for the continuation of formal education within the centre when necessary.<sup>355</sup>

Children under temporary protection and international protection can benefit from the same rights. Temporary Protection Directive Articles 26-28 about the services to be provided to people under temporary protection do not include a specific provision for UMCs, but these provisions are applicable to them.<sup>356</sup> It stipulates that education, including vocational training, is one of the services that will be provided.<sup>357</sup> UMD includes all UMCs, both the children under temporary protection and the ones under international protection.<sup>358</sup> Temporary protection institutions will also need to act according to this directive. Considering these scattered legislations, UMCs under temporary protection will benefit from vocational training opportunities just like the ones under international protection. This means children of preschool age can get a preschool education.<sup>359</sup> Besides, children who finished compulsory education can benefit from education and training opportunities in high schools or other higher education institutions.<sup>360</sup> In principle, these should include cultural, artistic and sportive activities besides school courses and studies.<sup>361</sup>

### 3.6.2. Content of Education in Türkiye

The education should be of adequate quality to answer the specific needs of UMCs and develop their right to agency. Regarding the content of education, The Constitution of the Republic of Türkiye says that ‘Education and training shall be carried out(...) according to the principles of modern science and education, under the supervision and control of the state.’<sup>362</sup> Education is a public service in Türkiye,

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<sup>351</sup> Millî Eğitim Bakanlığı Ortaöğretim Kurumları Yönetmeliği, 2013, Article 29.

<sup>352</sup> LFIP, Article 89-105.

<sup>353</sup> Akgül, p.98.

<sup>354</sup> LFIP, Article 105.

<sup>355</sup> Akgül, p.98.

<sup>356</sup> Ibid.

<sup>357</sup> Geçici Koruma Yönetmeliği, 2014, Art.26(1).

<sup>358</sup> Akgül, p.98.

<sup>359</sup> Arslan, p.101.

<sup>360</sup> Ibid.

<sup>361</sup> UMD, Article 10.

<sup>362</sup> Constitution of the Republic of Türkiye, Article 42(3).

and specifically for UMCs, it should be designed to help them heal from traumas, integrate into society as healthy individuals, and develop their personal lives.<sup>363</sup>

Care facilities are the places where UMCs spend most of their time.<sup>364</sup> The educational and training opportunities they can receive in these facilities are very important for realising their right to education. UMCs' requests about their dreams and interests are listened to in these facilities.<sup>365</sup> The caretakers who are called 'mothers' are very sensitive about showing respect to their wishes, considering their training and education. However, these opportunities provided by the government can always be improved.<sup>366</sup> Additionally, these opportunities are useful only if UMCs want to participate. A research study specifically on dormitories that provide accommodation to UMCs shows that the opportunities to develop hobbies and interests are insufficient.<sup>367</sup> The insufficiency in the physical conditions, number of teachers, and variety of options are the reasons why these facilities cannot meet the need for education and training.<sup>368</sup>

Vocational training plays a crucial role in fostering the agency of UMCs in Türkiye. Many UMCs originate from countries where vocational training opportunities are scarce.<sup>369</sup> For UMCs using Türkiye as a transit country in their migration trajectory, receiving vocational training can enhance their prospects for acceptance by third countries.<sup>370</sup> This expands their future choices and empowers them to make active decisions about their lives. However, the participation of UMCs in vocational training programs remains disproportionately low.<sup>371</sup> Factors contributing to this include limited availability of courses, lack of awareness regarding their right to vocational training, and insufficient information about existing opportunities.<sup>372</sup>

Integration with society and educational integration<sup>373</sup> are important parts of building up the agency rights of UMCs. The integration, which is also connected to social coherence, is harder for UMCs compared to other migrant children.<sup>374</sup> Due to this, they are required to have special care. However, domestic law does not require adaptation or catch-up classes for UMCs whose previous education was based on a different curriculum.<sup>375</sup> Pilot schools project for migrant children is promising for integration into the society.<sup>376</sup> The selected pilot schools provide compulsory education for migrant

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<sup>363</sup> Karatas, Türkiye'de Refakatsiz Çocuklara Erişim ve Çocuğun Yüksek Yararına Yönelik Hizmet Sunumunun Teşvik Edilmesi Projesi Değerlendirme Raporu, 2014, p.25.

<sup>364</sup> Mülteci Hakları Merkezi, Kendi Sözleriyle Türkiye'deki Refakatsiz Çocuk Sığınmacılar, 2018, p.28.

<sup>365</sup> Bulat & Baycılı.

<sup>366</sup> Ibid.

<sup>367</sup> Mülteci Hakları Merkezi, p.28.

<sup>368</sup> Ibid.

<sup>369</sup> Çiçek, p.53.

<sup>370</sup> Ibid.

<sup>371</sup> Ibid.

<sup>372</sup> Ibid.

<sup>373</sup> Mülteci Hakları Merkezi, p.26.

<sup>374</sup> Bulat & Al-Houssami.

<sup>375</sup> Habip, p.67.

<sup>376</sup> Application Directive, p.22.

children together with other children to prevent exclusion from society and discrimination.<sup>377</sup> This project especially addressed migrant children whose resettlement to another country will take a long time.<sup>378</sup> In this way, inclusive education can be used as a tool for integration.

Language plays a crucial role in the accessibility and acceptance of education for UMCs, as well as their integration into society. Establishing a social environment is particularly challenging for UMCs who do not speak Turkish. Moreover, navigating official procedures and communicating their basic needs outside of their organisation are significant challenges.<sup>379</sup> This situation impacts their agency rights and leaves them vulnerable to exploitation due to their inability to communicate effectively.<sup>380</sup> Only 15% of individuals under international and temporary protection possess fluent Turkish language skills, highlighting a substantial barrier to accessing services and achieving social cohesion.<sup>381</sup> Additionally, language education holds immense importance for the well-being of UMCs. Research indicates that proficiency in Turkish significantly enhances their overall psychological health, reducing feelings of isolation.<sup>382</sup> Instead, it empowers them to articulate their issues to those they interact with actively.<sup>383</sup>

The UMCs who are placed in shelters are given free Turkish Language lessons before they are enrolled on school. As school enrollment can take time, this opportunity is very important in aiming for sufficient integration in the schools. UMCs have easier access to language courses than other asylum-seeking children, who are also theoretically provided with the chance to take these courses in public education centres. However, it is argued that in the State shelters, not every UMC can benefit from free language education due to structural deficiencies. Furthermore, not all UMCs are identified and placed in shelters. Besides this being an important structural deficiency of the migration control system, it also seriously prevents UMCs from receiving language education. The Turkish Language Classes are offered by the Türk Kızılay centres across the country. NGOs started initiatives to develop online access to language courses. A free online Turkish Language course called the 'Let's speak the same language' project can be useful for UMCs who are not identified by the system.

