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ELLA LANDAU-TASSERON

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**HUDSON INSTITUTE**
1015 15th Street, NW
Sixth Floor, Washington, DC 20005
202-974-2400
**www.hudson.org**

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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 ʻUmar. 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 (*ʻiṣma*) and is not considered to be "a soul whom Allah has forbidden to kill," (*nafs ḥarrama Allāh qatlahā*). The concept of *ʻiṣma* 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 (*ʻiṣma*), 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" (*ʻiṣma 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" (*ʻiṣma muʼthima*). 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 baʼs 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 *Mawsūʻa*, 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 *mustaʼmin* (one who has temporary protection), but that the culprit should be imprisoned and reprimanded (or punished: *yuʼaddab*). 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 (*ʻiṣma*), see Johansen, *Contingency,* chapters 5 and 6.

[5] Ṭabarī, *Ikhtilāf*, 10; Sarakhsī, *Sharḥ* 4/1416, *Mabsūṭ* 10/30; *Mawsūʻa* 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

[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.

Lists of "non-combatants"

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

[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

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[20] See, e.g. Ibn Qudāma, *Mughnī* 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 Sarakhsīʿs 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.

wayfarer, and those who have escaped from the battlefield. All of these can at some point recover or come back and take up arms.

There were, however, other opinions. Those who raised the question whether it was permissible to kill the wayfarer, the wounded, those who escape from the battlefield and so on, were apparently working on the assumption that whoever was not involved in combat should not be harmed. This conclusion also arises from the jurists' rulings in various matters. For example, Abū Ḥanīfa thought that the use of ballistas was permitted even if this might harm "women, children, the very elderly, the retarded, the blind, the disabled, and the chronically ill." Admittedly this constitutes permission to harm these people rather than a prohibition. But this statement proves that there were discussions concerning groups of "non-combatants" not mentioned in the sayings attributed to the Prophet and Abū Bakr.[27] Indeed the lists of "non-combatants" attributed to Abū Ḥanīfa include children, women, the elderly, the insane, the blind, the chronically ill or the disabled, monks and farmers.[28] Awzāʿī, in the second/eighth century, includes in the list the blind, wayfarers, and shepherds, as well as the original four categories.[29]

There must have been jurists who thought that the wounded should not be killed, otherwise Abū Yūsuf (d. in 182/798) would not have taken the trouble to state explicitly that women, children, the elderly, and monks should be spared, but that the enemy wounded must be killed.[30] Shāfiʿī argues with those who thought that the ill, cowards, craftsmen, and farmers—meaning, those who do not take part in combat—should not be killed; he thought that they should be killed even though they do not take part in combat.[31] Clearly Shāfiʿī's opponents, among them Awzāʿī, as mentioned above, thought otherwise. And when Ṭabarī states that the blind, the terminally ill, shepherds, farmers, wayfarers, and monks should be killed, this is obviously not a list that he invented; he is merely arguing against those who thought that all these people should be spared as "non-combatants." According to Ṭabarī, only reliable traditions from the Prophet justify refraining from killing certain people; such traditions, he says, mention only women, minors, and monks residing in cells.[32]

It is noteworthy that concerning the ill, cowards, and so on, authoritative sayings from the Prophet and his Companions (*ḥadīth*s) were neither found nor invented. There are only a few sayings about servants and hired workers, such as the order reportedly given by the Prophet to his general Khālid b. al-Walīd, "Do not kill

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[27] Ṭabarī, *Ikhtilāf,* 6-8. This permission is given since harming "non-combatants" under these circumstances is considered unintentional. See the section on "Prohibitions concerning 'non-combatants'."

[28] Ṭabarī, *Ikhtilāf,* 12; cf. the opinion attributed to Abū Ḥanīfa in Sarakhsī, *Mabsūṭ* 10/137: women, minors, the very old, the disabled or chronically ill; contradictory opinions are attributed to him concerning monks. According to Ibn ʿAbd al-Barr, *Tamhīd* 16/138-139, Abū Ḥanīfa and Mālik included in the list of "non-combatants" the blind, the retarded, the paralyzed, and monks residing in cells (as well as women and minors). Cf. the lists in Kelsay, *Islam*, p. 58.

[29] Ṭabarī, *Ikhtilāf,* 10. According to Ibn ʿAbd al-Barr, *Tamhīd* 16/138-139, Awzāʿī included women, monks, the insane, the very old, and farmers.

[30] Abū Yūsuf, *Kharāj*, 194, 196.

[31] Shāfiʿī, *Umm* 4/254, 305; Ṭabarī, *Ikhtilāf*, 11-12; Māwardī, *Ḥāwī*, 14/193 gives this position legal justifications. Ibn Ḥazm, *Muḥallā* 5/351 shares Shāfiʿī's opinion, arguing that the Prophet did not spare servants, merchants, farmers, and the very old. See also Qurtubī, *Tafsīr* 2/349.

[32] Ibn ʿAbd al-Barr, *Tamhīd* 16/139; note the omission of the elderly.

children, nor servants." The words used here to refer to servants and hired workers—*wuṣafā'*, *'usafā'*—are rarely seen except in these traditions. There is, in fact, no consensus regarding the meaning of these words. Shāfi'ī understood *'asīf* as "slave," and on the basis of this tradition, he extended the category of "non-combatants" to include slaves as well, out of economic considerations.[33] In addition, a prohibition against killing farmers is sometimes attributed to 'Umar (though not to the Prophet).[34]

It seems that the opinion according to which the category of "non-combatants" was understood as those not involved in warfare, was marginalized to a large extent. Prominence was given to the stricter view, according to which only those who are not in any way able to contribute to warfare could be included in the list of "non-combatants," along with the original four categories mentioned in the early list (or original two—only women and children—according to one of Shāfi'ī's opinions, or original three—women, children, and the elderly—according to one of the opinions attributed to Abū Ḥanīfa). The original list was expanded to include those who are not able to contribute to warfare: the disabled, chronically ill, blind, insane, retarded, and the like. This expansion was based on analogy: for example, one who suffers from a disability or a defect is like an old person, whose killing the Prophet forbade.[35]

