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"Non-Combatants" in Muslim Legal Thought

ELLA LANDAU-TASSERON

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“Non-Combatants” in Muslim Legal Thought

by
Ella Landau-Tasseron

The law of war in Western tradition developed over hundreds of years, based on Roman law, the writings of the Church Fathers, and medieval codes of chivalry. These codes, rules, and regulations crystallized from the sixteenth century CE onwards into a doctrine known as *bellum justum*, a term commonly translated into English as “just war.” Since the issues of justice and the justification of war are only part of this doctrine, it would perhaps be better to understand the Latin term as meaning “war carried out in accordance with law.” This doctrine contains two well-defined categories dealing with different aspects of war. One is that of *jus ad bellum*, which lays down the principles by which a war is determined to be either legal or illegal. The second is that of *jus in bello*, which defines permitted and forbidden behavior toward the enemy and their property during combat and afterwards. One of the main rules of this second category is the distinction between combatants and non-combatants (often referred to as civilians). Non-combatants may not be harmed intentionally. By virtue of not being involved in warfare, they are considered to have immunity.[1]

The Muslim law of war existed hundreds of years before its Western counterpart. It does not have two clearly defined categories, but within it can be found parallels of almost all Western rules and principles. The Muslim law of war includes, among other things, a prohibition against harming various groups of people. An examination of the nature of this prohibition will show that the term “non-combatants” used in the doctrine of just war is not suited to Muslim law. While it is true that all those who may not be harmed according to Muslim law are non-combatants, not all non-combatants are immune from harm. For this reason, the term “non-combatants” will appear here in quotation marks, referring to all those categories of people mentioned in Muslim jurists’ discussions about those who may not be harmed. These categories will be explained and discussed below.[2]

Statements about “non-combatants” appear in the earliest legal works, beginning in the second century AH/eighth century CE. In these works, the prohibition against harming “non-combatants” is usually based on the personal judgment of the jurist, or

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[1] Discussion of the theme of “just war” is extensive; see, e.g., Johnson, “Roots;” Walzer, *Wars*; Nardin, *War and Peace*. For a comparison between the just war tradition and Islamic concepts of war see Kelsay, *Islam.*

[2] I have not classified the various legal solutions according to legal schools for two reasons. First, in the case of the early jurists, it is not always clear to which school they belonged. Second, the disagreements within the schools are sometimes as great as those between them. Nevertheless, I have noted in the bibliography the schools to which the various authors belonged (when this can be known for sure). For a discussion of the applicability of the term non combatant to Islamic law see Kelsay, *Islam*, chapter 4.

on a few sayings (*ḥadīths*) going back to the Prophet and the first two caliphs, Abū Bakr and ʿUmar. Only rarely is an attempt made to justify these sayings rationally. Rather, these *ḥadīths* are usually considered in themselves to be the real reason for refraining from killing "non-combatants." They reflect the general principle that a Muslim should not engage in killing if there is neither reason nor necessity for him to do so. However, this principle is not absolute, and the explicit prohibition against killing "non-combatants" is conditional and significantly restricted by law. To use the legal language developed after the second/eighth century, any given "non-combatant," although protected to a certain extent, does not in fact have immunity (*ʿiṣma*) and is not considered to be "a soul whom Allah has forbidden to kill," (*nafs ḥarrama Allāh qatlahā*). The concept of *ʿiṣma* is the key to understanding Muslim attitudes toward "the other" in general, and toward the killing of "non-combatants" in particular.

The prohibition against killing has the validity of law in regard to Muslims and their allies, but it is merely a general and non-binding directive in regard to others. The category of those who have full immunity (*ʿiṣma*), meaning that they must not be harmed, includes only Muslims and their allies, the infidels who have a specific legal treaty with Muslims. Such a treaty may be either permanent (such as the *dhimma* contract) or temporary (such as *amān*, given for instance to infidel merchants in Muslim territory).[3] The sanctity of the lives of Muslims and of those who have a treaty with them is defined as *ḥurma* and is absolute. Harm may be inflicted on them only in self-defense or as punishment for a crime committed by them. Muslims and their allies have "measurable and substantial immunity" (*ʿiṣma muqawwama or muqawwima*). This means that whoever harms any of them has to pay, by enduring punishment and/or by paying compensation as set down in the law.[4]

