Matteo Tondini

Statebuilding and Justice Reform. Post-Conflict Reconstruction in Afghanistan

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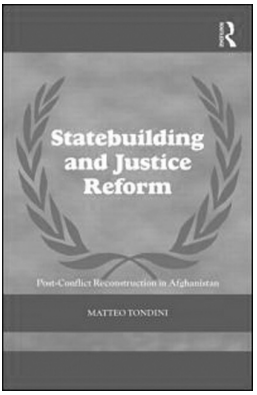

The evolution of the law governing peacebuilding in post conflict countries is a key feature in global and United Nations efforts to maintain peace and security. As the President of the Security Council stated in 1998 "post conflict peace building structures [are] part of efforts by the United Nations system to achieve a lasting peaceful solution to conflicts".[1] This idea has been reiterated in subsequent UN documents, such as the Brahimi Report[2] and the more recent "United Nations Peacekeeping Operations: Principles and Guidelines".[3]

However, the legal framework and political strategies for peacebuilding are far from being precisely defined in international law and international relations. The practice has shown some successful cases and other situations which presented, and are actually presenting, serious difficulties. In most of these situations, the process of peacebuilding is challenging and this is reflected in the mandates of the missions set up by international organizations and deployed in post conflict countries. The new trend in peacekeeping strategy is to focus more and more on the creation of multidimensional peacekeeping operations. International troops are not only mandated with typical peacekeeping functions but also with reconstruction and social tasks. In this regard, the reform of the justice sector plays a key role along with respect for human rights and security issues. In various scenarios the reform of justice has determined the success of the entire reconstruction strategy.

The book by Matteo Tondini deals with such a complex issue and specifically with justice sector reform in Afghanistan. It is a meritorious work of reconstruction of the fragmented involvement of national and international actors in the process of peacebuilding in that country. The case study of

1 Statement by the President of the Security Council, UN Doc. S/PRST/1998/38, 28 December 1998.

2 Report of the Panel on United Nations Peace Operations, UN Doc. A/55/305 - S/2000/809, 21 August 2000.

3 United Nations Department of Peacekeeping Operations, Department of Field Support, 2008, http://www.peacekeepingbestpractices.unlb.org/Pbps/Library/Capstone_Doctrine_ENG.pdf.

Afghanistan is one of the most interesting ones and gives the chance to explore and criticize the legal foundations of reforms in post conflict scenarios. Given the absence of a direct involvement of the UN Peacebuilding Commission, justice sector reform in Afghanistan has been followed up by a plethora of actors. The coordination of those entities has experienced some difficulties and the capacity building of the local actors has not always been successful. However, as reported by the author, there is room for improving the current situation and some important results have been achieved.

The book is composed of five chapters. While the first two are aimed at introducing the legal framework and the political strategies of peacebuilding in general and in the specific case of Afghanistan, the last three parts are dedicated to reform of the justice sector in that State. In this regard the author looks at the evolution of the justice system in Afghanistan starting from the adoption of the first constitution in 1923 and focusing on the situation prior to 9/11.

In the first chapter the author sets out the new approach to peacebuilding after the 9/11 attacks in 2001. There is a marked difference between the paradigm of statebuilding before and after that date. The author takes as examples of the former period the UN territorial administrations in East Slavonia, Bosnia, Kosovo and East Timor and defines the powers of the international actors involved as: "so extensive that the status of the administrated territories resembled that of a protectorate or a trusteeship administration". After 9/11, the "local ownership" (or national ownership) has become the new strategy to improve the institutional reforms processes. This new approach is guided by the idea that peacebuilding should be based on the reinforcement of the local capacity and of the domestic decision making.

The second chapter of the book is dedicated to the so called "consent based approach" in the reform of justice. Here the author again points out a difference between the approach followed in the territories administered by international actors and the situation in Afghanistan. He demonstrates that the previous approach ('neo-colonialist') consists in the arrangement of "justice packages" aimed at the reconstruction of the justice sector of post conflict States through the deployment of legal experts and the pre-arrangement of the applicable norms. The "consent based approach" illustrated in this part of the book is much more aimed at looking for consensus in order to respond to the local demand for justice. As an example of this approach, the experience of tribal justice is shown, which is currently fostered in Afghanistan and which has been successfully employed in Rwanda through the Gacaca Courts.