The distinctions became more and more precise and minute. For instance, at the end of the sixth/twelfth century, the "non-combatants" list of the Ḥanafī jurist, Kāsānī, reads as follows: women, children, the very old, the disabled, paralyzed, blind, those who have no right arm, those who have a leg and an arm missing (from opposite sides of the body), the retarded, monks residing in cells, the solitary wayfarer living in the mountains, monks living in their homes, or monks living in churches who do not venture outdoors. Kāsānī explicitly excludes from this list priests, a wayfarer who is in contact with other people, people suffering from temporary insanity, the mute, the deaf, and those missing their left hand or missing one leg. The fact that Kāsānī mentions all these groups probably means that their inclusion in the list of "non-combatants" was discussed. A person missing his left hand, for example, is able to fight with his right one, and is therefore excluded from the list of those who may not be harmed. The list includes only those whose disabilities keep them from making any kind of contribution to battle. Anyone who is, or will be, able to fight or to contribute to the battle (*ahl al-qitāl*) may be killed, regardless of whether he actually takes part in battle. Women and children and those who have withdrawn from society in an extreme fashion, although not physically disabled, may be regarded as exempt because their freedom of action is restricted by social or religious rules.[36]

The later, stricter principle sometimes coexisted with the older one. Thus the Ḥanbalī Ibn Qudāma (d. 620/1223) explains that a sick person who might recover and then take part in the battle must be killed, but that if he is terminally ill, "there is no fear that he will be able to fight." Yet the same Ibn Qudāma preserves to a certain extent the early principle that bystanders should not be harmed; he holds that farmers should not be killed if it is certain they are not taking part in the battle. He bases this opinion on three arguments: a tradition attributed to the second caliph, 'Umar, the customary

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[33] Cited in Ibn Qudāma, *Mughnī* 9/250. See the tradition, for example, in Ibn Abī Shayba, *Muṣannaf* (Beirut) 7/654.
[34] Ibn Qudāma, *Mughnī* 9/251.
[35] See, for example, Ibn Qudāma, *Kāfī* 4/267.
[36] Kāsānī, *Badā'i'* 7/101; cf. IbnNujaym, *Baḥr* 5/84; Marghinānī, *Hidāya* 2/815.

practice of the Companions during the conquests, and the opinion of the early Syrian jurist Awzāʿī. He refutes the opposing opinion of Shāfiʿī.[37] Again the same Ibn Qudāma elsewhere lists, along with the four original categories, only the disabled, the blind, and the androgynous; the latter are included since they might in fact be women and as such should not be killed.[38] The Ḥanbalī Ibn Mufliḥ (d. 763/1361) left on the list not only those suffering from various disabilities, but also farmers, slaves, and even Jewish sages (*ḥabr*).[39]

A restricted list is typical of Shāfiʿī jurists, who, insofar as they were able, abided by the general directive in the Qur'ān, "Kill the infidels." Their list was extended to include only slaves, the insane and the androgynous. The lives of all the others are forfeit, as they say, "also monks, hired workers, the blind, and the disabled, even if they are unable to fight or to contribute to war by giving counsel." Nevertheless, there is no unanimity among Shāfiʿī jurists, except in regard to women and children. The ʿ Shāfiʿīs exclude them from the Qur'ānic directive "Kill the infidels" due to the existence of an authentic Prophetic saying (*ḥadīth*) prohibiting killing them. It should be pointed out that this *ḥadīth* contradicts the plain meaning of the Qur'ānic verse, and yet the *ḥadīth*, and not the verse, is considered to be decisive.[40]

Prohibitions concerning "non-combatants" during and after combat

When discussing this topic, the distinction drawn above between "non-combatants" during combat and "non-combatants" who have been taken prisoner is no longer sufficient. An additional distinction is necessary, namely, between innocent "non-combatants"—those who do not take part in combat—and those who do take part, in one way or another. The latter are not always treated like regular warriors. Thus there are in fact four categories of "non-combatants": two during combat, the innocent and those who contribute to the war effort, and another two in captivity, again, the innocent "non-combatants" and those who contributed to the war effort. It should be mentioned again that the jurists usually do not mention these distinctions explicitly, and it is often unclear which category they have in mind when setting down their rules.

*Innocent "non-combatants" during combat*

During combat, the prohibition against harming innocent "non-combatants" has very little influence. The Shāfiʿī jurist, Māwardī, even claims that any prohibition against harming "non-combatants" refers, in fact, only to prisoners, and not to "non-combatants" during combat, when everything is permitted (*mubāḥ*).[41] Shāfiʿī himself, as well as most jurists of all schools, does not go that far. These jurists do, however, restrict the prohibition to that of intentional harm, while unintentional harm is not considered to be a breach of the law. According to the legal definition, unintentional harm (*ghayr*

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[37] Ibn Qudāma, *Mughnī* 9/251.
[38] Ibn Qudāma, *Kāfī* 4/267. Other schools discuss the androgynous too, e.g. the Shāfiʿīs, see Shīrazī, *Muhadhdhab* 2/233.
[39] Ibn Mufliḥ, *Furūʿ* 6/211; Ibn Qudāma, *Mughnī* 9/250.
[40] Zakariyā al-Anṣārī, *Fatḥ* 2/300; Shīrazī, *Muhadhdhab* 2/233-234; these two authors add emissaries to the list of those who must not be harmed, since "this is the custom." Emissaries are usually not mentioned in the context of "non-combatants." For other lists, see, for instance, Ibn Qudāma, *Mughnī* 9/250; Sarakhsī, *Mabsūṭ* 10/79 and above, notes 23, 24.
[41] Māwardī, *Ḥāwī* 14/184.

*ʻamd*) is not the equivalent of accidental harm (*khaṭaʼ*), which is caused by distraction, like a "stray bullet" (or stray arrow). A person who causes accidental harm is not aware of the consequences of his deed, while a Muslim fighting the infidels, among whom there are also "non-combatants," knows what might happen during battle. Such knowledge, however, does not make him responsible; in fact, the opposite is the case.

