Rule of Law: The quiet transformer

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In his first 18 months, Military Advocate-General Brig.-Gen. Sharon Afek has already managed to be a quiet transformer and shown himself to be impervious to pressure regarding even the thorniest issues.

During his term, he will be the primary lawyer to decide Israel’s stance on war crimes vis-à-vis the International Criminal Court, which will affect a range of bigger-picture Boycott, Divestment and Sanctions movement issues.

It is then surprising that, unlike his former boss, former military advocate-general and current Attorney- General Avichai Mandelblit, Afek appears, at first glance, as disarmingly regular.

Mandelblit is strikingly tall and has a sometimes bellowing laugh that can shake his body. As military advocate-general from 2004 to 2011 and in other positions, he gave strident public speeches in which he wore his emotions on his sleeve.

In contrast, Afek is short and thin, and minus the general’s crossed sword and sheaf of wheat on his shoulder and the insignia of the IDF Legal Division which mark him to insiders as the IDF’s top lawyer and legal adviser, he could easily blend into the crowd.

To date, he has been much less of a public media face than Mandelblit was, speaking only a few times in public at Israel Bar Association events and mostly operating in the halls of power behind the scenes. When he has spoken publicly, it has been in measured and carefully delivered tones.

And yet, he may be the most formidable military advocate-general in a long time, and the one most ready to address Israel’s international law challenges, having served as deputy military advocate-general and in top positions in the international law, Judea and Samaria, and air force departments. (Usually, the military advocate-general is expected to come from the prosecution or defense divisions, with no special international law background.) Despite his low-key public demeanor, no IDF staff member would ever submit himself to his incisive and quick questioning without being thoroughly prepared.

But his legacy internationally and nationally will likely be determined by his fateful decisions in the Hebron shooter case, on war crimes probes before the ICC prosecutor, on the rape case against storied former general Ofek Buchris and key appointments like that of the first-ever Druse-Israeli Judea and Samaria chief prosecutor, Lt.-Col. Asem Hamed.

Afek’s decision to indict Hebron shooter Elor Azaria for manslaughter, not the harsher murder charge and not the more lenient negligent homicide charge, has been his biggest decision to date.

Why did he decide on manslaughter and not murder, as Palestinians and many overseas Israel critics wished? The question is strengthened by how one-sidedly the IDF court ruled in favor of the IDF prosecution in its findings against Azaria, and by the appearance that his killing of terrorist Abdel Fattah al-Sharif was performed out of revenge, calculated and carried out calmly.

Legal sources with knowledge of the decision have said that it was not simple for Afek. He thought meticulously through all of the circumstances and reviewed dozens of murder cases to get a fuller comparative picture, but ultimately concluded that the case was relatively rare.

He thought that, overall, the operational circumstances and the stabbing attack by Sharif only around 10 minutes before Azaria shot Sharif, precluded attributing to Azaria any premeditated intent to kill. This was even though Azaria confessed afterward to being at least partially motivated by revenge for Sharif’s stabbing of his friend.

Afek would point out that Azaria did not come to the area with any sort of plan to kill Sharif, that he did not really have time to think, and that his decision to kill was essentially made only moments before he carried it out.

Unlike some legal systems that have dropped the concept of “provocation” as a mitigating circumstance, the IDF takes into account special circumstances where a soldier is provoked in the moment that they kill as a basis to reduce a charge from murder to manslaughter.

Always aware of related world developments, Afek might also point out that British marine Alexander Blackman’s murder conviction under more serious circumstances was reduced to manslaughter by British courts in March.

Afek thinks it is important to remember that his decision on the charges was made long before he knew how the trial would turn out, and with knowledge of police statements from dozens of soldiers and civilians who took Azaria’s side that there were concrete dangers or in other specific aspects of the story.

The IDF prosecution had also lost its push to keep Azaria in detention. This included losing its appeal to now-IDF Chief Judge Maj.-Gen. Doron Feles, in which the judges implied a number of possible evidentiary weaknesses in the prosecution’s case – though sources close to Afek dismiss the detention stage decisions as indicating little without a full picture of the evidence.

With so many extenuating circumstances, why didn’t Afek indict Azaria for mere negligent homicide, as seemingly most of the Israeli political establishment, including Prime Minister Benjamin Netanyahu, and much of the public, would have preferred?

Afek would explain that he was deaf to political pressure and that negligent homicide could have held water only if Azaria’s actions were a mistake or the result of over-perception of danger, which could have theoretically been legitimate.

Since the IDF court agreed with the IDF prosecution’s narrative that there was no concrete danger, the lower charge was not a real option, though it was unclear how Afek might have ruled if Azaria had not admitted to two soldiers that he shot Sharif out of revenge.

Afek views the IDF court’s 18-month sentence as justifying the prosecution’s seeking significant jail time, and there does not appear to be any readiness to reduce that time for a deal. This contrasts with what Azaria’s new lawyer has implied could happen in a deal.

How will Afek’s decisions impact the biggest game in which he is likely the dominant player for Israel? How will the Hebron shooter case decisions impact the preliminary examination of 2014 Gaza war crimes allegations and ongoing similar allegations being conducted by ICC Chief Prosecutor Fatou Bensouda?

Whether Bensouda gives Israel’s legal system a thumbs-up or thumbs-down and whether she seeks to indict Israeli soldiers for war crimes could also have a massive impact on BDS and delegitimization campaigns against Israel.