The system of justice in Afghanistan before the US intervention is presented in the third part of the book. It describes well how the Taliban regime, which took power in 1996 after the communist period and after the arrival of Mujahedins in 1992 and the correspondent period of Islamization, has modified the institutional framework. The Taliban regime brought the things back as they were before 1978. The judiciary was essentially composed of Shariat court with

limited powers and jurisdiction. In fact, the establishment of *ad hoc* religious courts to hear specific cases has been very frequent. The author concludes that the justice system was "completely in the hands of local actors" and that "it had never been considered as fair and impartial by the local population".

In the fourth part of the book it is shown how the "lead nation approach" contributed at first to the restoration of the justice system. The Bonn Agreement declared that until the adoption of a new constitution, the interim legal system in force in Afghanistan consisted of the 1964 Constitution. Furthermore, the Interim Administration created the Judicial Reform Commission in 2002 which identified a list of priorities for the justice sector. During this first period, Italy was named as the lead nation for the justice sector reform. Italy focused on the legislative reform, the training and capacity building and the rehabilitation of infrastructure. Particularly interesting is the approach followed by Italy, with a strong presence of international actors. The role of Italy in this regard is analysed by the author, who reflects on the choice by Italy to involve other international actors. Tondini sees the presence of multiple actors as a factor of confusion for the local institutions. It is also described that the initial phase was followed by the adoption of the 2004 Constitution, which drew up a new justice system consisting of the judiciary (Supreme Court, court of appeals and primary courts), the Attorney General and the Ministry of Justice.

The fifth part of the book describes the second phase of reconstruction, identifiable with the end of the Bonn process and the London conference. According to the author, in this phase of the reconstruction a gradual hand over to the Afghan Government of all the competencies in the field of justice reform is recognizable. It is illustrated the National Justice Programme set up within the National Justice Sector Strategy, established during the Rome Conference on the rule of law in Afghanistan held in 2007. Moreover, he describes reform activities in three sector: counter-narcotics law, training and capacity building and judicial infrastructure. He also explains how the US military has been more and more involved in the reform of justice. The author concludes by defining this phase as a "mixed ownership regime" in which the Afghan Government retained a major role in the reform of justice which was also open to the intervention of international actors. This was the case of European Union legal advisors working with the Afghan justice institutions.

The author concludes his book with some reflections and proposals. The conclusions drawn by Tondini focus on the international involvement and the on the strategies of the actors involved. He presents the necessity to reduce the number of international actors involved in the process of justice reform. This certainly derives from the need to put into practice the "national ownership" doctrine and also from the necessity to avoid confusion on the field and to improve coordination. Moreover, it is interesting that the author suggests to reduce the number of bilateral activities, such as legal training: this is a reference to the strategy adopted by Italy as the lead nation in the reform of

justice. Furthermore, one last interesting conclusion regards the future: the author notes that it is not useful to implement "those reform activities which mostly aim at copying with the short-term interests of donors rather than at shaping a modern and effective justice system".

This book raises some interesting points that deserve to be analyzed. I would like to focus mainly on two aspects, one general and the second more specific. The first point regards the "national ownership" that Tondini fostered in a previous article where he mentions the so called "light footprint approach".[4] I would like to start by mentioning a renewal in the United Nations peacebuilding strategy even if the UN are not involved in the reform of justice in Afghanistan. The new UN strategy, in fact, stresses some important principles that are useful to understand and to improve peacebuilding even if the UN is not actually involved.