On the other hand, the lives of "non-combatants" from among the non-Muslim enemy are forfeit to begin with. If they have immunity at all, it is merely "immunity that incurs a sin" (*ʿiṣma muʾthima*). A Muslim who harms them is a sinner, but no punishment is meted out to him, and he owes no compensation. There is general agreement regarding the exemption from punishment for a Muslim who harms "non-combatants." It is usually said that "there is nothing wrong" (*lā baʾs bihi*) with inflicting harm on a "non-combatant;" at most, the person who inflicted this harm must ask for Allah's forgiveness and express his remorse (*istighfār, tawba*).[5]

The boundaries set by the concept of immunity are also reflected in the difference between the laws governing war against infidels, on the one hand, and war against Muslim rebels (*ahl al-baghy*) on the other. Whereas the lives of the former are forfeit, the latter have immunity, and their lives are protected because they are Muslim.

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[3] Sarakhsī, *Mabsūṭ*, 10/78; Yūsuf, *Aḥkām*, 35-6, 50.

[4] See *Mawsūʿa*, 30/137. Jurists disagree about certain details of this principle. Ibn Ḥazm, for example, *Muḥallā* 10/220, thinks that no blood-money should be set on a Muslim who has harmed a *dhimmī* or a *mustaʾmin* (one who has temporary protection), but that the culprit should be imprisoned and reprimanded (or punished: *yuʾaddab*). See also other opinions on this matter: Marghināni, *Hidāya* 4/1606-1607; Sarakhsī, *Mabsūṭ* 10/95. One should also look into the difference between intentional and unintentional damage; this, however, falls outside the issues that concern us; see, e.g., Yūsuf, *Aḥkām*, 117-18, 148-210. For discussions about the concept of immunity (*ʿiṣma*), see Johansen, *Contingency,* chapters 5 and 6.

[5] Ṭabarī, *Ikhtilāf*, 10; Sarakhsī, *Sharḥ* 4/1416, *Mabsūṭ* 10/30; *Mawsūʿa* 30/137; Ibn Nujaym, *Baḥr* 5/85; Dirdīr, *Sharḥ* 2/177.

Those in power are allowed to fight only rebels who wage war, not those who belong to the rebel community but take no part in the rebellion. The concept of absolute immunity for those who really are non-combatants is thus applied only to Muslim rebels, not to infidels. The reason for this is legal: since the lives of all Muslims are sacred, it is a crime to harm them unless they rebel or commit a crime that entails capital punishment.[6] But any act of violence against an infidel, whose life is basically forfeit, is not considered to be a crime at all.[7] The difference between a life that is forfeit and one that is not can also be seen in the issue of *tatarrus,* the use of human shields. If the enemy uses Muslims as human shields, they may be fired upon only if it is absolutely necessary, because the lives of these Muslims are protected under Muslim law. There is no such limitation if the human shields are "non-combatant" infidels.[8] It is worth noting that early jurists such as Abū Yūsuf and Awzāʿī made no distinction between Muslim and infidel "non-combatants" regarding *tatarrus*.[9]

The difference between killing a person who has full immunity and killing a "non-combatant" can be seen not only in the steps taken—or not taken—against the killer, but also in the terminology employed. While those who are really immune are "*maʿṣūm*" (protected) or "*ḥarām al-dam*" (one whose blood is sacred), there are no specific legal terms to designate "non-combatants." They are sometimes referred to as "those whom it is not allowed to kill," "one whose blood is not to be spilt," "one who should not be aimed at," and "one who should not be killed" (*man la yaḥill qatluhu*; *maḥẓūr al-dam; mamnūʿ an yuqṣad; man lā yuqtal*).[10] The prohibitions against killing "non-combatants" are not usually expressed by the word *yuḥarram* (forbidden), but rather by such terms as "not possible," "not allowed," "not proper."[11] All these words convey a weaker prohibition than that expressed by the root *ḥ-r-m*.

It appears, therefore, that "non-combatants"—the infidels who may not be harmed—cannot be considered to have real immunity that protects them from harm.[12]

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[6] See, e.g., Shāfiʿī, *Umm* 8/364. Abou al-Fadl, "The Rules of Killing," thinks that Muslim law is lenient regarding Muslim rebels because their action is considered to be the outcome of poor judgment rather than of evil intentions.

[7] Yūsuf, *Aḥkām*, 50-56.