UMCs placed in shelters are provided with free Turkish language lessons prior to their school enrollment.<sup>384</sup> This initiative is crucial for promoting their integration into schools effectively, considering the potential delays in school enrollment processes. UMCs generally have easier access to language courses compared to other asylum-seeking children, who theoretically have the opportunity to enrol in these courses at public education centres.<sup>385</sup> However, structural deficiencies in state shelters may prevent some UMCs from benefiting from free language education.<sup>386</sup> Moreover, the lack of identification and placement of all UMCs in shelters not only reflects structural flaws in the

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<sup>377</sup> Ibid.

<sup>378</sup> Ibid.

<sup>379</sup> Cankaya, Çocuk destek merkezlerinde barınmakta olan refakatsiz çocukların sorunları ve Türkçe öğrenmelerinin değerlendirilmesi, 2019, p.79.

<sup>380</sup> Ibid.

<sup>381</sup> Asylum Information Database, p.78.

<sup>382</sup> Silav, p.119.

<sup>383</sup> Ibid.

<sup>384</sup> Altıntop, p.228.

<sup>385</sup> Ibid.

<sup>386</sup> Habip, p.67.

migration control system but also significantly hinders their access to language education.<sup>387</sup> Turkish language classes are offered by Türk Kızılay centres nationwide, and NGOs have initiated online initiatives such as the 'Let's Speak the Same Language' project to provide free access to language courses.<sup>388</sup> These efforts are particularly beneficial for UMCs who are not formally identified by the system.

Age is a critical factor influencing the Turkish language acquisition of UMCs. Children who engage in street play have an advantage in learning the language rapidly.<sup>389</sup> Those who arrived between the ages of 2-5 and are now between 13-17 years old speak Turkish fluently.<sup>390</sup> While reports suggest minimal systemic issues with language barriers among UMCs in schools, some children encounter difficulties.<sup>391</sup> Particularly, UMCs arriving in Türkiye during ages 9-11, amidst puberty, face challenges in educational settings, indicating a need for targeted support and specific attention to adolescent UMCs.<sup>392</sup>

Structural deficiencies persist within the education system in Türkiye. Research indicates challenges in securing instructors to initiate courses within childcare organisations, and there is inadequate provision of classrooms and materials.<sup>393</sup> Additionally, some UMCs exhibit reluctance to learn the Turkish language.<sup>394</sup> Temporary education centres, which employed Syrian-Arabic speaking teachers, were established between 2014 and 2017 during the Syrian crisis in Türkiye. These centres significantly facilitated children's language learning processes.<sup>395</sup> However, following their closure, no institutions offering comparable quality education have been established in their place.<sup>396</sup>

While UMCs can speak Turkish, they struggle with reading and writing in the language.<sup>397</sup> Furthermore, UMCs who learn Turkish under current conditions often become illiterate in their native languages. While they may speak their mother tongue, they lack proficiency in reading and writing. UMCs in childcare facilities typically only speak Arabic and cannot read or write in Arabic.<sup>398</sup> This puts them at a disadvantage in transitioning to adulthood.

UMCs, regardless of their protection status, are treated as adults upon reaching 18 years old.<sup>399</sup> A field study conducted in Türkiye reveals that UMCs experience significant anxiety concerning their

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<sup>387</sup> Ibid.

<sup>388</sup> Asylum Information Database, p.89.

<sup>389</sup> Bulat & Baycılı.

<sup>390</sup> Ibid.

<sup>391</sup> Altıntop, p.227.

<sup>392</sup> Bulat & Baycılı.

<sup>393</sup> Cankaya, p. 79.

<sup>394</sup> Ibid.

<sup>395</sup> Bulat & Baycılı.

<sup>396</sup> Ibid.

<sup>397</sup> Ibid.

<sup>398</sup> Ibid.

<sup>399</sup> Altıntop, p.247.

uncertain future after leaving institutional care.<sup>400</sup> Their apprehension about their future prospects and the perceived lack of opportunities profoundly impact their well-being.<sup>401</sup> There is a notable absence of institutional mechanisms and protective measures aimed at preparing them for adulthood, educating them about their rights, and enhancing their financial literacy.<sup>402</sup> Dormitory facilities often lack the capacity to offer essential services such as vocational training courses.<sup>403</sup> NGOs try to facilitate a smoother transition for UMCs. For instance, Mavi Kalem has collaborated with male children aged over 14 in childcare units, conducting information sessions where they discuss the life they envision as adults and impart necessary knowledge.<sup>404</sup>

### 3.6.3. Obstacles to Education in Türkiye

There are significant obstacles regarding UMCs' access to education. One major issue arises from integration challenges and the marginalisation experienced by migrant students in schools. UMCs often struggle with integration due to language barriers, increasing their vulnerability to bullying and discrimination from peers and occasionally from teachers.<sup>405</sup> In some cases, school administrators deliberately complicate the enrollment process, arbitrarily hindering a child's access to education.<sup>406</sup>

Additionally, UMCs may face difficulties in proving their academic level from their home country, resulting in placement in lower academic levels than warranted.<sup>407</sup> Arrival timing, particularly after the start of the academic year in September, can further delay their enrollment until the next semester, lowering their motivation to pursue education.<sup>408</sup> These challenges, compounded by the vulnerable and often traumatised state of adolescent UMCs, create significant barriers to their right to education. Consequently, some children opt to flee from facilities when they should attend school.<sup>409</sup> Rather than addressing the root issues, some facilities exacerbate the situation by imposing measures to prevent older UMCs from leaving facilities to attend school, thereby further obstructing their access to education.<sup>410</sup>

Securing necessary documentation poses a significant barrier to accessing the right to education. First, UMCs face challenges in obtaining proof of their previous education from their home countries, often due to the circumstances under which they fled.<sup>411</sup> Even if obtained, the credibility of these documents remains questionable.<sup>412</sup> Additionally, acquiring a foreign ID number presents another

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<sup>400</sup> Silav, p.119.