On 29 October 2010, the Security Council approved Resolution 1947 in which it reaffirmed the importance of the Peacebuilding Commission "as a dedicated intergovernmental advisory body to address the needs of countries emerging from conflict towards sustainable peace".[5] The occasion for a re-affirmation of the importance of the Peacebuilding Commission was the approval of the report "Review of the United Nations Peacebuilding Architecture"[6] (hereinafter 'Review'). A similar Resolution was also adopted on the same day at the 40th Meeting of the Sixty-fifth General Assembly plenary session.[7]

The Peacebuilding Commission was established as an outgrowth of the General Assembly's 2005 World Summit. It is charged with helping post-conflict countries in their recovery, reconstruction and development efforts. The countries on its agenda include Burundi, Central African Republic, Guinea-Bissau and Sierra Leone. At the time it was set up, the Commission - an intergovernmental body mandated to foster coordination among key actors on the ground and to bring together resources for post-conflict countries - was hailed as a milestone. It was created as part of a broader United Nations peacebuilding architecture that includes the Peacebuilding Support Office and a multi-donor facility.

The idea of peacebuilding, however, is not a totally new one. The so called second generation peacekeeping operations are to be considered a practical *mise en ouvre* of peacebuilding in the much broader sector of the maintenance of international peace and security. In the 1990s and since the United Nations mission in Namibia (UNTAG), peacebuilding activities have become a key element of peacekeeping operations.[8] Moreover, peacebuilding has been seen

4 M. Tondini, 'From Neo-Colonialism to a "Ligh-Footprint Approach": Restoring Justice Systems', Vol. 15 *International Peacekeeping* 2008, pp. 237-251.

5 UNSC Res. 1947, 29 October 2010.

6 Review of the United Nations Peacebuilding Architecture, UN Doc. A/64/868-S/2010/393, 21 July 2010, hereinafter 'Review'.

7 UNGA Res. 65/7, 29 October 2010.

8 N. Schrijver, 'Introducing Second Generation Peacekeeping: the Case of Namibia',

as one the most successful attempt in the whole United Nations efforts in maintaining peace and security.[9]

However, there was a "key institutional gap"[10] in the United Nations system as no organ was devoted to the promotion of peacebuilding. The creation of the Peacebuilding Commission created such an organ.

The Peacebuilding Commission has experienced some problems in perform effectively its work. More expressly, the new Report adopted by the Peacebuilding Commission on 21 July 2010 admits that, despite the great enthusiasm which welcomed the institution of the new organ, the Peacebuilding Commission has never reached the threshold of success that was hoped.[11]

The Review identifies six key issues and concerns which are crucial for the future evolution of peacebuilding: 1) the complexity of peacebuilding, 2) the imperative of national ownership, 3) the illusion of sequencing, 4) urgency of resource mobilization, 5) women's contribution, and 6) connection with the field.

It seems that the second of these points regards an issue which is central in the book by Tondini. The Review suggests that the Peacebuilding Commission: "needs to ensure that national ownership genuinely and comprehensively underpins its work".[12] The theory of "national ownership" implies that "the international community must understand the limits of its role as midwife to a national birthing process".[13] This concept has also been emphasized during the discussions at the General Assembly where the Croatian representative stressed the need to take "national ownership" as a basis for every process of peacebuilding. Such an idea is not a new one, but needs to move from theory to practice. In order to improve the practical *mise en ouvre* of "national ownership" the Review suggests to link this concept with the capacity of the local actors to "fully engage throughout all phases of planning and implementation".[14] In the absence of a strict connection between ownership and capacity, the former remains mere theory.

The "national ownership" theorized in the Review reflects among other examples the evolution of the justice reform in Afghanistan as reported in the book by Tondini. This includes the Consultative Groups where national and international stakeholders, chaired by the local Government, participate in the policy making. Moreover, even at a lower level, sector working groups

Vol. 6 *African Journal of International and Comparative Law* 1994, p. 1.

9 E. Bertram, 'Reinventing Governments: the Promise and Perils of United Nations Peacekeeping', Vol. 39 *Journal of Conflict Resolution* 1995, pp. 388 and 390.

10 G. Thallinger, 'The UN Peacebuilding Commission and Transitional Justice', Vol. 8 *German Law Review* 2007, p. 682.

11 Review, § 10.

12 Review, § 19.

13 Review, § 18.

14 Review, § 52.

are equally composed by national and international actors under the chair of the national Government.

