

Memorandum on the *Nairobi Code* and the *UNHCR Code of Conduct*

By Matthew Budow

I. Introduction

I am a final semester law student at the University of Michigan, currently placed with the Refugee Rights Project at the University of Cape Town as part of Michigan's South Africa externship program. In beginning my externship at the Refugee Rights Project, I was given the *Nairobi Code* as a guide towards ethical practices in the provision of legal services to refugees. While the *Nairobi Code* offers a strict set of legal rules to illuminate proper professional conduct for Refugee Rights Project legal advisors, the office, as a UNHCR implementing organization, also looks to the broader *UNHCR Code of Conduct*. While neither code exercises binding legal authority, they are both incredibly beneficial in providing an ethical baseline for refugee work.

Taken together, the behavioural principles of the *UNHCR Code of Conduct* serve to put meat on the more bare bones or strictly tailored legal regulations of the *Nairobi Code*. The need for the ethical provision of refugee services is paramount, and increasing the familiarity of refugee aid organizations (including their staff members, volunteers and interns) with both Codes will only strengthen the quality of services provided. As such, the *Nairobi Code* and the *UNHCR Code of Conduct* are important and powerful tools for any organization dealing with legal aid or other refugee services.

The following memo represents a brief comparison and reaction to both the *Nairobi* and *UNHCR* codes from a newly minted extern beginning his semester of work.

II. Comparing the Scope and Purpose of the *Nairobi* and *UNHCR* codes

In reacting to both the *Nairobi* and *UNHCR* codes, it is important to first note the slightly different purpose served by each respective document. At the most basic level, the *Nairobi Code* is directed to guide legal practitioners and those that provide legal aid and services to refugees. The specific legal basis of the *Nairobi Code* rules

stands in contrast to the more general focus of the *UNHCR* code, which was propagated to direct the behaviour of all UNHCR staff members.¹ Accordingly, the broader-based *UNHCR* code includes considerations like the reputation and morale of the UNHCR, which do not necessarily fall within the scope of the strict legal rules of the *Nairobi* code. Still, the same guiding principles of maintaining integrity and avoiding exploitation or exploitative relationships serve to motivate the implementation of both documents.

While both the *Nairobi* and *UNHCR* codes are aspirational in that they seem to lack a binding legal force², the *Nairobi Code* offers a more concrete and practicable set of rules compared with the *UNHCR Code*'s more general, "...illustrative guide for staff to make ethical decisions in their professional lives, and at times in their private lives."³ Taken together, however, both codes (and the UNHCR explanatory notes) demonstrate proper rules for the provision of legal aid to refugees and broader moral principles designed to guide interactions between service providers and refugees.

III. Linkages Between the *Nairobi* and *UNHCR* codes

Numerous and explicit links between the text of the *Nairobi* and *UNHCR* codes illustrate the complementarity of the two documents. For example, *Nairobi Code* §4 Diligence provides that, "Advisors are responsible for maintaining regular access to published UNHCR materials and country of origin information necessary to assist clients in refugee status determination applications and other matters"⁴, and that, "An advisor shall act...to obtain the best results possible for the client."⁵ This directly corresponds to the section of UNHCR Code of Conduct Principle 1 which states that, "I will keep myself informed about UNHCR's policies, objectives, and activities and about refugee concerns, and will do my utmost to support the Office's protection and

¹ *UNHCR Code of Conduct* at 2 ("The Code applies to all UNHCR staff members who are all requested to sign it. Persons holding a UNHCR consultant contract, UNVs and interns will also receive the Code and be requested to confirm that they uphold its standards as far as applicable to their status").

² *See id* at 1 ("It is a moral code that does not have the force of law"); *See also The Nairobi Code* §1 ("These rules are subordinate to any applicable domestic rules governing the provision of legal services, and are intended only to supplement such rules").

³ *UNHCR Code of Conduct* at 1.

⁴ *The Nairobi Code* at §4.3.

⁵ *Id.* at §4.1.

assistance work.”⁶ *Nairobi Code* §5 deals with conflicts of interest, declaring that, “Advisors shall not provide services to any prospective client where the advisor has a direct financial or personal interest that is opposed to the client’s interest.”⁷ Similarly, Principle 3 of the *UNHCR Code* includes the commitment to performing official duties and conducting private affairs in a manner that avoids conflicts of interest, specifically stating that, “My actions will be free of any consideration of personal gain.”⁸ *Nairobi Code* §6 regarding confidentiality also closely corresponds to provisions in the UNHCR Code. The *Nairobi Code* provides that, “An advisor shall protect the confidentiality of all information that is gathered regarding a client’s affairs...”⁹ The UNHCR Code likewise asserts that, “I will exercise due care in all matters of official business, and not divulge any confidential information about refugees, colleagues and other work-related matters...”¹⁰ The *Nairobi Code* section on the Duty of Integrity states that, “An advisor shall adhere to the truth in all communications”,¹¹ and that, “An advisor shall conduct his or her interactions with other parties in a courteous, professional manner, consistent with principles of respect for other people and principles of human rights and non-discrimination.”¹² The UNHCR Code similarly provides that, “I will demonstrate integrity, truthfulness, dedication and honesty in my actions. I will be patient, respectful and courteous to all persons with whom I deal in an official capacity, including refugees and other persons of concern, representatives of operational and implementing partners, governments and donors.”¹³ Finally, §8 of the *Nairobi Code* covers the duty to avoid exploitation, which is repeatedly echoed throughout the UNHCR Code. The most prominent link can be found in Principle 7 of the UNHCR Code, which demonstrates a commitment to, “Prevent, oppose and combat all exploitation and abuse of refugees and other persons of concern.”¹⁴

⁶ *UNHCR Code of Conduct* at 5.