[8] Māwardī, *Ḥāwī*, 14/187-188; Zakariyā al-Anṣārī, *Fatḥ* 2/300; Kāsānī, *Badāʾiʿ* 7/101; there is no consensus on this issue, and even Shāfiʿī voices two different opinions: once (*Umm* 4/306) he applies the same rules to both Muslim and non-Muslim "shields," but on another occasion (*Umm* 8/378) he distinguishes between Muslim and non-Muslim "shields." See also the disagreements in Sarakhsī, *Mabsūṭ* 10/31-32; Ibn ʿAbd al-Barr, *Tamhīd* 16/143. On *tatarrus* see also below, p.11.

[9] Abū Yūsuf, cited in Shāfiʿī, *Umm* 7/369; Awzāʿī, cited in Fazārī, *Siyar*, 333. In the fifth/eleventh century Sarakhsī supported the opinion viewing Muslims and non-Muslims as equal in regard to the issue of "human shields." According to him, Muslims must fire upon the enemy regardless of whether the "shields" are Muslim prisoners or infidel women and children; see *Mabsūṭ* 10/65.

[10] See e.g., Shāfiʿī, *Umm* 4/253, 274.

[11] Later sources are less particular about terminology, and I have found use of the word *yuḥarram* to denote the prohibition against killing "non-combatants" in the following sources: Sarakhsī (fifth/eleventh century), *Sharḥ* 4/1416, *Mabsūṭ* 10/29; Ibn Mufliḥ (eighth/fourteenth century), *Furūʿ* 6/210, see also 212; Mardāwī (ninth/fifteenth century), *Inṣāf* 4/133; Zakariyā al-Anṣārī (tenth/sixteenth century), *Fatḥ* 2/299, 300. This terminology does not point to a change of attitude, because, as before, the jurists hold that whoever kills these "non-combatants" is not punished. The exceptions are women and children; since they are considered property, a person who kills them must repay their price.

[12] But see Zuḥaylī, *Āthār*, 495, 503, where he claims that "non-combatants" have immunity. This is just one illustration of this author's goal of proving that the law of war in Islam is compatible with international law.

Even the locution "they may not be harmed" is misleading, since this prohibition is severely limited, and violating it does not entail any punishment.

Four categories of enemies

The concept of "non-combatants" in Muslim law can be better understood within the wider context of the enemy in general. In Muslim legal works, rules are not usually presented systematically and are sometimes listed in a rather jumbled fashion. Although more often than not the distinctions underlying the rules are not mentioned, it is sometimes possible to reconstruct them. One such distinction is that made between two categories of enemies, combatants as opposed to "non-combatants"; another is the distinction between the situations in which these people find themselves, namely combat as opposed to captivity. Examining these distinctions allows us to define four categories of enemies, to each of whom different rules are applied. These four categories are:

1. Combatants during combat.
2. Combatants who have been taken prisoner.
3. "Non-combatants" during combat.
4. "Non-combatants" who have been taken prisoner (with one reservation: there is a disagreement whether it is permissible to take them prisoner).

The disagreements among the jurists increase as we move from one category to another. The first one, that of combatants during warfare, is the most straightforward: the enemy must be fought by all possible means and with no limitations whatsoever, the aim being either to kill them or to take them prisoner. There are no disagreements on this matter.

In the case of the second category, that of enemy combatants who have been taken prisoner, we find disagreements regarding the fate of the prisoners. Qur'ān 47:4 reads: "When you meet the unbelievers, smite their necks; then, when you have made wide slaughter among them, tie fast the bonds; then set them free, either by grace or ransom, till the war lays down its loads."[13] This verse clearly offers two options: prisoners may be released either for a ransom or without any kind of remuneration. Although the verse is clear, it seems that it was customary to execute prisoners of war. This is proved by the fact that certain early jurists denounced this practice. There is a report according to which ʿAbd Allāh b. ʿUmar (d. 73/693) was ordered by the governor al-Ḥajjāj to kill a prisoner and refused to do so, citing this verse. The scholars Al-Ḥasan al-Baṣrī (d. 110/728) and ʿAṭāʾ (d. 114 or 115/732 or 733) also opposed the killing of prisoners.[14] On the other hand some jurists, including Abū Ḥanīfa, added to the two options given in the verse also that of executing the prisoners, basing their argument on the general Qur'ānic directive "Slay the idolaters wherever you find them" (Qur'ān 9:5). Another justification for this option was found in the verse stating that "it is not for any Prophet to have prisoners" (Qur'ān 8:67, although the verse continues, "until he make wide slaughter in the land"—meaning, after which it is permissible to hold prisoners). There were also jurists who added the customary option of enslaving prisoners of war, although this is not mentioned in the Qur'ān. Others omitted the option of releasing prisoners without remuneration, even though this is mentioned in