Furthermore, and specifically on the reform of justice, the case of Afghanistan, as explained by Tondini, seems to give effect to the "national ownership" by generating a strong demand for legal and judicial services. Such an ambitious objective could be reached by adapting the justice system to the local conditions. This is the case of transnational justice and of those judicial mechanisms based on local tradition and created in post conflict countries. In his book Tondini concluded that this is not really the case for Afghanistan as the "action plan" launched in 2006 is actually far from being implemented.

Some kind of scepticism with regard to the implementation of the "national ownership" in Afghanistan emerges from the second part of the book where the author analyses the recent developments of the reforms in Afghanistan referring to them as a "mixed ownership" regime. Tondini points out that although the structure is certainly modelled on the "national ownership" principle, in Afghanistan, the strong presence of international actors and donors *de facto* impedes the strengthening of the local institutions. Moreover, the author also indicates that the "lead nation approach" is not that appropriate. In this regard, it can be added that a major coordination between international actors should be preferable. Speaking of coordination, the UN Review on the new peacebuilding architecture must be recalled again. In that document it is said that "improving coordination in the field is vital"[15] and that it is important for all the international actors involved in peacebuilding to maintain coherence in the field.[16] In the future, the role of the UN Peacebuilding Commission should be devoted to ensure coordination and coherence, with the involvement of the whole "UN family". The suggestions made by the UN are difficult to conciliate with the "lead nation approach" which has proved to be problematic in the specific case of Afghanistan where Italy, the "lead nation" for the reform of the justice sector has involved a huge number of other international actors. Such a situation can be seen, as Tondini points out in the book, as an obstacle to a complete process of devolution of powers to the local authorities. In this regard the analysis proposed by the author seems to be in line with the UN proposal for a better coordination in the field.

One last point that could be interesting is the contradiction expressed by those Islamic laws which are not compatible with universally recognized human rights laws. Tondini explains that such a contradiction derives from the need of a balance between the Afghan traditions and externally generated laws introduced into the domestic legal system. With regard to this contradiction it is interesting to note the institution of the Afghanistan Independent Human Rights Commission (AIHRC) which has become a constitutional organ. The Commission may receive individual complaints regarding human rights abuses

[15] Review, § 137.
[16] Review, § 58.

and thus seems to be a guarantee for the respect of human rights. However, the AIHRC has no binding powers and it can only refer cases to judicial authorities or give assistance to victims of violations of human rights. The need of a stronger role for the AIHRC is envisaged in the Strategic Action Plan issued by the same Commission in 2010.[17] The institution of AIHRC is important and meritorious but it should play a more central role in the process of justice reform in Afghanistan.

Concerning human rights it is also to be noted that after the adoption of the 2004 Constitution the death penalty is still a legal punishment. As the author correctly points out, this is in line with the International Covenant for Civil and Political Rights but, probably, it is not in line with the trend in international law to abolish the death penalty.[18] It seems that the necessity of an approval of the Afghan President in cases of capital punishments represents rather a mere political than a judicial guarantee. In the case of death penalty and in other cases where Afghan traditional laws clash with generally recognized human rights principle, a stronger intervention by the international actors in the modification of those laws could be preferable.

In conclusion, the book by Matteo Tondini offers an interesting overview of the principles governing the justice sector reform in Afghanistan and of the concerns that such a long process has been raising since its very beginning. While important results have been achieved, other objectives are still to be reached. Having regard to the future developments, the suggestions put forward by the United Nations in renewing its peacebuilding architecture are to be taken into account as they seem to be shaped also on the basis of the experience of Afghanistan. In this regard, the conclusions and the suggestions proposed by the author are compatible with the new UN peacebuilding architecture.

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[17] AIHRC, First Quarterly Report, 1389, March-June 2010, http://www.aihrc.org.af/2010_eng/Eng_pages/Reports/First%201389%20Quarterly%20Report%20%28English%29.pdf

[18] See for instance the UN General Assembly Resolution on a Moratorium on the use of death penalty. UNGA Res. A/C.3/62/L.29, 1 November 2007.