

# Why hasn't alleged Australian war criminal Ben Roberts-Smith been charged?

Oscar Grenfell  
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A federal judge determined last Thursday that a protracted civil suit had established “the substantial truth” of allegations that Australian soldier Ben Roberts-Smith committed war crimes.

Roberts-Smith, a highly-decorated former Special Forces commando, had initiated the case himself, suing the *Sydney Morning Herald*, the *Age* and the *Canberra Times* for defamation over articles in 2018 accusing him of murdering Afghan civilians and other crimes.

Since the ruling, some have noted that Roberts-Smith has not faced criminal prosecution. While it may be permissible to call him a “war criminal,” those allegations have not been proven in a criminal proceeding. The burden of proof, they also point out, is lower in a civil hearing than in a criminal one.

The socialist movement is least of all inclined to jettison fundamental democratic rights, including to the presumption of innocence, due process and a trial before a jury of one's peers. Such rights were established in centuries of struggle against tyranny and oppression, and are continually being undermined by the state and the ruling elite.

But the obvious question is: why hasn't Roberts-Smith been charged for the war crimes and brought before a criminal court? In this instance, it is not Roberts-Smith's legal rights that have been undermined, but those of his Afghan victims.

By failing to charge Roberts-Smith, federal authorities created a bizarre situation, where matters of a plainly criminal nature were first heard in a civil hearing initiated by the soldier accused of committing the crimes.

Lawyers for the publications being sued mounted a highly complex legal defence, based on proving that while the papers had branded Roberts-Smith a war criminal, the allegation was substantially true. This involved securing the testimony of multiple Special Forces soldiers, including those who had witnessed Roberts-Smith's murders. Afghan witnesses were also heard, despite the obvious complexities of obtaining their testimony.

If all of this was able to be accomplished by a well-funded private law firm, why is it beyond the powers of the state to mount a similar case though in a criminal court?

An article in the *Sydney Morning Herald* yesterday asserted that the federal police provided two briefs of evidence to the

Commonwealth Director of Public Prosecutions (DPP), accusing Roberts-Smith of having committed war crimes, in May 2020. That is, the DPP has been sitting on a possible criminal prosecution for three years.

By allowing the issues to run in a defamation hearing before leveling any criminal charges, the DPP has immeasurably complicated any future criminal prosecution. One can well imagine that Roberts-Smith's defence counsel would argue, with justification, that he could not possibly receive a fair trial, given the publicity surrounding the defamation case.

What could the DPP's office have been doing in those three years that was conceivably more important than this case, involving as it does multiple alleged murders and violations of international law?

For one thing, it has been targeting whistleblowers who exposed war crimes. Over the same period that it sat on its hands over Roberts-Smith, the DPP finalised its case against David McBride, a whistleblower who courageously exposed other war crimes in Afghanistan. He faces a criminal trial later this year and the prospect of life imprisonment.

The retort may be that further inquiries are required to build a case that would meet the criminal threshold. But it appears that Roberts-Smith is not under any substantial form of caution or restriction. He was holidaying in Bali, Indonesia when the judgment was made in the defamation case. That is more lenient and seemingly blasé treatment than is frequently meted out to people accused of petty crimes. How did the DPP know he would even return to the country?

It is well-established that Roberts-Smith has backing from powerful sections of the media, business and political establishment. As a recipient of the Victoria Cross, Australia's highest military award, he was hailed as a hero by successive prime ministers.

But broader issues are at stake in the protracted cover-up of his crimes. Above all, what does it say about the character of the war in Afghanistan that the most prominent Australian soldier who fought there is accused of the most heinous crimes?

Among the allegations deemed “substantially true” in the defamation hearing was that Roberts-Smith machine-gunned a disabled Afghan prisoner to death then stole his prosthetic leg,

and that he kicked a handcuffed Afghan civilian off a cliff before ordering subordinates to shoot him dead.

Such crimes are not committed in a war for “democracy” and “human rights,” as governments sought to present the occupation of Afghanistan. Instead, they are particularly barbaric manifestations of a neo-colonial war of occupation aimed at subjugating a hostile population. They are, in an extreme form, the sort of crimes that have been committed in every imperialist war, especially those that have acquired the character of a “counter-insurgency.”

That is underscored by the fact that it is hardly a matter of Roberts-Smith alone. Every single US-allied power involved in the occupation was credibly accused of war crimes, including the killing of civilians.

Allegations of Australian Special Air Services (SAS) war crimes in Afghanistan extend over a period almost as long as the two-decade occupation itself. A detailed official timeline on the federal parliament website, records that accusations of unlawful killings of Afghan civilians were first levelled in 2006.

In July 2006: “Haji Malem Mohammed Abdul Khaliq Khan, a Barakzai member of Parliament, complained that his family had been attacked by the SAS as they fled Chora. His car was shot up and his wife blinded, their daughter lost a leg and his brother-in-law, Abdul Baqi, was killed. His son and a niece and nephew were also injured.”

The alleged crimes continued with disturbing regularity. There are entries on the timeline for virtually every year after 2006.

It is not an accident that most of the documented Australian war crimes were committed in 2010 and the years immediately following. This was the period of the Obama administration’s “surge,” backed fully by the Australian Labor government of Prime Minister Julia Gillard. Amid a crisis of the occupation and massive Afghan opposition, it was perhaps the largest official “counter-insurgency” operation conducted by the US since Vietnam.

Multiple nights a week, Australian Special Forces would “go outside the wire,” participating with other coalition troops in “capture or kill” raids based on US intelligence. The prospect that such operations, already legally dubious and murderous in intent, would degenerate into random killing is obvious.

So is the fact that the soldiers were trained to view the entire Afghan population as the enemy. Even when they returned to their heavily-fortified compounds, one soldier, the “guardian angel” would have his finger on the trigger of a loaded gun at all times, in case a member of the Afghan Army was in fact a secret Taliban fighter.

In April 2013, David Hurley, then chief of the defence force and now governor-general, issued a secret directive to soldiers, warning that they could be “exposed to criminal and disciplinary liability, including potentially the war crime of murder” if they could not prove that those they killed were

participating in hostilities.

No one has ever explained why such a directive would be sent, if military command was unaware that war crimes were being committed. The same year, Special Forces troops first raised concerns with command over the conduct of Roberts-Smith, who had received the Victoria Cross two years earlier.

For years and years afterward, the possibility that war crimes had been committed was covered-up. They were only brought to light thanks to whistleblowers, such as McBride, and persistent journalists.

Such reports eventually compelled the authorities to call an official inquiry into the war crimes in 2018. It dragged on for two years under complete secrecy. Dubbed the Brereton Inquiry, it concluded in late 2020 that there was “credible evidence” Special Forces had murdered 39 Afghan civilians and prisoners, along with committing other war crimes.

Above all, the inquiry cleared governments and military command of having had any knowledge of the crimes. It provided no evidence whatsoever for this assertion.

Even the figure of 39 murders is likely a substantial undercount.

An earlier secret inquiry within the defence force in 2016 heard accounts of Australian troops going to Afghan villages, where they “would take the men and boys to these guest houses and interrogate them, meaning tie them up and torture them.” After the soldiers left, “the men and boys would be found dead, shot in the head, sometimes blindfolded and throats slit.” The report described these as “corroborated accounts.”

Individual soldiers who committed war crimes should be brought to justice. But the far larger issue is the criminality of the governments that oversaw a predatory and illegal occupation for two decades. Having devastated Afghanistan, they have moved on, but only to prepare new and even greater crimes in the US-led confrontations with Russia and China.



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