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[13] All translations of Qur'ānic verses are taken from A. J. Arberry, *The Koran Interpreted* (London, 1955).
[14] Ibn Qudāma, *Mughnī* 9/179.

the Qur'ān.[15] Thus the discussions move among these four options—release, ransom, execution, and enslavement. It is agreed that the Imam must choose one of these options (for some reason, the title "Imam" is always used in this context, to mean the caliph or his representative). Some jurists consider all four options to be valid, while others allow only some of them.[16]

Numerous points of contention can be found concerning the third and fourth categories, namely, "non-combatants" in combat and "non-combatants" who have been taken prisoner. These disagreements fall under three main headings:

1. Lists of the categories of "non-combatants".
2. Prohibitions concerning "non-combatants" during and after combat.
3. Actions that constitute taking part in combat.

<u>Lists of "non-combatants"</u>

In the early sources, the lists of those whom one should not harm include women, children, old people, and monks. One may cite to this effect the Iraqi jurist Abū Yūsuf, who lived at the end of the second/eighth century, as well as his Syrian contemporary Abū Isḥāq al-Fazārī (d. 186/802).[17] It seems that this list was a given and was axiomatic. Those who would prefer to adhere to the principle stating that the lives of all infidels are forfeit had to accept this list too, at least partially, or to provide an explanation. This state of affairs is reflected in the opinion of the early jurist Sufyān al-Thawrī (d. 162/178): in spite of the prohibition against killing monks, al-Thawrī insisted on demanding that they pay *jizya*, and on killing them if they refused to do so. The person asking his opinion inquired, if this was so, then why could monks not be killed outright? Al-Thawrī replied, "Because traditions were transmitted regarding this" (*jā'a fīhi athar*),[18] meaning that the transmitted traditions (forbidding the killing of monks) limited his choice of options. Nevertheless, al-Thawrīs opinion, that monks should pay *jizya*, amounts to considering them as combatants.

The payment of *jizya,* the poll tax incumbent on non-Muslims in return for protection by the Muslim state, is directly connected with the distinction between combatants and "non-combatants". The latter, even if spared and given protection, are not required to pay *jizya* (the term for "non-combatants" here is *man lā yastaḥiqq al-qatl,* "those who do not deserve to be killed", meaning women, children etc., see further below).[19] The jurist Abū 'Ubayd, who set down this rule in the beginning of the third/ninth century, was of the opinion that monks residing in monasteries have to pay *jizya*. This means that he does not consider such monks to be "non-combatants," and that the rules applying to them are the same as those applying to other (combatant) infidels. It also means that Abū 'Ubayd was familiar with the distinction between

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[15] Abū 'Ubayd, *Amwāl*, 51-57, 61-67; Abū Yūsuf, *Kharāj*, 194.

[16] Shāfi'ī, *Umm* 4/275, 305, 7/359, 8/606; Māwardī, *Ḥāwī* 14/172-177; Sarakhsī, *Mabsūṭ* 10/24; Ibn Qudāma, *Kāfī* 4/271-272, *Mughnī* 9/179-180; Ibn Mufliḥ, *Furū'* 6/212. It should be pointed out that the prisoner's religion may determine his fate: there are those who hold that a prisoner who is not one of the People of the Book must choose between Islam or death, and that the four options are not relevant in his case; see, e.g., Shāfi'ī, *Umm* 4/302-303. See also Friedmann, *Tolerance*, 115-120. Detailed discussions concerning prisoners and the various options are recorded in Zuḥaylī, *Āthār*, 429-442, 447-457, 471.

[17] Abū Yūsuf, *Kharāj*, 194, 195; Fazārī, *Siyar*, 282, 334.

[18] Ṭabarī, *Ikhtilāf*, 10-11; Fazārī, *Siyar* 334, cf. 358, where al-Thawrī withdraws his opinion regarding the destruction of enemy property because of a tradition to the contrary.

