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Misguided guidance?

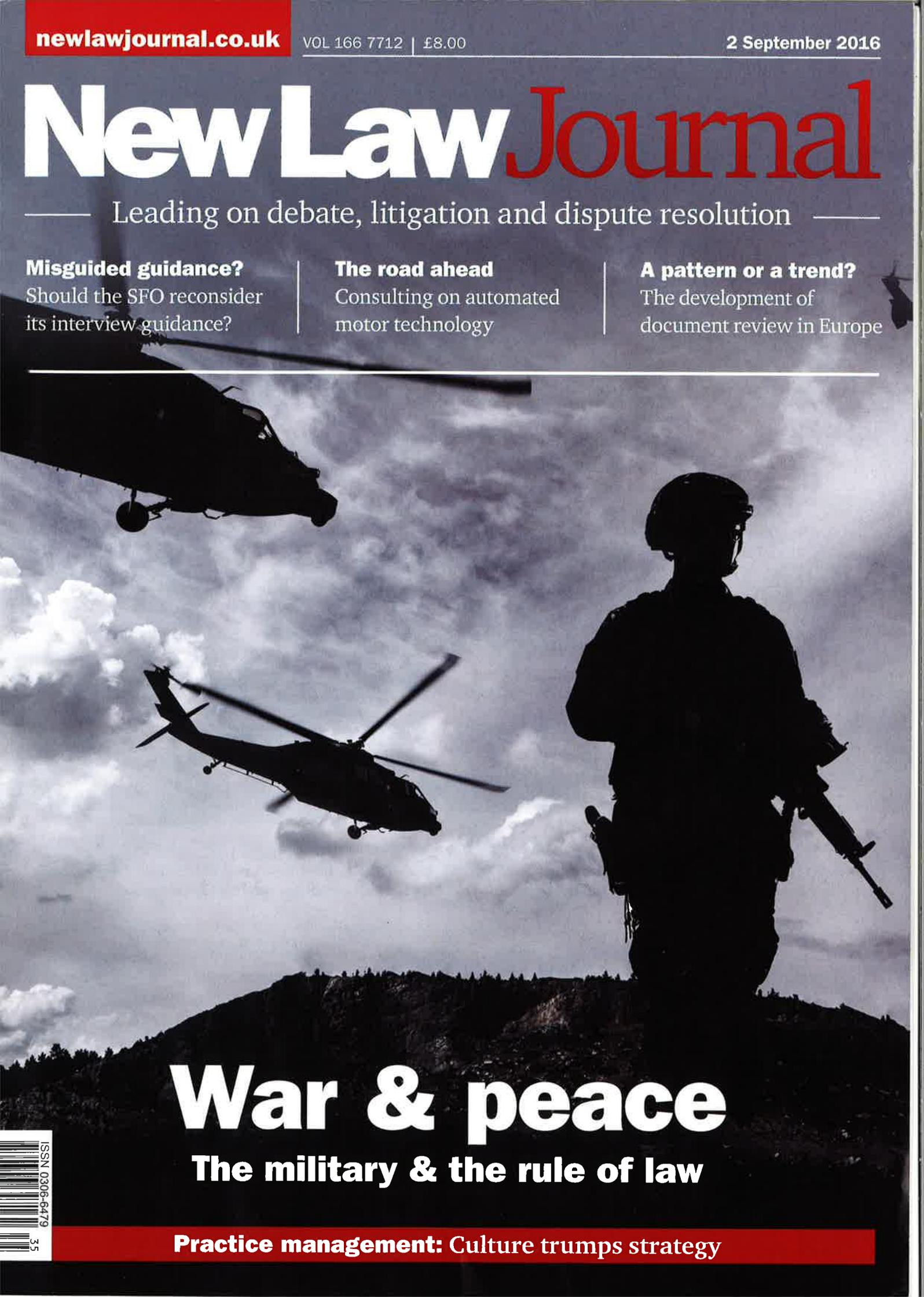
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War & peace

Philip Evans QC & Tom Coke-Smyth discuss the importance of applying the rule of law to the military

The news, on 14 August, that Public Interest Lawyers, the firm which brought a host of discredited cases alleging abuse by British servicemen in Iraq, is to be wound up has been met with applause by the press and service community. These claims culminated in the Al Sweady Inquiry which considered allegations of war crimes and abuse by British troops in Iraq in 2004. The allegations were found to be “baseless” and claims of torture and murder were “wholly without foundation” and “entirely the product of deliberate lies, reckless speculation and ingrained hostility” from some Iraqi witnesses. It has prompted calls for the suspension of the European Convention on Human Rights (ECHR) on the “battlefield” and a general attack on lawyers meddling or challenging affairs involving “war”. That reaction is understandable; however, it would be an enormous mistake to conclude that the law only interferes with the military doing its job.