The difference between accidental and non-intentional harm is reflected in the rules governing each of the cases, as follows: a Muslim who accidentally harms another Muslim (or a *dhimmī* or a *mustaʼmin*) has to perform expiatory acts (*kaffāra*) in order to acquire absolution of his fault. Harming a "non-combatant" during combat, on the other hand, is always regarded as unintentional or even permissible (*mubāḥ*); if innocent "non-combatants" are hurt or killed during combat, there is "no harm" in this (*lā baʼs*), and the person who committed the act is not punished, nor is he required to pay blood-money or to perform expiatory acts.[42] The effect of this is a severe limitation on the prohibition against inflicting harm on innocent "non-combatants." Thus, most jurists, both early and late, permit firing at enemies who use women and minors as shields, as long as the Muslims do not aim at the women and minors.[43] Likewise, the use of non-discriminatory weapons and tactics, such as ballistas, flooding, setting alight a fortress, and launching an attack by night, is usually permitted. All these might harm women and minors (for some reason, these discussions are always about women and children and not about other "non-combatants"), but they are always considered to be without ill-intent and therefore permissible.[44] I have not seen in the sources any discussion of cases of Muslims intentionally causing harm to "non-combatants," nor have I seen any jurist who holds a Muslim responsible for harming innocent "non-combatants" during combat. Apparently, such an act is not punishable under Islamic law.

Finally, it is worth referring again to the contradiction in Shāfiʻī`s positions concerning monks, this time in the context of permissible conduct toward them. As recorded in the *Kitāb al-umm*, on one occasion he prohibits killing them and taking them prisoner, as well as looting their property. A few pages before this, he holds that monks should not be killed, but that their property, wives and children (*sic*) belong to the Muslims. Elsewhere, later on, we read that monks are to be treated like all other infidels: their lives are forfeit during combat without any reservations or restrictions, and they are in fact not considered "non-combatants."[45]

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[42] Ṭabarī, *Ikhtilāf*, 5; Shāfiʻī, *Umm* 4/252-253, 7/369; Māwardī, *Ḥāwī* 14/184; Sarakhsī, *Mabsūṭ* 10/65; Ibn ʻAbd al-Barr, *Tamhīd* 16/145; Ibn Nujaym, *Baḥr* 5/85; Dirdīr, *Sharḥ* 2/177; Ibn Mufliḥ, *Furūʻ* 6/217, and see above p. 2.

[43] This is the issue of *tatarrus* (the use of human shields), see, for example, Shāfiʻī, *Umm* 4/258, 7/369; Māwardī, *Ḥāwī* 14/186-187 (but they also cite the opinion that the Muslims should not fire at all in this case), 7/369; Ibn Mufliḥ, *Furūʻ* 6/210; Kāsānī, *Badāʼiʻ* 7/101; Zakariyā' al-Anṣārī, *Fatḥ* 2/300; according to Mālik and Awzāʻī, the Muslims should not fire at all at the enemy taking cover behind women and minors, see Shāfiʻī, *Umm* 7/369; Zuḥaylī, Āthār 497-498. Zuḥaylī omits mention of the fact that most jurists do permit firing "without aiming" at women and minors. This omission is one of many examples of the apologetic tendency of his book; see note 12 above.

[44] Shāfiʻī, *Umm* 4/256, 257, 274, 7/369, 8/378; Ṭabarī, *Ikhtilāf* 5-8; Sarakhsī, *Mabsūṭ* 10/65, Ibn ʻAbd al-Barr, *Tamhīd* 16/143-145. Some jurists limit the permission to a situation when there is no other choice and no other way to overcome the enemy, or when the Muslims are in danger; see, e.g., Zurqānī, *Sharḥ* 3/16.

[45] Shāfiʻī, *Umm* 4/265, 303, and above, note 24.

*"Non-combatants" who take part in combat*

It is widely agreed that the lives of "non-combatants" who take part in combat—which need not mean taking up weapons—are forfeit, like those of the warriors themselves.[46] Shāfiʿī, although usually severe in his attitude toward infidels, is cautious when it comes to women and children taking part in combat, probably because of the explicit traditions transmitted from the Prophet. He does not say outright that they should be killed, but rules that "there is no need to be careful not to harm them with weapons."[47] The same Prophetic traditions caused Mālik to rule that women and minors should not be killed even if they fight the Muslims.[48] There were later Mālikīs who rejected this opinion of Mālik and shared with other schools the view that during battle, the lives of "non-combatants" taking part in the fighting are forfeit.[49]

*Innocent "non-combatants" who have been taken prisoner*

At the outset, the difference between combat and the situation following combat should be made clear. During combat, permission to kill "non-combatants" or the prohibition thereof applies to every Muslim warrior. When it comes to prisoners, the general rule is that the only one who has authority to determine their fate is the Imam.[50] This is the reason why the law forbids Muslims in general to kill prisoners, whether warriors or "non-combatants"; only the ruler and his representatives have the authority to execute a prisoner. Despite this, no punishment is meted out to a Muslim who kills a prisoner. A justification for this is the idea that the life of a prisoner is forfeit to begin with, being an infidel (he is *mubāḥ al-dam* and not *maʿṣūm*).[51] Certain jurists rule that a Muslim who kills a woman—or a minor—prisoner has to pay their price to the public treasury (*bayt al-māl*), but this is a payment of compensation rather than a punishment for a crime. As will be presently shown, women and minors are considered to be property, and whoever kills them must pay the damage incurred by their death to the public treasury.[52]

Since there is a prohibition against killing "non-combatants," however limited, the Imam cannot treat them as warriors and execute them when taken prisoner (unless they have taken part in fighting against the Muslims, see above). One of the legal opinions concerning them holds that by becoming prisoners, the "non-combatants" have become enslaved.[53] More often than not, "non-combatant" male prisoners are

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[46] Ṭabarī, *Ikhtilā*f, 9; Zuḥaylī, Āthār, 418, 419, 497; Sarakhsī, *Mabsūṭ* 10/5, Zakariyā' al-Anṣārī, *Fatḥ* 2/300; Ibn Qudāma, *Mughnī* 9/250-252; see also the references in the section "Actions that constitute participation in combat."

[47] Shāfiʿī, *Umm* 4/253. But Shīrāzī, who adhered to the Shāfiʿī school, permitted the killing of women warriors, see *Muhadhdhab* 2/233.

[48] Ṭabarī, *Ikhtilāf* , 8 -9. Al-Thawrī distingishes between women, who should be killed if they participate in combat, and minors, who should not be killed; Ṭabarī, ibid., 9.

[49] Ibn ʿAbd al-Barr, *Tamhīd* 16/138. He mentions that there were jurists whose opinion was different but does not name them.

[50] See above p.4-5. But see Sarakhsī, *Mabsūṭ* 10/137, where Abū Ḥanīfa allows a captor to kill a prisoner.