<sup>401</sup> Ibid.

<sup>402</sup> Altıntop, p.253.

<sup>403</sup> Çiçek, p.51.

<sup>404</sup> Bulat & Baycılı.

<sup>405</sup> Koruyucu Aile Evlat Edinme Derneği, p.13.

<sup>406</sup> Habip, p.68.

<sup>407</sup> Çiçek, p.53.

<sup>408</sup> Altıntop, p.227.

<sup>409</sup> Ibid, p.229.

<sup>410</sup> Ibid.

<sup>411</sup> Çiçek, p.53.

<sup>412</sup> Ibid.



challenge, potentially hindering their enrollment in schools or the issuance of diplomas.<sup>413</sup> Moreover, the intensive and irregular migration patterns delay the issuance of residence permits.<sup>414</sup> These cumulative challenges underscore the difficulties UMCs encounter in obtaining the necessary documentation essential for their education in Türkiye.

Some adolescent UMCs opt to discontinue education after turning 14 and pursue employment.<sup>415</sup> Financial difficulties often drive this decision. Türkiye supports UMCs through the Social Assistance and Solidarity Fund, supplemented by efforts from municipalities and non-governmental organisations to promote and facilitate their education, encouraging continued enrollment in secondary and higher education.<sup>416</sup> Despite these supportive measures, some UMCs decline the opportunity for education, viewing their schooling period as 'time lost'.<sup>417</sup> Many UMCs who migrate to Türkiye to earn income, support their families, pay smugglers<sup>418</sup>, and enter the workforce frequently attempt to evade facilities designed to provide care and education.<sup>419</sup>

In principle, UMCs in Türkiye are subject to Turkish labour laws, which govern the employment of minors. However, specific provisions addressing the employment of UMCs are lacking in legislation.<sup>420</sup> According to regulations enforced by institutions and facilities responsible for UMCs' care, these children are prohibited from engaging in employment until they reach 18 years of age.<sup>421</sup> Unfortunately, there are instances where UMCs are observed working illegally in precarious sectors such as construction, textiles, and tourism, often exploited as a source of cheap labour.<sup>422</sup> There are legal alternatives available for UMCs to earn income under regulated conditions. Article 10 of the UMD provides for vocational training opportunities coordinated by provincial directorates of national education. UMCs may receive education in vocational training centres, high schools, or higher education institutions and engage in internships or work aligned with their educational pursuits.<sup>423</sup>

### 3.7. Conclusions

Safeguarding the agency rights of UMCs in Turkish Domestic Law is complex due to its scattered nature and various gaps. Significant legislative gaps and practical challenges exist concerning the right to participation and the right to privacy. One critical issue is the failure to appoint guardians upon arrival, which severely compromises UMCs' agency rights by hindering their ability to participate and effectively represent themselves in decision-making processes.<sup>424</sup>

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<sup>413</sup> Ibid.

<sup>414</sup> Ibid, p.41.

<sup>415</sup> Bulat & Baycılı.

<sup>416</sup> Application Directive, p.23.

<sup>417</sup> Cankaya, p.79; Karatas, p.23.

<sup>418</sup> Cankaya, p.79.

<sup>419</sup> Altintop, p.229.

<sup>420</sup> Akgül, p.102.

<sup>421</sup> Karatas, p.26.

<sup>422</sup> Cankaya, p.79; Karatas, p.26.

<sup>423</sup> Akgül, p.102.

<sup>424</sup> Çiçek, p.44.

The evolving capacities of children should be considered in light of non-individualistic traditional upbringing and traumatic migration experiences. These diverse factors require a case-by-case approach.<sup>425</sup> A prevailing perception of childhood often impedes the realisation of their agency rights and undermines their capacities. This is particularly evident in the context of privacy rights, where children are primarily viewed as objects of rights requiring protection, thereby potentially neglecting their privacy needs.<sup>426</sup>

The protection of UMCs often prioritises vulnerability over agency, yet it is crucial to recognise UMCs with varying levels of agencies and needs for protection. For some UMCs, Türkiye is a transit country.<sup>427</sup> While UMCs may assert their agency by leaving care facilities, risks attached to this should be considered.<sup>428</sup> This dilemma underscores the challenge of determining the right approach for UMCs who choose not to remain in Türkiye. Allowing them to leave the country through precarious means cannot be accepted, yet forcibly keeping them in facilities against their will is also inconsistent with the child rights perspective. This unresolved dilemma contributes to issues such as false age declarations and heightens risks for UMCs.<sup>429</sup>

Education is compulsory for all children aged 6-14 in Türkiye, irrespective of their protection status.<sup>430</sup> However, societal discrimination remains a significant barrier to access to education.<sup>431</sup> The educational content could be more tailored to develop UMCs as active agents in society.<sup>432</sup> Consequently, some UMCs perceive their interests as aligning more with leaving education and seeking employment<sup>433</sup>, which increases their vulnerability to exploitation.<sup>434</sup> While UMCs should have the agency to refuse education and pursue financial independence, this should not compromise their right to compulsory education.

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<sup>425</sup> Kerem, p.300.

<sup>426</sup> Bulat & Al-Houssami.

<sup>427</sup> Çocuk Hizmetleri Genel Müdürlüğü, p.79.

<sup>428</sup> UMD, Article 8.

<sup>429</sup> Asylum Information Database, p.107.

<sup>430</sup> Application Directive, p.22.

<sup>431</sup> Koruyucu Aile Evlat Edinme Derneği, p.13.

<sup>432</sup> Çiçek, p.53; Habip, p.67.

<sup>433</sup> Bulat & Baycılı.

<sup>434</sup> Cankaya, p.79; Karatas, p.26.

## Chapter 4: Compliance of Turkish Domestic Law and Practice with CRC and ECHR

### 4.1. Introduction

This chapter analyses the legal aspects surrounding UMCs in Türkiye in comparison with CRC and ECHR. For this purpose, it scrutinises their agency rights in light of evolving capacities, protection rights, participation rights, privacy rights, and educational rights. Turkish domestic law and practice should comply with CRC and ECHR because Türkiye is a state party to both conventions.<sup>435</sup> This comparative chapter underscores the significance of effective participation frameworks, guardianship systems, and privacy safeguards for UMCs, highlighting existing legislative frameworks and pragmatic implementations. Furthermore, the pivotal role of education in fostering the empowerment of UMCs stresses barriers to educational access, challenges with educational curricula, and the central role of language education in promoting societal integration.