Where does Israel stand with the ICC over the broader 2014 Gaza war crimes allegations?

Though Israel has issued five detailed reports on cases it has closed, dozens of criminal investigations opened and a few indictments for theft, to date there is still not a single indictment for killing any of the 2,100 Palestinians (of whom around 50% [according to the IDF] or 70%-80% [according to NGOs] were civilians) whom the IDF killed during the war.

Moreover, two-and-a-half years after the war, Afek has not reached a decision on whether to open a criminal investigation in the Hannibal Protocol/“Black Friday” incidents, the “Shejaia Massacre” incidents and the Khuza incidents. These are the cases with the most Palestinian dead and which the ICC prosecutor has dubbed the key to its own probe.

Is Israeli delay on these cases unnecessarily risking a battle with the ICC?

The Jerusalem Post has previously exclusively reported that as early as June 2015, top Israeli legal officials were considering publishing at least partial decisions on some of these incidents.

That means that a conscious decision was made to wait and, it would seem, to hold all of the findings until everything is completed.

This probably also means waiting until after the state comptroller releases his report on whether the IDF targeting policy was legal at the broadest level.

How would Afek respond to these allegations of delay? He would reject them outright, according to legal sources with knowledge.

Afek believes that he and his staff have worked extremely hard to clarify all of the relevant facts in these most serious and most complex cases, which occurred in the fog of war.

He would note that many critics wrongly act as if Israel is dragging its feet on these cases, when really each incident must be broken down into dozens or more sub-incidents, which may have been in the same area, but were not at the same time and often involved different forces.

Pressed that the Post had multiple impeccable sources that a decision was ready in June 2015, Afek would reject this as a misunderstanding either by the sources, or that, at most, perhaps some subset of the sub-incidents had been reviewed by then.

Afek was pushed further that the IDF must be holding some major, broader conclusions back, or the July 2015 promotion to the rank of brigadier-general of Hannibal Protocol incident commander Ofer Winter would not have gone through. Sources close to Afek would reject conflating interim findings with final legal determinations.

Afek also would reject any idea that he has waited for the comptroller’s report. He would note that the ICC prosecutor is still only at a preliminary examination stage, not a criminal investigation, let alone near any decision to indict Israeli soldiers.

Afek has been military advocate-general for 18 months, but in the first year after the war, the handling of the major incidents was carried out by his predecessor, Danny Efroni.

Despite two-and-a-half years passing since the war, Afek is not ready to commit to any time frame for the major decisions, whether six or 12 additional months, suggesting that the decisions are still off in the distance.

While the indictment, conviction and likely jail sentence of the Hebron shooter will not get the IDF off the hot seat before the ICC, it does remove the allegation that the IDF never goes after soldiers for killing Palestinians.

At the national level, the next blockbuster decision by Afek was to indict Buchris for rape, despite not only Buchris’s denial of the charges, but denial that he had had any sexual contact with his accusers, whether consensual or not.

Before the rape charges, Buchris was considered on track to be a future IDF chief of staff. There was also a massive political and media campaign by his supporters, including other top IDF brass, to get Afek to drop or reduce the charges.

In that sense, from the outside, Afek’s decision to indict a decorated general, seemingly on the word of one young female soldier against his word, was a major, gutsy and risky judgment call.

Even as the case was far from simple, Afek did not see it that way.

Despite contrary media reports that Buchris had passed a lie-detector test, a legal source with knowledge said that, from the start, Afek did not believe Buchris was telling the truth, partially because he had failed his polygraph.

While many people who knew Buchris wanted to believe him and believed what they wanted to believe, the evidence was clear and convincing, said sources.

Some factors included all of the backup to the female soldier’s story from her mental healthcare professionals as well as a second victim, a female officer who, when pushed, eventually came forward and accused Buchris of committing nonconsensual sexual acts against her.

Further, Afek never considered Buchris’s rank, and viewed Buchris’s actions as very grave.

But then Afek threw everyone a curveball, cutting a plea bargain heavily reducing the charges and leading to no jail time and a mere demotion in rank as punishment.

While there was some criticism by women’s rights organizations, Afek would note that the two victims themselves were entirely supportive of the deal, especially because Buchris eventually publicly admitted responsibility, and it saved them from an emotionally traumatic trial.

Another mark Afek has made on the face of the IDF legal division, making an impression also on the broader world, was appointing Hamed. Hamed recently took up his post, and both his Arabic fluency and his familiarity with Arab culture made quite a few Palestinian defense lawyers optimistic that the system would improve somewhat under his leadership.

Afek would deny making the appointment because of Hamed’s ethnic background, and believes that he is a top-notch lawyer and that there is plenty of diversity in the IDF legal division’s ranks. Still, he certainly would not deny that the appointment could have some legal and public relations fringe benefits.

Afek has made some major less-reported moves, reforming IDF policy on drug violations, so that the first three to four times that a soldier, while on civilian leave, smokes a joint, he can emerge with an unscathed record and no jail time, by receiving treatment, being put on probation and undergoing drug tests.

Others had discussed this reform for years, but Afek implemented it within a relatively short time after taking over the reins of the IDF legal division.

There are expectations that some other major new reforms are also on deck down the road, and that Afek is not afraid to ruffle feathers and does not feel restrained to wait years for committees to deliberate to make changes he believes in.

Most of all, despite serving in one of the most sensitive, complex and influential positions in the country during a time of unprecedented high-profile decisions and disputes, Afek’s cool temperament under pressure has served him well.