[51] Shāfiʿī, *Umm* 4/274, 305; Māwardī, *Ḥāwī* 14/177; Ibn Mufliḥ, *Furūʿ* 6/212, 217; Sarakhsī, *Mabsūṭ* 10/64; Ibn Nujaym, *Baḥr* 5/85.

[52] Shāfiʿī, *Umm* 4/305; Zuḥaylī, *Āthā*r, 418. According to Zuḥaylī, this is the Shāfiʿī opinion, but I have found Ḥanbalīs of this same opinion; see Ibn Mufliḥ, *Furūʿ* 6/211; the Māliki jurist Dirdīr applies this rule to all "non-combatants" and not only to women and minors, *Sharḥ* 2/177.

[53] Ibn Mufliḥ, *Mubdiʿ* 3/326; Ibn Mufliḥ, *Furūʿ* 6/217-218; Ibn Qudāma, *Mughnī* 9/249; Mardāwī, *Inṣāf* 4/133.

excluded from this rule, so that it applies only to women and minors. The latter should not be killed; regardless of their religious affiliation, they become enslaved once they have been taken prisoner and they are considered to be spoils of war.[54] Nevertheless, discussions of the following issues are found in the sources: may women and children be released with no remuneration? May they be ransomed for money? May they be exchanged for Muslim prisoners? It goes without saying that different jurists rule differently regarding these issues. Some think that women who remain in Muslim hands might eventually convert to Islam, and that minors become converted to Islam by their captors; therefore, they should under no circumstances be returned to the enemy. Others hold the same view for different reasons: they fear that, if returned to the enemy, the minors would grow up to fight against the Muslims, and the women would give birth to sons who would fight against the Muslims. Still others attach priority to releasing Muslim prisoners and therefore allow exchanging women and children for Muslim prisoners.[55]

There is a wide range of opinion regarding "non-combatant" male prisoners. According to some, they should indeed be treated like warriors who have been taken prisoner, namely, the Imam is to decide their fate applying one of the options mentioned above: execution, enslavement, and release (with no recompense, or release in exchange for money or for Muslim prisoners).[56] This means that, in the case of "non-combatant" male prisoners, the state of captivity cancels out the distinction between combatants and "non-combatants"; the only distinction in this state is that between women and minors on the one hand, and men on the other. The idea underlying this approach seems to be that the inability to fight (which makes one a "non-combatant") is no longer relevant. Presumably, once the state of war is over, and a prisoner cannot engage in combat in any case, the distinction between combatants and "non-combatants" is unnecessary. The same idea leads also to the opposite conclusion. Sarakhsī holds that blind, paralyzed, and retarded prisoners should not be executed, because as prisoners they can cause no harm, and therefore there are no grounds for killing them. Sarakhsī in fact insists that the distinction between combatants and (male) "non-combatants" is not annulled by the state of captivity and that the restricted immunity of the latter is valid both during and after combat.[57] Therefore, the ruler or his representative may not execute them, but he may choose between the remaining options of the treatment of prisoners. Some jurists offer the ruler only two options: to release the "non-combatant" prisoner with, or without, recompense. This means that, according to them, male "non-combatant" prisoners cannot be enslaved (contrary to the Arabian pre-Islamic custom).[58] There are Ḥanbalīs who went so far as to forbid taking male "non-combatants" prisoner altogether, or at least those who "are of no use to the

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[54] Ibn Qudāma, *Kāfī*, 4/271; Ibn Mufliḥ, *Furūʿ* 2/218. Māwardī cites Shāfiʿī as allowing the killing of female prisoners who do not belong to the People of the Book, cited in Zuḥaylī, *Āthār*, 418.

[55] See, e.g., Abū ʿUbayd, *Amwāl*, 61; Ibn Mufliḥ, *Furūʿ* 6/217; Ibn Qudāma, *Kāfī* 4/272-273; Sarakhsī, *Mabsūṭ* 10/138-140, see details in Zuḥaylī, *Āthār*, 420-427.

[56] Māwardī, *Ḥāwī* 14/173; Ibn Qudāma, *Mughnī* 9/179; Ibn Nujaym, *Baḥr* 5/84, and see in the following note the opposite opinion of Sarakhsī, who, like Ibn Nujaym, is a Ḥanafī. For the discussion of prisoners see above p.4.

[57] Sarakhsī, *Mabsūṭ* 10/64; Zuḥaylī, *Āthār* 427-428.

[58] All these opposing opinions are within the Ḥanbalī school; see Ibn Mufliḥ, *Furūʿ* 6/217-218; Ibn Qudāma, *Mughnī* 9/179.

Muslims."[59] The Mālikīs and the early Syrian jurist Awzāʿī apply the prohibition against taking prisoners only to monks.[60] Mālik maintains, moreover, that monks should be left with means to keep themselves alive.[61]

*"Non-combatants" who participated in battle and have been taken prisoner*

Early jurists are of the opinion that "non-combatants" should not be harmed once taken prisoner, regardless of whether they participated in combat against the Muslims, since they no longer pose a threat.[62] Among the later jurists, some permit executing them, as a punishment for having participated in combat, while others preserve the early view.[63] There are Ḥanafī jurists who distinguish between the prisoners on the basis of the concept of legal accountability: after the battle has ended, they no longer distinguish between combatants and "non-combatants," distinguishing rather between those who can be held legally accountable in a court of law (*mukallaf*) and those who cannot. Those who are accountable are treated like warriors who have been taken prisoner. Thus a woman and an elderly person who took part in combat may be executed. Those who are not legally accountable—there are jurists who specify this as referring to minors and the insane—may not be executed after being taken prisoner, even if they killed Muslims during battle.[64]

An issue related to captivity is that of the fate of prisoners who cannot walk because of an illness or any similar reason. Discussions of this kind may refer to prisoners at large and not necessarily to "non-combatants," and at times it is unclear whether or not the latter are included. The Ḥanbalīs disagree among themselves on this matter: some permit killing such a prisoner, while others forbid it. As far as I have seen, such permission is given only in regard to men.[65] Abū Ḥanīfa, however, is unequivocal on this issue: in case the prisoners cannot be taken to Muslim territory, the women and children must be released and the men killed. According to Shāfiʿī, regarding the same case, the men may be killed, although this is not obligatory, while the women and children may not be killed.[66] This particular topic is sometimes discussed without any solution being proposed: Ibn Nujaym states that "non-combatants" should not be left in enemy territory unless they are unable to procreate (men) or give birth (women), but he does not say what should be done with prisoners who cannot be taken to Muslim territory and do not meet these criteria.[67] The early jurist, al-Thawrī, on the other hand, sets down a clear and simple rule in this case: women, minors, and the elderly who