### 4.2. Determining if UMCs are 'Capable' to be Recognized as Agents

The traditional upbringing and dependency of children on institutions create a false premise that UMCs in Türkiye, who predominantly come from Middle Eastern countries, are incapable of being active agents like their Western counterparts despite similar gender and age demographics.<sup>436</sup> This perception undermines their decision-making power within the migration system, leading to their exclusion as right-holder individuals. Consequently, it can be argued that CRC Article 6 is not effectively realised because of the underestimation of their capacities. The focus on vulnerabilities rather than agency stems from limited resources and the mass influx of migrants, as protection and prevention are easier than empowerment and individual capacity assessment.<sup>437</sup> To address this, trained staff who can spend time individually with each UMC to understand their evolving capacities beyond their coping abilities and survival strategies are needed.<sup>438</sup>

The perception of UMCs as less capable due to traditional upbringing fosters a sense of self closely attached to society. However, this "dependency" on their social environment should be evaluated differently and used as a guiding principle to develop the agency of children. Investment in the development and agency of UMCs should be considered within the societal context they inhabit rather than through an individualistic lens.<sup>439</sup> Connections to institutions, friends, and other social contacts are more significant for UMCs traditionally raised as dependent parts of a larger group. Therefore, social integration through education, language education, and the ability to effectively participate and choose the society they will live in are crucial rights for building their agency. Adopting this perspective can transform the approach to UMCs from viewing them as dependent and vulnerable children to recognising them as active right-holders, aligning with a more child rights-compliant framework.

### 4.3. Effective Participation: Obligation on Theory

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<sup>435</sup> Özbudun, p.985.

<sup>436</sup> Bulat & Al-Houssami; Altıntop, p.72; Euro-Med Human Rights Monitor, p.10-11.

<sup>437</sup> CRC Committee, General Comment 4, para.34.

<sup>438</sup> Bell & Payne, p.1041.

<sup>439</sup> Ibid.

Türkiye should sustain the effective participation of UMCs as enshrined in CRC Articles 12, 13, ECHR Articles 8, 10 and ECtHR case law. Considering domestic legislation, there are gaps that necessitate more comprehensive regulation. The scattered domestic legislation gives UMCs in Türkiye limited opportunities to express their views.<sup>440</sup>

An environment based on trust and information sharing<sup>441</sup> is not sufficiently created in the implementation. Furthermore, children are not effectively facilitated to participate and have a voice.<sup>442</sup> For instance, obtaining UMCs' consent prior to their relocation<sup>443</sup> should be mandated as a precondition. Despite it being regulated both by ECHR and CRC Articles 10 and 13(1), the lack of receiving information is one of the highlighted issues. While the methods of disseminating information may appear extensive, there are concerns about their efficacy in reaching all UMCs and the adequacy and suitability of the information provided in terms of being child-friendly. As shown in the interviews with children regarding their experiences with placement procedure<sup>444</sup>, they cannot access appropriate and diverse information.<sup>445</sup> The information provided is not culturally diverse<sup>446</sup>, and health services<sup>447</sup> lack interpretation. Trained staff, interpreters and specialised personnel are needed to resolve the information gap in child participation.

The audience capable of listening to UMCs and providing guidance is lacking.<sup>448</sup> The insufficiencies of the guardianship system<sup>449</sup> and language barriers are the biggest issues to resolve with the qualified staff who can effectively communicate with children. The language courses should be provided to the personnel working in the field in line with the profile of UMCs in the region.<sup>450</sup> The interviews of UMCs should be conducted in the presence of qualified personnel with adequate knowledge of that specific child's physical, psychological and emotional conditions.<sup>451</sup> Highly qualified people should be recruited, and experienced people should be selected from the relevant fields.<sup>452</sup>

UMCs should be immediately represented by a guardian when they are within the borders of Türkiye<sup>453</sup> as stipulated in Turkish domestic law, CRC General Comments and ECtHR case Law. This deficiency also creates problems in considering the best interests of the child and linguistic, cultural and religious differences for the accommodation and sustaining legal representation.<sup>454</sup> Despite the

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<sup>440</sup> Lundy, p.933.

<sup>441</sup> CRC Committee, General Comment 4, para.8.

<sup>442</sup> Lundy, p.933.

<sup>443</sup> Altıntop, p.226.

<sup>444</sup> Ibid, p.223.

<sup>445</sup> CRC Committee, General Comment 4, para.10.

<sup>446</sup> ECtHR, Guide on Article 10, para.151.

<sup>447</sup> Altıntop, p.229.

<sup>448</sup> Lundy, p.933.

<sup>449</sup> Euro-Med Human Rights Monitor, p.95.

<sup>450</sup> Koruyucu Aile Evlat Edinme Derneği, p.9.

<sup>451</sup> Akgül, p.51.

<sup>452</sup> Koruyucu Aile Evlat Edinme Derneği, p.9.

<sup>453</sup> Çiçek, p.44.

<sup>454</sup> Ibid.

general provision in LFIP, the application of the law is different. Domestic court procedure causes an 'undue delay', which violates state obligations to protect UMCs.<sup>455</sup> The upper time limits can be imposed to make the process faster.<sup>456</sup> Furthermore, consultancies incapable of 'representation' leave UMCs without effective protection mechanisms. To improve the guardianship system, guardianship institutions should be autonomous public legal entities.<sup>457</sup> Within this system, guardian pools should be established to appoint a guardian before any asylum application is made immediately.<sup>458</sup>

The domestic law is mostly silent regarding the influence of UMCs' perspectives on decision-making processes and the due weight given to their views.<sup>459</sup> Such influence should be considered together with the perspective of the capacities of the traditional Middle Eastern Child.<sup>460</sup> Whether in substantial or trivial matters, the desires and choices of the UMCs ought to remain uninfluenced by adults, with only supervision in line with their developing capacities and the paramount consideration of the child's best interests. Overall, UMCs' right to participation in ECHR and CRC is partially respected, while child agency is mostly overlooked. Regrettably, the lack of sufficient checks and balances to ensure effective participation is evident.<sup>461</sup> Engagement in political and civil activities can serve as a method to sustain meaningful participation.<sup>462</sup> At the same time, it can help UMCs understand their rights regarding agency, foster social awareness, facilitate a cultural change and increase the influence of child participation in the long run.