⁷ *The Nairobi Code* at §5.1.

⁸ *UNHCR Code of Conduct* at 6.

⁹ *The Nairobi Code* at §6.2.

¹⁰ *UNHCR Code of Conduct* at 8.

¹¹ *The Nairobi Code* at §7.1.

¹² *Id.* at §7.3.

¹³ *UNHCR Code of Conduct* at 6.

¹⁴ *Id.* at 9.

IV. *The Nairobi Code*

Given the specific legal focus of the *Nairobi* code, the rules that it presents are strongly rooted in general legal ethics, broadly applicable to any lawyer-client relationship. In fact, outside of the scope and purpose section, “legal advisor” and “representation” definitions, §4.3, and Annex 1, the *Nairobi Code* does not even mention refugees. The fact that the *Nairobi Code* is largely non-refugee specific is not entirely surprising as its legally-focused rules reflect commonly held standards of professional responsibility. In fact, the *Nairobi Code* closely parallels the American Bar Association’s Model Rules of Professional Conduct governing client-lawyer relationships. Though slightly more expansive than the *Nairobi Code*, sub-sections of Rule 1 of the Model Rules of Professional Conduct are similarly devoted to the Scope of Representation and Allocation of Authority between Lawyers and Clients, Diligence, Confidentiality of Information, and Conflicts of Interest, while including numerous other areas of substantive overlap.¹⁵

One possible shortfall of the *Nairobi Code* is that it propagates a set of rules without specifying any type of sanction or penalty that might be imposed for breaching those rules. This is not entirely surprising given the softer, supplementary nature of the Code relative to domestic rules. Similarly, as refugee services are often provided by volunteers, effective penalties might be difficult to implement. Still, some form of model sanctions or penalties to accompany these rules may serve to improve how well they are obeyed.

V. UNHCR Code of Conduct

The *UNHCR Code of Conduct*, in addition to providing a broad and far reaching behavioural guide to accompany the *Nairobi Code*’s strictly legal rules, also seems to maintain a heightened focus on sexual exploitation and misconduct. No less than a third of the nine principles contain references to sexual exploitation in their

¹⁵ See Model Rules of Professional Conduct, American Bar Association, Available at: http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_table_of_contents.html

explanatory notes.¹⁶ This concentration on sexual relationships is likely responding to General Assembly Resolution 57/306 regarding the investigation into sexual exploitation of refugees by aid workers in West Africa. The Code also includes the Secretary-General's Bulletin SGB/2003/13 prescribing special measures for protection from sexual exploitation and abuse. While *Nairobi Code* §8 on the duty to avoid exploitation and §5 on conflicts of interest do prescribe rules for dealing with sexual relationships, the *Nairobi Code* does not seem to share the same degree of focus and attention that the *UNHCR Code* pays to sexual exploitation.

Separately, just as the more structured rules of the *Nairobi Code* parallel the American Bar Association's Model Rules of Professional Conduct, the behavioural guidelines of the *UNHCR Code of Conduct* also have an American analogue. The American Bar Association's Model Code of Professional Responsibility is similarly broad and behaviourally focused, corresponding to the Model Rules of Professional Conduct just as the *UNHCR Code* can be seen to correspond to the *Nairobi Code* rules.

VI. General reaction and conclusions regarding the application of both codes

The two Codes combine to provide a very valuable guide to proper behaviour for anyone engaging in the provision of legal aid or counsel to refugees. Given the numerous links between the text in the two documents as well as the themes, rules, and principles that underlie both Codes, the *Nairobi Code* and the *UNHCR Code of Conduct* may easily be read in a complementary way. While these rules and principles are largely grounded in common sense, the benefit of both the *Nairobi Code* and the *UNHCR Code of Conduct* is in connecting basic ethical guidelines to actual conduct in practice. For example, the *Nairobi Code* provides for integrity and truthfulness in dealing with refugee/client matters. Still, these two principles can be complicated by the duty of confidentiality also included in the Code. Fortunately, however, the *Nairobi Code* demonstrates practicable standards for dealing with situations where integrity and confidentiality butt heads (such as when a client's misstatement becomes known to a legal advisor). The moral principles underlying

¹⁶ See *UNHCR Code of Conduct*, Explanatory Notes, Principles 7-9, at 29-36.

such a conflict are further fleshed out in the explanatory notes of the *UNHCR Code*. While ethical standards are of absolutely primary importance when it comes to the provision of legal aid and services to refugees, it is easy to see how ethical dilemmas often are presented in varying shades of grey. By combining the more focused rules of the *Nairobi Code* with the broad sweeping principles and behavioural guidelines of the *UNHCR Code of Conduct*, the end result is a comprehensive professional and personal roadmap to the provision of ethical and proper refugee services.