[19] See Abū 'Ubayd, *Amwāl*, 23; Sarakhsī, *Mabsūṭ* 10/79; Rāzī, *Tuḥfa* 1/188; Ibn 'Ābidīn, *Ḥāshiya* 4/199.

monks residing in monasteries and those residing in cells (*aṣḥāb al-ṣawāmiʿ*): there were jurists who held that only the latter were meant in the list of "non-combatants," whereas the monks residing in monasteries were not.[20] Clearly the aim of this distinction was to restrict the category of "non-combatant monks." An exceptional view among the early jurists is that of Shaybānī, who omits monks altogether from the list of "non-combatants" and includes in it women, minors, the elderly, and the insane.[21] Abū Ḥanīfa, considered the mentor of both Abū Yūsuf and Shaybānī, is cited in the fifth/eleventh century as having once permitted the killing of monks and once forbidden it.[22] Of course, it is hard to tell what his opinion really was.

In any case, it appears that later jurists found ways to evade traditions that contradicted their opinions, whereas earlier jurists, such as Sufyān al-Thawrī, saw themselves as being restricted by such traditions. Shāfiʿī (d. 204/820), who took an extreme position commanding the killing of any and all infidels, felt himself compelled to accept as authentic the sayings attributed to the Prophet, which prohibited the killing of women and children. He found, however, a rational justification for this prohibition. Instead of viewing it as a moral imperative, which would mean respecting the lives of infidels, he interpreted the prohibition as a directive based on financial considerations. Women and children, Shāfiʿī explains, are property, and property should not be damaged.[23] Thus Shāfiʿī was able to resolve the contradiction between the ruling in the tradition forbidding the killing of women and children and the principle in which he believed: that the lives of all infidels are forfeit due to their idolatry.

Regarding monks, two contradictory opinions are attributed to Shāfiʿī. On one occasion, he accepts the tradition attributed to Abū Bakr prohibiting the killing of monks. Their lives are forfeit only if they actively fight against Muslims; but if they assist the enemy in other ways, they are to be punished but not executed. Elsewhere in the same book, Shāfiʿī states that all infidel men without exception must convert to Islam or be killed; all men of the protected religions (*ahl al-kitāb*) must pay *jizya* or be killed. He emphasizes that this rule applies to monks as well and denies the authenticity of the tradition attributed to Abū Bakr, which he himself had accepted on another occasion. Alternatively, he explains that even if the tradition from Abū Bakr is authentic, this does not mean that monks may not be killed. Abū Bakr's intention, according to Shāfiʿī, was that monasteries be left aside temporarily in order to concentrate on more important military targets first. Shāfiʿī thus concludes that monks are not included in the lists of "non-combatants," and they most definitely may be fought and killed. Later Shāfiʿī jurists sometimes opt for either one of the two

[20] See, e.g. Ibn Qudāma, *Mughn*ī 9/250; Ibn Nujaym, *Baḥr* 5/84; Rāzī, *Tuḥfa* 1/188. According to Ṭabarī, *Ikhtilāf*, 10, Awzāʿī in the second/eighth century already regarded only the cell-residing monks as "non-combatants."

[21] Sarakhsī, *Sharḥ* 4/1415; since this text is Sarakhsī's reproduction of Shaybānī's *Siyar* there is no certainty that the list is indeed Shaybānī's—it may be Sarakhsī's, from the fifth/eleventh century. But elsewhere Sarakhsī's list includes only three categories: women, minors, and the elderly; *Mabsūṭ* 10/4-6, 29.

[22] Sarakhsī, *Mabsūṭ* 10/137.

[23] Shāfiʿī, *Umm* 7/370 (although in 4/253 he justifies the prohibition against harming women and children by traditions from the Prophet and by the fact that they are "not from amongst those who fight"); see also Māwardī, *Ḥāwī* 14/193. At the beginning of the seventh/thirteenth century the Ḥanbalī Ibn Qudāma held the same opinion, see *Kāfī* 4/267, but he adds elsewhere a different reason: a minor may convert to Islam and therefore should not be killed, Ibn Qudāma, *Mughnī*, 9/249.

contradictory opinions recorded in Shāfiʿī's book; at other times they adduce both of them.[24]