[59] Ibn Qudāma, *Kāfī* 4/271; Ibn Mufliḥ, *Mubdiʿ* 3/326-327; Mardāwī, *Inṣāf* 4/133. Some Ḥanbalīs, however, hold that the state of captivity transforms all "non-combatants" into slaves; see note 53 above.
[60] For the Mālikīs see Ṭabarī, *Ikhtilāf*, 9-10; Dirdīr, *Sharḥ* 2/177; Zuḥaylī, *Āthār* 428. For Awzāʿī, see Fazārī, *Siyar* 334, Ṭabarī, *Ikhtilāf*, 10.
[61] Ibn ʿAbd al-Barr, *Tamhīd* 16/139; Saḥnūn, *Mudawwana* 3/6.
[62] Ṭabarī, *Ikhtilāf*,, 9 (Awzāʿī, Shāfiʿī).
[63] Zuḥaylī, *Āthār* 418, 427.
[64] Sarakhsī, *Sharḥ* 4/1416, *Mabsūṭ* 10/64; Ibn Nujaym, *Baḥr* 5/84; Marghinānī, *Hidāya* 2/816; cf. al-Thawrī's position, note 48 above.
[65] Ibn Mufliḥ, *Furūʿ* 6/211.
[66] Shāfiī, *Umm* 4/274, 305; Ṭabarī, *Ikhtilāf*, 132, 133; Sarakhsī, *Mabsūṭ* 10/36.
[67] Ibn Nujaym, *Baḥr* 5/85.

cannot be taken to Muslim territory should be left behind, whereas monks must pay *jizya* or be executed.[68]

Actions that constitute participation in combat

There are many points of contention regarding this matter. It appears that in the early period the lives of the "non-combatants" were forfeit only if they actively took part in combat. The early scholar, al-Ḥasan al-Baṣrī (d. 110/728), relates that the Prophet's Companions used to kill women and children who had acted against them.[69] The early Syrian jurist, Awzāʿī, holds that "non-combatants" should not be harmed on account of the mere possibility or the fear that they might cause harm, but only if they actually do so.[70] Even Shāfiʿī, who takes an extreme position toward infidels, writes that only actual fighting makes the lives of monks, women and children forfeit. If they turn Muslims over to the enemy, or supply weapons to the enemy, they are to be punished but not killed.[71] Mālik, on the other hand, rules that "anyone who is feared must be killed."[72] Sufyān al-Thawrī rules that the blind and the disabled must be killed if they have the strength to fight.[73] This reflects the principle that the potential to commit a hostile act is equivalent to committing it.

The concept of participation in combat, which makes the life of a "non-combatant" forfeit, was extended to include such actions as espionage, turning Muslims over to the enemy, agitation, and giving counsel to the enemy. Even having a position of authority among the enemy, the mere suspicion of having taken part in battle, or the ability to take part in battle, to give counsel, or to cause any kind of damage even if not directly connected to battle—all these became factors that made the life of a "non-combatant" forfeit.[74] The jurists differ on these matters as they do on most topics. First, different jurists cite different factors; second, not every factor is applied to every category of "non-combatants." The matter of giving counsel or the ability to procreate is mentioned in connection with the very old (and not, for instance, the ill or the disabled). The suspicion or knowledge of assistance to the enemy is mentioned in relation to monks (and not, for instance, the old, the insane etc.).[75] The reason for this is historical: it was presumably monks who were suspected of assisting the enemy during the conquests; and it was the aged poet and tribal chief, Durayd b. al-Ṣimma (executed by the Prophet), who served as an example of a "non-combatant" who can harm the Muslims by the counsel he gives to his people. Later sources sometimes take a factor that had been applied to a specific group of "non-combatants" and apply it to other

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[68] Fazārī, *Siyar*, 334-335, 358. As mentioned above, the early list of "non-combatants" included only these four categories.

[69] Cited in Ibn Abī Shayba (beginning of the third/ninth century), *Muṣannaf* (1970-1971) 12/389; cf. Qurṭubī, *Tafsīr* 2/348: a minor who fights must be killed but not a woman.

[70] Fazārī, *Siyar*, 334; Ṭabarī, *Ikhtilāf*, 10.

[71] Shāfiʿī, *Umm* 4/253, 265. As pointed out above, Shāfiʿī contradicts himself elsewhere (4/303) and claims that monks are like any other man belonging to the People of the Book: they must either convert to Islam or pay *jizya*, or else be killed; see above note 25.

[72] Ibn ʿAbd al-Barr, *Tamhīd* 16/139.

[73] Fazārī, *Siyar,* 335, cf. a similar opinion regarding the disabled or the chronically ill (*zamnā*), Qurṭubī, *Tafsīr* 2/349.

[74] See, e.g., Kāsānī, *Badā'iʿ* 7/101, and the references in notes 36-37; Ibn Mufliḥ, *Furūʿ* 6/211; Ibn Qudāma, *Kāfī* 4/267.

[75] See, e.g., Ibn Mufliḥ, *Furūʿ* 6/211.

groups.[76] In any case, the statement by the Ḥanafī Ibn Nujaym (tenth/sixteenth century) that "in our opinion, that which makes a person's life forfeit is combat" is nearly meaningless in light of the fact that he considers "combat" to include the ability to shout, the ability to have children, and mental clarity (which enables a person to give counsel).[77]

Special stipulations are sometimes mentioned concerning women. Some jurists allow killing a woman if she curses the Muslims or exposes herself to them: these are actions that, when carried out by women, constitute participation in combat.[78] We might well wonder why a blind or a handicapped person who curses the Muslims is not treated equally. The answer is probably related to the special role played by women in combat—a role that is considered "women's business," just as lamenting the dead is an affair for women. There are hardly any references to this in the legal works I have read, but a hint can be found in Qurṭubī's interpretation of Qur'ān 2:190. Here it is said that women may cause damage, either by financing war or by agitation. They might set out with their hair down, issue battle cries, and berate those who escape from battle with the Muslims; all this constitutes participation in combat. In spite of this, Qurṭubī prefers that such women be taken prisoner rather than killed.[79] Sarakhsī bases the special directives concerning women on Prophetic custom: he is referring to traditions according to which the Prophet allowed killing women who cursed him and incited others against him.[80]