#### 4.4. Overprotection That Underestimates Agencies of UMCs

Pursuant to Turkish domestic law, Article 22 of the CRC, and the ECHR, Türkiye is obligated to protect UMCs. Domestic legislation emphasises prompt and simplified procedures for the protection of UMCs, consistent with the case law of the ECtHR.<sup>463</sup> However, the protection of UMCs is not viewed holistically, including safeguarding the child's agency, as mandated by the CRC Committee.<sup>464</sup> The views and wishes of children are not effectively considered in the implementation of protection measures, and there is an absence of an effective guardianship system. These shortcomings can result in failures of procedural guarantees, compromises to the integrity of UMCs, and violations of ECHR Article 8.<sup>465</sup> Unlike the CRC Committee's approach, Türkiye's protection framework is perceived as protectionist and top-down, mostly neglecting the individuality of the child.<sup>466</sup>

There are issues within domestic legislation and practice concerning the balance between protection and agency rights for UMCs. Throughout the process, UMCs are frequently treated as passive

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<sup>455</sup> Darboe and Camara v. Italy, para.142-150.

<sup>456</sup> Nalçacıoğlu Erden, p. 40.

<sup>457</sup> Ibid.

<sup>458</sup> Ibid.

<sup>459</sup> Lundy, p.933.

<sup>460</sup> CRC Committee, General Comment 20, para.22.

<sup>461</sup> Euro-Med Human Rights Monitor, p.96.

<sup>462</sup> CRC Committee, General Comment 20, para.24.

<sup>463</sup> Council of Europe, Joint note, p.8.

<sup>464</sup> CRC Committee, General Comment 6, para.25.

<sup>465</sup> Darboe and Camara v. Italy, para.151.

<sup>466</sup> Altıntop, p.72.

subjects reliant on adults.<sup>467</sup> The efforts of NGOs to balance protection and agency rights by providing guidance to UMCs<sup>468</sup> can be unsustainable and insufficient. Therefore, an effective guardianship system should be established to represent UMCs and provide necessary legal advice adequately.<sup>469</sup> Empowering UMCs with information and protecting them are intrinsically connected.<sup>470</sup> Empowering children can enhance protection without restricting their agency and utilising fewer resources. The focus should shift to trying to overcome vulnerabilities and develop agency rights. Mostly in domestic regulations, the need for protection outweighs the emphasis on agency rights.

In the case of precarious situations, such as the emergency situation after the 6 February Türkiye-Syria Earthquake, the agency is thinned to prevent dangers of violence and abuse against UMCs.<sup>471</sup> However, even though the agency is thinned, it should be continuous, and there should always be room for exercising agency.<sup>472</sup> Despite the open-door policy increasing the vulnerability of UMCs, it is not a child rights-compliant approach to close UMCs inside the institutions. Keeping UMCs in the institutions and not allowing them to leave can amount to deprivation of liberty.<sup>473</sup> ECHR recognises that certain measures restricting the alien's liberty of freedom of movement may not amount to deprivation of liberty.<sup>474</sup> However, depending on the length, nature, and accumulation of restrictions imposed, restrictions on freedom of movement can lead to the deprivation of liberty.<sup>475</sup> According to the ECtHR's decision concerning Türkiye, Abdolkhani and Karimnia v. Turkey, preventing migrants from leaving facilities by administrative authorities amounts to deprivation of liberty.<sup>476</sup> Similarly, preventing UMCs from leaving facilities should also amount to a deprivation of liberty. Focusing strictly on protection and preventing all opportunities for escape from facilities can severely limit the agency of children, given their diverse migration trajectories. The appropriate approach should involve guiding them to address their specific needs and vulnerabilities.

In the case of thick agency, children have broader choices.<sup>477</sup> For example, when choosing their hobbies and vocational training activities, they should have various options and freedom to choose. However, in the instances where the agency should be thickened for UMCs, the lack of space in facilities, physical conditions, and lack of investment for the vocational training activities<sup>478</sup> are the external factors preventing UMCs from making choices. The practical situation should be sufficient to allow them to choose. To sustain this, the state should invest to provide more opportunities to UMCs to

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<sup>467</sup> Ibid, p.37.

<sup>468</sup> Bulat & Baycılı.

<sup>469</sup> CRC Committee, General Comment 6, para.33.

<sup>470</sup> Ibid, para.24.

<sup>471</sup> Bell & Payne, p.1029.

<sup>472</sup> Ibid.

<sup>473</sup> CRC, Article 37(b).

<sup>474</sup> ECHR, Article 5.

<sup>475</sup> Ktistakis, Protecting migrants under the European Convention on Human Rights and the European Social Charter, 2013, p. 24.

<sup>476</sup> Ibid.

<sup>477</sup> Bell & Payne, p.1029.

<sup>478</sup> Mülteci Hakları Merkezi, p.28.

the maximum extent of their available resources.<sup>479</sup> Furthermore, the opportunities provided should be tailored to be in line with the migration trajectories of children.

The age assessment process can hinder the provision of rights to UMCs. It is uncertain whether all UMCs are given the benefit of the doubt and afforded protections provided to children while awaiting the results of the age determination process.<sup>480</sup> Moreover, there is a discriminatory culture of disbelief driven by the social and political approach to migrants.<sup>481</sup> Reported practices by security forces of falsely declaring children as adults suggest that the state is circumventing migration rules, as highlighted in the ECtHR judgment in *T.K. v Greece*.<sup>482</sup> In addition to authorities' false declarations, UMCs themselves may misrepresent their ages to avoid measures applied to minors. If authorities turn a blind eye and 'trust' the UMCs' declarations, this constitutes a form of 'discriminatory culture of belief'. Additionally, if a falsely declared age that grants majority is close to the actual age or if the child's physical development makes distinction difficult<sup>483</sup>, these children may be wrongly deprived of protection.