As far as elderly enemies are concerned, Shāfiʿī ruled that their lives were forfeit, basing his view on a Prophetic statement that contradicts the prohibition against killing them; the Prophet is reported to have said, "Kill the elderly from among the enemy." The full version of this particular tradition allows for various interpretations, which were duly adduced in order to support varying legal opinions regarding the elderly. The tradition reads, "*Uqtulū shuyūkh al-mushrikīn wa-stabqū sharkhahum*." *Shuyūkh* normally means "old, elderly," whereas *sharkh* has no fixed meaning and can refer to a young male as well as to a minor. Shāfiʿī interprets *sharkh* as "a minor" and takes this tradition to mean, "Kill the old people and let the minors live." Certain Ḥanafīs interpreted *shuyūkh* in this *ḥadīth* as meaning "adult" rather than old, so that according to them the saying means, "Kill the adults and let the minors live." By this interpretation these Ḥanafīs preserved the prohibition against killing the elderly. Abū Ḥanīfa himself reportedly based the prohibition against killing the elderly on another *ḥadīth* that is the reverse of the one just quoted, which reads, "*uqtulū al-sharkh wa-trukū al-shaykh*." Here *sharkh* is interpreted as a young man, so that the tradition means, "Kill the young men and let the old live." Thus different versions of traditions (*ḥadīths*), as well as philology, were put to use in order to supply a textual basis for varying opinions.[25]

Discussions of this kind in the writings of al-Thawrī and Shāfiʿī at the end of the second/eighth century show that this list of four categories—women, children, the elderly, and monks—was deeply rooted. In the same period, Fazārī defines these four categories as those whom it is forbidden (*nuhiya*, a term weaker than *ḥurrima*) to kill, but also notes questions addressed to jurists concerning other categories: should the sick, the wounded, the lame, the blind, the disabled, and those who have fled the battlefield be spared? It is no wonder that the same al-Thawrī, who attempted to evade the prohibition against killing monks, permitted killing most of the above. He voices reservations only in the case of the disabled and the blind: they must be killed only if they have the strength or the ability to fight. And for some reason, he shows mercy toward the retarded (*maʿtūh*): "I shouldn't like it that such a one be killed" (*lā yūʿjibunī qatluhu*).[26]

Al-Thawrī's reservation ("They should be killed only if they are able to fight") is phrased in a way that points to the principle guiding his opinion: only those who are unable to fight, and will continue to be unable to do so, should not be harmed. For this reason, he does not hesitate when it comes to killing the wounded, the sick, the

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[24] Shāfiʿī, *Umm* 4/253-254, 257, 259, 265, 7/376, as opposed to 4/303, 304, and see also 7/376 (where monks and the elderly are counted among the "non-combatants"), 8/379; Ṭabarī,*Ikhtilāf*, 11. Shāfiʿī contradicts himself in the same manner also regarding the very elderly and possibly—the text is unclear—also regarding hired workers, craftsmen engaged in their craft, the blind, and the disabled. In *Kitāb ḥukm ahl al-kitāb*, the killing of these is forbidden, whereas it is permitted in *Siyar al-Wāqidī* (but this may be Wāqidī's opinion, not Shāfiʿīs). See Māwardī, *Ḥāwī* 14/192-193; Marghinānī, *Hidāya* 2/815, note 5; Shīrāzī, *Muhadhdhab* 2/233; see also Ibn ʿAbd al-Barr, *Tamhīd* 16/139. Later jurists refer to such contradictions as "two opinions" (*qawlān*).

[25] The issue of the elderly: Shāfiʿī, *Umm* 8/379; (for the contradictory opinions of Shāfiʿī see also ibid. 4/303 and Māwardī, *Ḥāwī* 14/192-3); Ibn Qudāma, *Mughnī* 9/250; Ibn ʿAbd al-Barr, *Tamhīd* 16/142. Ibn Ḥazm, *Muḥallā*, 7/351; Ibn Abī Shayba, *Muṣannaf* (Beirut) 7/657. The Ḥanafī interpretation: Sarakhsī, *Sharḥ* 4/1417, *Mabsūṭ* 10/6. Abū Ḥanīfa's reversed version: Māwardī, *Ḥāwī* 14/193.

[26] Fazārī, *Siyar* 335;Ṭabarī, *Ikhtilāf*, 10-11.

ABOUT THE AUTHOR

Professor Ella Landau-Tasseron is a historian of medieval Islam. She acquired her Ph.D. at the Hebrew University of Jerusalem, and is part of what is informally known among scholars as "the Jerusalem school of oriental studies." She has researched Islamic history, tradition, institutions and historiography. Since she was a fellow at the Institute for Advanced Studies at the Hebrew University, her research has focused on the concept of jihad. Professor Landau-Tasseron is affiliated with the Department for Islamic and Middle Eastern Studiesat the Hebrew University.

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