## Conclusions

### A. The sources of contention

In light of the many points of contention regarding the list of the "non-combatants" and other matters, one may wonder how and why they arose. It seems to me that they do not arise, for example, out of contradictory Qur'ānic directives, since the Qur'ān hardly deals with these matters. Only rarely was one verse or another adduced as a justification for the prohibitions against harming "non-combatants".[81] Neither could the various contradictory Prophetic traditions (*ḥadīth*s) give rise to contention. As is well known, traditions were often forged to back up arguments, and jurists cited them as part of ongoing disputes. Contradictory traditions therefore reflect the result of the disagreements rather than the reason for them. The same can be said of the different, sometimes contradictory, interpretations of Qur'ānic verses and of traditions.

The disputes regarding "non-combatants" appear to me to have arisen first and foremost because of a conflict between different principles, such as that which states that the lives of the infidels are forfeit, as opposed to the general principle that one should kill only when it is absolutely necessary or because there is legal ground for doing so. According to the statements of the Ḥanafīs, they think that only aggression on the part of the infidels makes their lives forfeit; therefore those who are unable to

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[76] See ibid., 6/210-211; Ibn Mufliḥ lived in the eighth/fourteenth century.
[77] Ibn Nujaym, *Baḥr* 5/84.
[78] Ibn Mufliḥ, *Furūʿ* 6/211 (with a reference to the fact that this is not the opinion of all Ḥanbalīs).
[79] Qurṭubī, *Tafsīr* 2/348; Ibn Mufliḥ, *Furūʿ* 6/211.
[80] Sarakhsī, *Sharḥ* 4/1418-1419.
[81] Qur'ān 2:190: "And fight in the way of God with those who fight with you, but aggress not."

fight—like the disabled—should not be harmed.[82] This means that the Ḥanafīs attached greater importance to the general principle than to the anti-infidels one. On the other hand, the Shāfiʿīs accept at face value the directive in the verse "Kill the infidels";[83] idolatry, according to them, is the legal ground for killing, and the lives of all the infidels are forfeit—including the disabled, the elderly, and so on.

However, two points should be emphasized. First, there are disagreements within each school, and there are surely Shāfiís and Ḥanafīs whose views are not compatible with these statements. Second, the disagreement between Shāfiʿīs and Ḥanafīs is not as great as it seems at first. The Ḥanafī jurist Sarakhsī, for example, states that the lives of all humans are basically protected (*al-ādamī fi-l-aṣl maḥqūn al-damm*; note that he does not say *maʿṣūm*). This formulation creates the false impression that he is cautious when it comes to the lives of all human beings, and only allows warfare against aggressors. But Sarakhsī permits the use of non-discriminatory weapons and tactics, such as ballistas and flooding, and exempts those who harm "non-combatants" from responsibility, as do the Shāfiís.[84] In addition, the Ḥanafī`s concept of "combat" is very expansive. As shown above, this concept includes the refusal to convert to Islam, the ability to perform certain activities, such as shouting, and a certain way of life as well: being a monk is to them the equivalent of taking part in combat, since this presents exemplary behavior to the infidels. Thus the number of non-aggressors whose lives are protected is very small, again in accordance with the Shāfií position.[85]

A second source of disagreement among the jurists is the different interpretations given to the basic legal principles. For instance, one of the basic principles is that of utility and damage. When applied to war this principle dictates that whoever inflicts damage on the Muslims must be killed, even if he or she is a "non-combatant." When interpreted in an extended manner this principle dictates, for example, that whoever is capable of procreation must be killed, since he or she might in the future increase the number of enemies. Thus, various answers were given to the question of whose life is forfeit and under what circumstances.

B. Inconsistency

All the people mentioned in the lists recorded above were included in them on the assumption that they do not take part in combat. However, as shown in this article, Muslim law does not adhere to the distinction between those who take part and those who do not: it adheres to the lists. The result is a one-way movement, from within the lists outwards. That is to say, when a person included in the lists acts contrary to the assumptions and takes part in combat, he/she is withdrawn from the list and is not considered a "non-combatant." But when a young, healthy, free male acts against the assumptions and refrains from taking part in combat, he is not put on the list of "non-combatants." This means that Muslim law does not in fact distinguish between soldiers and civilians. The distinction is instead between those who are subject to certain disabilities and limitations (in body, in mind, and in religious and social behavior) and those who are not. Only the former enjoy some immunity from harm, provided they do

[82] See,e.g., Marghinānī, *Hidāya* 2/815; Sarakhsī, *Mabsūṭ* 10/4-5, 30-31, 64, *Sharḥ* 4/1415.
[83] See, e.g., Ibn Qudāma, *Mughnī* 9/250; Zakariyā' al-Anṣārī, *Fatḥ* 2/300; the verse is 9:5.
[84] Sarakhsī, *Mabsūṭ* 10/81, opposed to 30-31, see note 82 above.
[85] Sarakhsī, *Mabsūṭ* 10/31, 137; see above, the section "Participation in combat."

not contribute in any way to combat against Muslims. This one-way movement may be considered as an inconsistency in the law.

Inconsistency in adopting and applying the legal principles is common to all the legal schools. For example, Shāfiʿī rules that the directive in the verses reading "Kill all the idolaters" is comprehensive and absolute (*ʿāmm*). This means that no exception is to be made. But Shāfiʿī and his followers feel themselves bound by the Prophetic tradition and the ancient custom stipulating that women and minors must not be killed. In other words, Shāfiʿī and his followers do not consistently apply the Qur'ānic principle that the blood of all idolaters is forfeit. On the other hand the Ḥanafīs expressly argue that all humans basically have immunity from harm, and only aggression on the part of a person constitutes legal grounds for killing him. But the Ḥanafīs do not apply this principle of the immunity of the innocent to all bystanders: they have their lists of the "non-combatants." Furthermore, as shown above, they permit the use of indiscriminate weapons and tactics (which may harm the innocent) as well as the execution of prisoners (who can no longer harm the Muslims). Reportedly Abū Ḥanīfa allows Muslim captors to kill prisoners even before bringing them before the commander.[86] The Ḥanbalī jurist Ibn Qudāma explains in the seventh/thirteenth century that an old man should not be killed because he is not one of the combatants (*laysa min ahl al-qitāl*); in spite of this, he does not apply this prohibition to others who are in practice also non-combatants.[87] And if we were to assume, based on common sense, that the principle of self-defense would apply in any case, we then find that Mālik forbids harming women and children, even if they fire at the Muslims.[88]