Despite the fundamental importance of protecting UMCs, the current protection system may lead them to feel that their agency is overly restricted and their freedom of choice will be taken away if they are recorded as UMCs. The issue is exacerbated by the diverse migration trajectories and purposes of UMCs arriving in Türkiye. However, the system fails to provide balanced and flexible protections and agency rights to all UMCs. Consequently, because the protections offered are not tailored to their needs, UMCs may prefer to remain outside this protection system. To address this, protections for migrants should be developed and made more flexible. While it is unrealistic to expect the system to function perfectly, investing in UMCs' capacities and centring on child agency can help mitigate this issue. Ultimately, the desire for the total agency of an adult motivates UMCs to make false age declarations. Providing them with child agency can address this issue while maintaining balanced protections to mitigate risks.

#### **4.5. Unseen and Overlooked Concept: Privacy Rights of UMCs**

Domestic law regulations on privacy are not comprehensive. The prevalent view of UMCs as helpless individuals who should feel gratitude<sup>484</sup> leads to privacy rights violations. Although the privacy rights of adolescent UMCs are particularly important,<sup>485</sup> there is a legislative gap in this area. The ECtHR's broad interpretation of privacy necessitates that architectural details of institutions, such as bedrooms and shared facilities, be designed to maintain a private sphere.<sup>486</sup> It is debatable whether the individuality and subjectivity of UMCs are ensured in practice.<sup>487</sup> Restrictions on the right to privacy are often unjustifiable and arbitrary, potentially violating the ECHR and CRC.<sup>488</sup>

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<sup>479</sup> CRC, Article 4.

<sup>480</sup> Doek, p.22.

<sup>481</sup> Raissan.

<sup>482</sup> *T.K. v Greece*.

<sup>483</sup> UMD, Article 6(1).

<sup>484</sup> Björklund, p.12.

<sup>485</sup> CRC Committee, General Comment 20, para.46.

<sup>486</sup> Equalityhumanrights, Article 8: Respect for your private and Family Life.

<sup>487</sup> Altintop, p.37.

<sup>488</sup> ECHR, Article 8; CRC, Article 16.

Confidentiality in health care and data protection is regulated under domestic law<sup>489</sup>, with the child's best interest<sup>490</sup> serving as the criterion for evaluating the sharing of confidential information with third parties. However, vague terms like "strictly necessary" can lead to varied interpretations regarding when confidential information may be shared.<sup>491</sup> Additionally, there is a gap concerning the participation, knowledge, and degree of control that UMCs have over the data collection process.<sup>492</sup> While meeting these requirements depends on the state's capacities<sup>493</sup>, minimal standards for protecting privacy rights, including the confidentiality of UMCs' health records, should be upheld even during emergencies.

The modest expectations of UMCs concerning privacy protection and the imperative for their survival in emergency settings frequently result in the neglect of their right to privacy.<sup>494</sup> This scenario highlights the intricate challenges involved in safeguarding privacy rights, especially during crises such as earthquakes and large-scale migration movements. While the necessity to aid children in crisis is unquestionable, it is essential to uphold the right to privacy without compromise, even under emergency circumstances. Education and developing the capacities of UMCs are crucial for dealing with the problem that makes UMCs tend to position their self-image of agency similarly to the adult approach.<sup>495</sup> The care workers or 'mothers' contacting UMCs should be aware of the importance of privacy rights for realising their right to agencies. Trained staff is required who can consider the increasing capacities, age, and maturity of UMCs when addressing their privacy rights. While case-by-case consideration is always necessary, more comprehensive rules outlining children's privacy rights are needed.

#### **4.6. Right to Education: Key for Empowerment of UMCs**

Türkiye is responsible for ensuring the right to education for UMCs throughout their stay, as mandated by the CRC and the ECHR, Protocol No. 1.<sup>496</sup> Additionally, the right to education is enshrined in Türkiye's Constitution and the LFIP, along with relevant secondary legislation. However, challenges persist regarding access to education and the suitability of educational content. Some UMCs cannot continue to school until their agencies are developed and they are equipped with the skills and knowledge.<sup>497</sup>

The conditions enshrined in domestic law regarding the requirement for valid documentation significantly limit the right to education for UMCs<sup>498</sup> and, consequently, agency rights. These requirements can make obtaining an education nearly impossible for some UMCs. It can be argued that these limitations violate the exercise of the right to education by "infringing upon its essence" and

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<sup>489</sup> LFIP; Application Directive.

<sup>490</sup> CRC, Article 3.

<sup>491</sup> Arslan, p.86.

<sup>492</sup> CRC Committee, General Comment 20, para.46.

<sup>493</sup> CRC, Article 4.

<sup>494</sup> Altintop, p.225.

<sup>495</sup> Bell & Payne, p.1039.

<sup>496</sup> Altintop, p.229.

<sup>497</sup> CRC Committee, General Comment 4, para.17.

<sup>498</sup> Habip, p.67.



exceed the permissible restrictions outlined in the Constitution of the Republic of Türkiye, being "contrary to the letter and spirit of the Constitution and the principle of proportionality".<sup>499</sup> As this right is enshrined in ECHR Protocol No. 1, the legislation limiting the right to education for UMCs can be challenged through constitutional complaints.<sup>500</sup> Amending the LFIP to remove these conditions would be an important step towards realising the right to education.

Considering current legislation and its implementation, there is insufficient effort to make education instrumental for the agency development of adolescent UMCs.<sup>501</sup> Education should aim to fulfil the full potential of these adolescents.<sup>502</sup> However, the lack of trained teachers, adequate physical space, and available options for hobbies and activities in dormitories indicates that this objective remains unmet.<sup>503</sup> Additionally, prejudices from school teachers and peers present a significant barrier for UMCs<sup>504</sup>, which should be addressed through public awareness campaigns and educational programs.

Voluntary engagement in education is unlikely if UMCs perceive compulsory education as a waste of time.<sup>505</sup> Offering courses, particularly vocational training tailored to their specific interests, abilities, and circumstances, within the maximum extent of available resources<sup>506</sup> can enhance their enthusiasm for education. This approach also supports the realisation of UMCs' right to capacity building through education<sup>507</sup>, fostering their development as individuals in a responsible and free society.<sup>508</sup> In conditions where legislation is insufficient and implementation flawed, UMCs may regrettably transform from being children into illegal migrant workers.<sup>509</sup> Alternative internship and training opportunities that allow them to earn money should be developed and made practically accessible to all UMCs. If effectively facilitated, these alternatives can increase the number of children willing to receive education services and decrease the incidence of illegal work.