The first reason is that contemporary military operations are not war in the conventional sense as understood by the public and traditional military doctrine. Recent operations in Iraq and Afghanistan have taken place on a wide spectrum, ranging from military support to the civil power to localised peaks of high intensity fighting. However, these operations have been directed at relatively small numbers of insurgents rather than at armies.

Away from the “battlefield”

So where does the law come into this and why is its application important? It is important because: i) we are not in fact on the “battlefield” in any traditional sense; and ii) in a counter insurgency winning cannot be

defined by simply defeating the insurgents on the “battlefield”. If you accept that the law and democratic system which protect our rights and freedoms in the UK are fundamentally valuable and worthy of our protection, it makes no sense to throw these out of the window the minute a man with an assault rifle starts shooting at our soldiers when trying to build these systems overseas. Our soldiers are often deployed in situations where they face non-state actors or insurgents. They act as a strange hybrid of soldier, policeman, diplomat and aid worker.

Bitter experience of British military involvement in Northern Ireland during the troubles teaches us that the use of blunt or excessive force outside of the law is entirely counterproductive and will in fact strengthen the very forces we seek to defeat. Bloody Sunday is a prime example of this. The lack of accountability for the British Army’s actions that day destroyed its legitimacy in the eyes of many of Ireland’s Catholic community for decades afterwards and acted to significantly prolong the conflict.

The importance of accountability

If our armed forces need to operate within the law to be effective then law without accountability is meaningless. The reality of accountability is that we must accept that there will be cases where individuals in our armed forces break the law. We must also accept that there will be occasions where the only way that we will be able to address that is to have a process where an external complaint can be made and dealt with formally and independently. Distasteful as it may seem, that requires courts and lawyers. There are clearly very serious concerns about how this system operated, arising from Public Interest

Lawyers, but it would be wrong to suggest that the system should be abandoned.

Political disconnect

Further, British military involvement in Iraq and Afghanistan has taught us that there has, at various points, been a disconnect between our political leaders and senior officers and the reality of what our servicemen have experienced on the ground. That disconnect has often been exposed through the applicability of the law. Art 2 of the ECHR has provided families of our deceased servicemen with a tool which, largely through the inquest process, has enabled exposure of systemic failings within our armed forces. These failings in other circumstances simply would not have been actioned. Our politicians and senior officers have been slow to provide soldiers with the kit and resources required to do their job and to protect them doing it. The scrutiny brought to bear by lawyers acting for these families is, in those circumstances, right, proper and often beneficial in ensuring deficiencies are not repeated and future servicemen put at unnecessary risk. It should be pointed out that most of these lawyers will not have been paid and large numbers appear at these types of inquest pro bono through the Royal British Legion.

Sensitive area

The role of lawyers in dealing with the military will always be a sensitive one. Lawyers, for the most part, will not have been soldiers nor will they have first-hand experience of the unique challenges which our servicemen face. Their challenge will be to apply their judgment carefully when dealing with cases involving the military and ensure that they themselves adhere to the highest standards of their profession in deciding whether they can properly act for those who instruct them. If that is done, there is nothing wrong with challenges being brought or our armed forces being questioned. That does not mean that courts should not be very slow to interfere with decisions made in good faith under enormous pressure. However, if we do not have the lawyers and the courts to resolve issues when they arise we fundamentally weaken the perceived legitimacy of our application of military force. That is something which will only strengthen the insurgents we seek to defeat.

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Philip Evans QC & Tom Coke-Smyth are barristers from QEB Hollis Whiteman. They acted for the families at the Art 2 Inquest into the deaths of Captain Sawyer and Corporal Winter in a friendly fire incident involving the Javelin missile system. Having trained at the Royal Military Academy Sandhurst Tom served as an officer in the British Army, including in Helmand province, Afghanistan