It is a tremendous honor to contribute an essay to this volume commemorating Professor Yoram Dinstein on the occasion of his seventieth birthday. We first met when Professor Dinstein held the Charles H. Stockton Chair of International Law at the US Naval War College. Being a young military lawyer and aspiring scholar, I was naturally enthralled by the breadth and depth of his expertise on international law. Taking time that few in his position would, Professor Dinstein graciously mentored me: patiently explaining nuances in the law of armed conflict with a passion that evidenced both his love for the law and commitment to it. I am honored to call him a mentor and friend.

During November 2005, over eight hundred men in the small farming village of Ar Rabit in the al Anbar Province of western Iraq were roused from their homes and detained by US and Iraqi military forces. According to the New York Times, the men were often detained based on little more evidence than the word or gesture of a single informant.1 Over three hundred of the men were sent to the infamous Abu Ghrabi prison on the outskirts of Baghdad.

The Marine commander overseeing the operation, Colonel Stephen W. Davis, justified the detentions with a dismissive “[w]elcome to the insurgency”; he explained the use of confidential informants with every realist’s favorite maxim: “the enemy of my enemy is my friend.”2 The informants came from a local militia called the Desert Protectors who offered their services to Coalition Forces, ostensibly at least, to help rid their region of insurgents. Of course, whether a love of democracy or tribal vendettas was their primary motivation will likely never be known.

How could such seemingly capricious detentions be lawful in 2005? While it is well established that the law of armed conflict allows belligerents, includ-
ing occupiers, to conduct battlefield detentions, wasn’t sovereignty transferred to the Iraqi people in June of 2004? Not only did detentions in Iraq continue after the transfer of sovereignty, but they skyrocketed – from around 4,000 detainees in the custody of Coalition Forces in the spring of 2004 to over 11,350 less than one year later.\(^3\) By December 2005 over 14,000 detainees were being held by Coalition Forces and a day seldom passed without a press release issued by the Multi-National Force in Iraq (MNF-I) announcing a military operation in which “terror suspects” were captured. What was the legal basis for these detentions? What evidentiary standard applied? What, if any, due process safeguards were in place to ensure innocent men were not deprived of their freedoms? And when, if ever, would these detainees be released?

These are the questions this article will answer. It focuses solely on the legality of civilian detentions and the review of those detentions required by international law. It does not address the operational and intelligence aspects of detainee operations, nor will it address standards of care for detainees (including the salacious details of the Abu Ghraib abuse scandal). Those issues have already been addressed in countless investigations and articles.\(^4\)

I Defining the Debate

As an entire book could easily be written on the conduct and legality of detention operations during Operation Iraqi Freedom, the scope of this article must necessarily be refined and limited.

A Occupation, Post-Transfer of Sovereignty, or the Transitional Period?

As this article is being written in late 2005, the situation in Iraq continues to evolve from a wartime purely law of armed conflict paradigm to one of peacetime law enforcement. The legal basis and implementation of detention operations in

---