There are invisible issues with language education. Both Turkish and native language education are insufficient, leading to an erosion of cultural connection and an essential part of their identity.<sup>510</sup> Beyond the cultural implications, this situation underscores the broader challenge UMCs face in achieving fluency in any single language, thereby limiting their ability to express themselves comprehensively and diversely.<sup>511</sup> For a smooth transition to adulthood, the establishment of institutional mechanisms and practices that support individuality is crucial for developing the self-

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<sup>499</sup> Constitution of the Republic of Türkiye, Article 13.

<sup>500</sup> Ibid, Article 148(4).

<sup>501</sup> Çiçek, p.53.

<sup>502</sup> CRC Committee, General Comment 20, para.72.

<sup>503</sup> Mülteci Hakları Merkezi, p.28.

<sup>504</sup> Habip, p.68.

<sup>505</sup> Karatas, p.23.

<sup>506</sup> CRC, Article 4.

<sup>507</sup> Jerome & Starkey, p.441.

<sup>508</sup> CRC, Article 29(1)(d).

<sup>509</sup> Karatas, p.26.

<sup>510</sup> CRC Committee, General Comment 6, para.42.

<sup>511</sup> Bulat & Baycılı.

confidence and agency of UMCs as they approach the age of 18.<sup>512</sup> Children who lack fluency in languages face significant barriers in communicating with the outside world and may develop trust issues and difficulties in self-expression. This problem can be alleviated through the deployment of more trained staff and increased opportunities for language courses.<sup>513</sup>

UMCs cannot refuse compulsory education as mandated by Article 28 of the CRC. Due to their age, UMCs' wishes to forgo compulsory basic education should not be considered.<sup>514</sup> The specific needs and wishes of UMCs should be considered when determining the content of the education provided.<sup>515</sup> Given the diverse motives of UMCs, it is important to question whether their views on refusing education should be given due weight. Completely rejecting the possibility of refusing education would be overly strict. While Türkiye can be an origin, destination, or transit country for UMCs and thus cannot treat all cases uniformly, a baseline of compulsory education that UMCs cannot refuse must be maintained to protect their best interests.

#### 4.7. Conclusions

Violations of CRC and ECHR rights indicate that the development of the UMCs agency requires progress. Approaching children as passive individuals poses significant challenges to realising their agency.<sup>516</sup> Their connectedness to their society or institution for care should be utilised to develop their right-holder position within the community to which they feel they belong. Effective participation within the community should be sustained.<sup>517</sup> This can be achieved by giving them a role within the social environment and investing in their capacities.

There is a discriminatory culture in the age determination process<sup>518</sup> - manifesting either through disbelief towards UMCs or dishonest belief when UMCs declare incorrect ages - results in being recorded as adults. To address incorrect age declarations made by UMCs, protections should be enhanced and made more flexible. Most importantly, empowering UMCs and ensuring they are granted agency rights can help mitigate these problems.

One of the causes of the risks UMCs face outside institutions in Türkiye may be their lack of agency rights. Respecting their capacities and investing in their development can transform child agency into a supportive tool for protection rather than a contradicting right. The current protection of UMCs is not viewed holistically.<sup>519</sup> An effective guardianship system can address the imbalance between protection and agency rights.<sup>520</sup> Focusing strictly on protection and preventing all opportunities for escape from facilities can severely limit the agency of children. Instead, the appropriate approach should involve guiding them to address their specific needs and vulnerabilities.

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<sup>512</sup> Altıntop, p.253.

<sup>513</sup> Cankaya, p.79.

<sup>514</sup> Arslan, p.101.

<sup>515</sup> Ibid.

<sup>516</sup> Bell & Payne, p.1041.

<sup>517</sup> Euro-Med Human Rights Monitor, p.95.

<sup>518</sup> Raissan.

<sup>519</sup> CRC Committee, General Comment 6, para.25.

<sup>520</sup> Ibid, para.33.

The right to education is not fully utilised as a multiplier of other rights<sup>521</sup> and a facilitator of the right to agency. The deficiencies in human capacity and resources may limit the realisation of UMC agencies.<sup>522</sup> Additionally, questions arise regarding whether UMCs can refuse education and start working. There is no definitive answer to these questions. In addition to the CRC and ECHR frameworks, the diverse migration trajectories of children in Türkiye should be considered when analysing these dilemmas, as there can be extreme cases where leaving education and working are vital for UMCs. This underlines the need for case-by-case evaluation and flexibility.

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<sup>521</sup> Jerome & Starkey, p.440.

<sup>522</sup> Mülteci Hakları Merkezi, p.28.

## Chapter 5: Conclusion

### 5.1. Developing an Abstract Concept: Right to Agency

The research question posed was: "**To what extent is the right to agency of UMCs as a right holders under CRC and ECHR protected in Türkiye?**" To address this, the concept of the right to agency was developed, recognising that it is an emerging area with no established definition. The right to agency, often described as the empowerment of children, encompasses their capacities, competencies, and activities, allowing them to navigate life, fulfil needs, and make choices. It embodies their ability to act and effect change.<sup>523</sup>

The thesis aimed to analyse the position of UMCs as rights holders, incorporating the most relevant children's rights for this purpose. While the analysis in this thesis focuses on UMCs in Türkiye, it is acknowledged that the right to agency is a broader concept that should also be applied to all children. Given the upbringing in a non-individualistic culture and the associated complexities, studying the agency of Middle Eastern children holds promise for future research. To analyse UMCs in Türkiye, the right to the agency was constructed upon evolving capacities, the right to participation, the right to protection, the right to privacy, and the right to education. As a result of analysing these rights, the necessity of balancing protection and agency is highlighted. The vulnerability of UMCs, as enshrined in ECtHR case law<sup>524</sup> and CRC General Comments<sup>525</sup>, is an important factor necessitating effective protection. However, it is evident that providing agency is inseparable from ensuring effective protection in CRC and ECtHR case law.<sup>526</sup>

Positive developments in the agency rights of UMCs can only be achieved through appropriately considering the child's evolving capacities. The UMCs' capacities are intrinsically linked to their environments.<sup>527</sup> Additionally, utilising education as an effective, accessible, and appropriate tool to develop agency can build up UMCs' capacities and facilitate effective participation.<sup>528</sup> Above all, maintaining a balance between protection and agencies is crucial to safeguarding vulnerable children from abuse, violence, exploitation, and trafficking.<sup>529</sup>

### 5.2. Country-Specific Considerations for Agency Rights

Türkiye partially complies with each mentioned right separately. However, these rights should be looked at from the perspective of the agency. The right to agency is an overlooked concept, primarily due to resource limitations stemming from the influx of migrants. While the approach to vulnerability aligns partially with both the ECtHR and CRC Committee,<sup>530</sup> there is a notable absence of investment in child agency beyond addressing vulnerabilities.