Even the principle of utility is not applied consistently. For instance, the jurists state that this is the principle that determines the fate of the prisoners: they should be released if there is a chance that they will convert to Islam, or they should be exchanged for ransom or for Muslim prisoners; they should be killed if this will weaken the enemy, or they should be enslaved.[89] Had the law been consistent, these same options would be relevant also to women and children. The opposite also holds true: the jurists explain that women and children are considered property and hence should not be killed; the same could be said of male prisoners, but the law does not take this approach.[90] Different rules regarding different groups included in the list of "non-combatants" are also evidence of inconsistency.[91] This inconsistency shows that there was no general concept of "non-combatants" whom it is forbidden to harm.

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[86] Sarakhsī, *Mabsūṭ* 10/137-139 and see above, the section "Combatants who have been taken prisoner."
[87] Ibn Qudāma, *Mughnī* 9/250. The phrase *ahl al-qitāl*, however, can also mean "those who do not usually engage in fighting," and in that case there is no contradiction in his position.
[88] Ṭabarī, *Ikhtilāf*, 8.
[89] Shāfiʿī, *Umm* 4/275, and see above, the section "Combatants who have been taken prisoner".
[90] Qurṭubī, the seventh/thirteenth-century Qur'ān interpreter, was probably thinking of this inconsistency; see *Tafsīr* 2/348, where he explains that women tend to convert to Islam sooner than men and are also less likely to escape from captivity; hence they should be enslaved rather than killed, unlike men.
[91] See, for example, Qurṭubī, *Tafsīr* 2/348: a woman who took part in combat should be killed; not so a minor: see also above, the section "Prohibitions concerning 'non-combatants'".

C. The concept of "non-combatants"

It is no accident that Muslim law has no term analogous to that of non-combatants, or civilians, in international law. Rather, it has defined lists of various categories of people, which do not include all the non-combatants. These lists are based on an ancient and deeply rooted tradition, according to which four categories of people should not be harmed: women, minors, the elderly, and monks. It appears that at the basis of this tradition lies the principle, or custom, of not killing bystanders. Muslim law did not extend this principle to include all bystanders. On the contrary, this principle was largely rejected in favor of another principle, one that held that only those who are incapable of harming Muslims in any way, due to physical, mental or other limitations, should not be harmed. The Shāfiʿīs refute this principle too, and prohibit harming only women and minors (because of traditions transmitted from the Prophet), although some of the Shāfiʿīs extended this prohibition to others as well, on the basis of analogy.

The most stable element found in the rules concerning the "non-combatants" is that of refraining from harming women and minors. These two groups are mentioned in the earliest lists, and there are almost no disagreements about the prohibition against killing them under any circumstances. Even when men included in the list of "non-combatants" lose this classification after being taken prisoner, the lives of women and minors are still considered to be protected. When women and minors who have been taken prisoner cannot be taken into Muslim territory, the jurists do not order killing them (unlike their ruling regarding male prisoners).[92] An opinion permitting the killing of women and children is rare and is considered aberrant (*gharīb*).[93]

Abū Yūsuf's ruling concerning arbitration is yet another witness to the stability of the "non-combatants" status granted to women and children: according to Muslim law, the enemy have the option of surrendering unconditionally and entrusting the decision about their fate to a named Muslim arbitrator. Abū Yūsuf rules that if the arbitrator decrees that women and children should be executed, his decree contradicts the Prophetic Custom (*sunna*) and is therefore illegal.[94]

It is also noteworthy that no distinction is made between women and children belonging to the People of the Book (*kitābī*s) and those of other religions. The rule that forbids killing includes all women and children, whereas rules concerning men distinguish between *kitābī*s and idolaters. By taking this approach toward women and children the Muslims are continuing a very long tradition.[95]

Respect for early traditions transmitted from the Prophet and his close Companions (*ḥadīth*s) impel many jurists to include monks and the elderly in the list of "non-combatants." To be sure, they sometimes explain their attitude on the basis of analogy (e.g., the elderly are harmless, like women). However, certain jurists do exclude these two categories from the list by denying the authenticity of the early *ḥadīth*s or by interpreting them in ways that allowed this exclusion.

It seems likely that a Western approach to this problem would be, first to formulate a concept of "non-combatants" and then to draw up a list of protected people

[92] Shāfiʿī, *Umm* 4/274, 305.
[93] Zurqānī, *Sharḥ* 3/16, but see above pp. 14, 16.
[94] Abū Yūsuf, *Kharāj*, 203.
[95] See Deuteronomy 20:13-14.

on that basis. But attitudes toward non-combatants in Muslim law developed in a different way: there was first an original list of "non-combatants," probably based on ancient custom and on the notion that bystanders should be left alone. The list took the form of *ḥadīth*s and became rooted in Islamic practice. Some of the earliest jurists, in the second/eighth century, readily accepted the tradition. Others had a different opinion, but they nevertheless respected the tradition and the *ḥadīth*s and attempted to explain the list, or parts thereof, on the basis of analogy, or by applying the principle of utility. There were also attempts to explain away parts of the list, because the notion that bystanders should be left alone was not acceptable to all jurists. At the same time the list was expanded to include additional categories on the basis of analogy. All these processes are reflected in the remarks of the seventh/thirteenth-century Ḥanbalī jurist Ibn Qudāma: according to him, women and minors should not be killed, since this was forbidden by the Prophet, and in addition, they are considered to be property, and property should not be damaged. The elderly should not be killed, since this was forbidden by the Prophet, and in addition, they are unable to cause damage during war (*lā nikāya lahu fī al-ḥarb*) and they are thus like women. The disabled and the blind are like the elderly. Abū Bakr prohibited the killing of monks, and since religious reasons prevent them from participating in combat, they are like those who are unable to fight. Slaves who fall into Muslim hands become their property, like women and minors. Hence they are treated in the same way as far as the prohibition against killing them is concerned.[96]

The fact that various explanations were offered for the different categories leads to the conclusion that the list was not drawn up systematically according to a certain principle, but was rather gathered from various sources and extended on the basis of analogy. The later legal discussions remained very similar to those from earlier periods when the jurists were faced with questions based on analogy: "What is your opinion regarding the blind? How would you rule concerning the sick? And what of the disabled?" This is one the reasons why it is so difficult to follow the discussions in the legal sources. Another (related) difficulty is that each category in the lists is discussed separately, and different reasons are adduced as explanations why members of that category should not be harmed. Usually no systematic distinctions are made, and the discussions often revolve around some of the categories, ignoring others. The discussion about the permissibility of taking prisoners, for instance, is usually recorded as pertinent only to monks and not to others on the list. The elderly, the disabled, and so on, are discussed separately. There is no general concept of a category of "non-combatants," nor is there one theoretical basis for the rules concerning them.

D. Practical, moral and legal considerations[97]

Refraining from killing "non-combatants" is often explained in Muslim law on the basis of considerations of utility. The inconsistency in the application of these considerations has been shown above. The moral principle, that is, the inculpability of those not involved in combat, is usually absent from the explanations offered by Muslim jurists. Zurqānī is exceptional in this regard; he explains the prohibition

[96] Ibn Qudāma, *Kāfī* 4/267, *Mughnī* 9/250.

[97] The tension between practical and moral imperatives is the subject of Abou al-Fadl's article "Rules of Killing." He ignores the legal imperative.

against killing women and minors as derived from the fact that they are unable to commit acts of idolatry (*li-quṣūrihim ʿan fiʿl al-kufr*). Exactly what he means by this is left unclear, since obviously women can be idolaters. It should also be noted that Zurqānī conceives of their innocence as related to their faith, not to their actions. The author, however, does not neglect to mention that leaving women and minors alive is useful, since they can be exchanged for Muslim prisoners or used as slaves.[98]

The prohibition against killing "non-combatants" is sometimes explained with the words "they are not of those who fight" (*laysa min ahl al-qitāl, lā yuqātilūn*).[99] Although this explanation may be taken as reflecting a moral approach, it seems that the approach of those who offered it was in fact legal rather than moral. If their reasoning had been purely moral, the principle of inculpability would have been applied to all those who do not actually participate in combat rather than only to those included in the list of the "non-combatants." As Sarakhsī states, the prohibition against killing "non-combatants" is based on the ensuing utility from the Muslim point of view, or on the absence of a legal basis for killing them.[100] No moral consideration is present. The case of rebels (*ahl al-baghy*) strengthens my interpretation. In this case, all rebels who do not take part in combat should not be killed, but for legal rather than moral reasons: their lives are immune (*maʿṣūm*), because they are Muslims (see above).

It appears that in early Islam, the customary avoidance of killing farmers, shepherds, craftsmen, the disabled, and deserters was indeed based on a moral consideration of inculpability. Although this is not stated explicitly, this seems to me to be the only possible interpretation of traditions such as the following: "Umar wrote to the commanders to fight in the way of Allah and to fight *only those who fight against them* [emphasis mine], and not to kill women or minors, nor to kill those who do not use a razor" (namely, minors).[101] This moral tendency is reflected also in particular rulings. Awzāʿī, for instance, prohibits the extraction of information from monks, since this might endanger them if they are later taken prisoner by the enemy.[102]

In later writings, however, not much survives of this moral approach, not even the names of those who held it. They appear, for example, as Shāfiʿī's adversaries, when he adduces arguments against them.[103] It is especially noteworthy that Shāfiʿī uses the factor of inculpability rather in the case of animals. When asked whether it is permissible to destroy property in order to prevent it falling into enemy hands, he gives an affirmative answer, excluding animals: "animals have souls, and they suffer if tortured; an animal has not sinned [and should not be killed except for consumption]."[104] The idolaters, by definition, are guilty, and therefore their suffering should not be a consideration, even if they pose no threat to Muslims. This distinction between a moral imperative and a legal one complements what has been said above: the lists of "non-combatants" were drawn up on the basis of analogy from a core list and

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[98] Zurqānī, *Sharḥ* 3/16.
[99] E.g. Shāfiʿī, *Umm* 4/253; Sarakhsī, *Mabsūṭ* 10/29; Ibn Qudāma, *Mughnī* 9/250, 252; Ibn ʿAbd al-Barr, *Tamhīd* 16/138.
[100] Sarakhsī, *Sharḥ* 4/1415-1416.
[101] Abū ʿUbayd, *Amwāl*, 23.
[102] Fazārī, *Siyar*, 334; Ṭabarī, *Ikhtilāf,* 10.
[103] See above pp. 8, 10. Abou el-Fadl, "Rules of Killing," claims the opposite: he says that from the fourth century AH the moral imperative overcame considerations of utility.
[104] Shāfiʿi, *Umm* 4/274: *…li-annahu dhū rūḥ ya'lam bi-l-'adhāb wa-lā dhanb lahu.*

not on the basis of a moral principle. The only principle guiding the jurists was a legal one, that of immunity, '*iṣma*—or to be precise, the lack of it as far as infidels are concerned. The approach of Muslim law to the idea of "non-combatants," in conclusion, is markedly different from the distinction made by international law between combatants and the civil population, even if, at first glance, the rules seem similar.

Epilogue

This paper investigates medieval Muslim law. However, one recent development in particular deserves to be mentioned.

In 1997, the Egyptian terrorist organization al-Jamāʿa al-Islamiyya renounced violence and ceased to conduct terrorist activities. Moreover, its leadership proceeded to publish a series of books providing a religious basis for this ideological reversal. One of the main arguments adduced in these books is that Muslim law forbids targeting civilians. This argument has been hitherto adduced only in contexts of apologetics and polemics against the West. As has been shown in this article, Muslim law does not really forbid targeting civilians. It is therefore remarkable that al-Jamāʿa al-Islamiyya created for itself a legal restriction previously absent from the law. The organization obviously added the moral aspect to its considerations. [105]

[105] See the information in http://memri.org/bin/articles.cgi?Page=archives&Area=sd&ID=SP130106 (*MEMRI*, Special Dispatch No. 1301 "Al-Gama'a Al-Islamiyya vs. Al-Qaeda,", September 27, 2006)

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## 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 Studies at the Hebrew University.

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