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<sup>523</sup> Robson, p.135; Jerome & Starkey, p.441.

<sup>524</sup> Rahimi v. Greece, para.87.

<sup>525</sup> CRC Committee, General Comment 20, para.22.

<sup>526</sup> Darboe and Camara v. Italy, para.151; CRC Committee, General Comment 6, para.25.

<sup>527</sup> Oswell, p.44.

<sup>528</sup> Jerome & Starkey, p.440.

<sup>529</sup> Oswell, p.9.

<sup>530</sup> Çocuk Hizmetleri Genel Müdürlüğü, Çocuk Destek Merkezleri.

The most pressing issues in developing children's agency are the perceptions of childhood<sup>531</sup>, the lack of trained personnel<sup>532</sup>, and adequate space<sup>533</sup>. Furthermore, the traditional, non-individualistic upbringing<sup>534</sup> necessitates more attention to respecting the right holder position, especially concerning the right to education and privacy. The consideration of agency rights must be culturally sensitive and practically applicable. Child dependency on institutions and non-individualism<sup>535</sup> can be leveraged to enhance their agency rather than be seen as a barrier. They can develop their sense of self as valuable members of their society through education and capacity building.

### 5.3. Navigating Between Two Opposing Extremes

The dichotomy between the need for protection and agencies causes dilemmas with no definitive answers. The dilemma of whether children should be allowed to make significant decisions under their agency rights or be prevented by adults poses the question of their freedom to cross a dangerous bridge. It is open to further discussion whether they have the right to go missing, refuse education, or work. Considering the risks, strictly adhering to this idea is not agreeable. Instead, it can be seen as an extreme end of the spectrum, where the agency is very thick.<sup>536</sup>

Conversely, the opposite extreme—restricting children entirely from leaving facilities due to escape risks—makes the agency disproportionately thin. A strict protectionist approach can severely violate UMCs' agency rights. This issue can be addressed through the careful consideration of continuous agency, balancing protection with empowerment.<sup>537</sup> Still, this balancing act requires adults to decide right or wrong for UMCs, bringing out another question: to what extent can adults do this for unaccompanied migrants?

When analysing these dilemmas, the diverse migration trajectories of children in Türkiye should be considered in addition to the CRC and ECHR frameworks. Although flexibility and finding a balanced way between thick and thin agency<sup>538</sup> can be a way of sustaining the best interest of UMCs, accepting two extremes to coexist in the system can be another way to deal with this situation. UMCs arriving in Türkiye with intentions to use it as either transit or host country exhibit varying levels of vulnerabilities and capacities. Trying to melt all these differences in a pot to find a definitive answer to the agency dilemma can result in overseeing the need for extreme measures or extreme agencies. While these measures may seem 'extreme', they stem from the complexities of migration realities and must be addressed accordingly. This underscores the importance of conducting nuanced assessments of their agency rights to tailor them to their unique circumstances and requirements.

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<sup>531</sup> Jerome & Starkey, p.439.

<sup>532</sup> Altıntop, p.229.

<sup>533</sup> Mülteci Hakları Merkezi, p.28.

<sup>534</sup> Bulat & Al-Houssami.

<sup>535</sup> Ibid.

<sup>536</sup> Bell & Payne, p.1029.

<sup>537</sup> Ibid; Hanson & Nieuwenhuys, p.5.

<sup>538</sup> Ibid.

#### 5.4. Tools to Empower UMCs

Considering the nature of the right to agency and the specific conditions identified in the country study, alongside the necessary improvements to align with the CRC and ECHR, two key areas are highlighted as crosscutting with other rights and as crucial facilitators of UMC agencies: investing in the development of UMCs' capacities<sup>539</sup> and establishing an effective guardianship system<sup>540</sup>. When UMCs are supported in developing their capacities and recognised as rights holders, they can effectively protect themselves in accordance with their age and maturity, thereby gaining increased autonomy. Focusing on the development of the capacities of UMCs in Türkiye can challenge cultural norms and enhance their individuality.

An effective guardianship system can further develop children's capacities by ensuring they are well-informed<sup>541</sup> and adequately represented<sup>542</sup>, thereby enabling them to become active participants. Furthermore, when guardians are immediately appointed upon arrival, as CRC Committee<sup>543</sup> and ECtHR<sup>544</sup> stress, UMCs can be better protected while making tangible impacts on the decisions concerning them. These two factors can be utilised to ensure that the agencies of all UMCs, whether requiring extreme protection measures or more freedoms, are comprehensively addressed.

Enhancing the agency of UMCs through the rights enshrined in the CRC, ECHR, and ECtHR interpretations is crucial for effective child protection and mitigating the risks associated with overly restrictive protectionist approaches. Despite the inherent risks of potentially increasing vulnerability by granting agency rights, UMCs can achieve full development of their capacities only when they are empowered with agency rights. Using the bridge metaphor, it suggests children should be allowed to cross but with safeguards, risk information<sup>545</sup>, capacity-building<sup>546</sup>, and agency rights. Flexibility in protection is the most viable approach. Therefore, it is imperative for Türkiye, a key transit and destination country for many UMCs, to align its domestic law and practice of agency rights with CRC and ECHR standards to the fullest extent possible.

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<sup>539</sup> Ibid.

<sup>540</sup> Kilkelly, p.248 and ECtHR, Key Theme Article 8.

<sup>541</sup> CRC Committee, General Comment 6, para.37.

<sup>542</sup> Council of Europe, Joint note, p.9; Darboe and Camara v. Italy, para.142-150.

<sup>543</sup> CRC Committee, General Comment 6, para.33.

<sup>544</sup> Council of Europe, Joint note, p.9.

<sup>545</sup> CRC Committee, General Comment 6, para.24.

<sup>546</sup> CRC Committee, General Comment 20, para.22; General Comment 6, para.25.

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