Within Japan, it is generally believed that British and other Allied war courts were conceived in anger and bitterness, that the Allies were reckless in identifying and punishing war criminals, and that their courts (and sentences) were harsh and unfair. This essay reveals British official thinking about the B/C class trials from conception until the release of the last convicted Japanese war criminal for whom Britain had responsibility.

Between January 1946 and December 1948, British military tribunals held 308 war crimes trials, conducted by 12 separate courts in fixed locations or on circuit throughout South East Asia. A total of 967 accused were tried, 291 death sentences were pronounced, 564 were sentenced to periods of imprisonment ranging from one day to life, and 112 were acquitted (some purely on technicalities). These figures mask complicating factors. At least 30 convictions were set aside by the Confirming Authorities. Forty defendants stood trial more than once. Only 220 (75 per cent) of those condemned to death were executed. In addition, a small number of Japanese, Koreans and Taiwanese (at least eight and possibly as many as ten) were prosecuted through the territories for felonies corresponding to war crimes: no records of those proceedings have been found.

It was understood from the outset that war criminals brought to justice would constitute only a fraction of those against whom there was compelling evidence. These trials, and further proceedings carried out by other Allies on the strength of British investigations, were outcomes of huge efforts by the British Army to screen 708000 members of the Japanese Armed Forces and enemy civilians in South East Asia in order to identify and punish individuals concerned with war crimes. It proceeded with remarkable expeditiousness. Within four months of convening their first trial, 71 per cent of British war crimes prosecutions in the Far East were concluded. Thereafter the number of prosecutions fell rapidly, to a trickle by late 1947.
When the creation of these courts was first considered in London, two War Crimes Bills were drafted to be laid before Parliament in 1943 and 1944. This proved troublesome. Those responsible soon accepted it would be unfair and wrong to apply national law to members of the armed services of a foreign state without prior consent. Some argued it would breach international law. On seeing the Parliamentary Counsel’s first draft of the War Crimes Bill in October 1942, William Malkin of the Foreign Office wrote:

If there is one rule of international law which is well-established, it is that the members of a hostile invading or occupying army are not subject to the municipal law of the country concerned or to the jurisdiction of its civil courts . . .

It is suggested accordingly that war criminals should not be tried for offences against the municipal law of the invaded or occupied country where the act was committed, but for breaches of the laws of war . . . for once the jurisdiction of the State concerned is claimed as resulting from its rights under international law and not from its territorial jurisdiction, the question of what courts it should employ for the purpose of applying international law to cases where it possesses this jurisdiction would seem to be a matter which each country is entitled to decide for itself.5

The Judge Advocate General, Sir Henry MacGeagh (the Army’s top legal adviser), agreed. They resisted the Parliamentary Counsel, Lord Chancellor, Attorney General and Treasury Solicitor. MacGeagh had no objection to legislation that might grant British criminal courts with jurisdiction over crimes of violence committed on British subjects overseas, but he was utterly opposed to the idea that such jurisdiction should be extended to war crimes or made retrospective. MacGeagh maintained that

The true basis of the liability to punishment for war crimes is not that the war criminal has offended against the peace-time criminal law of the invaded country or of enemy nationals but that he has committed violations of the rules of warfare as agreed or recognized [emphasis added] among civilised nations . . .

The question of a war crime is whether or not the act complained of can be justified as an act of legitimate warfare. This is a question involving military considerations, upon which military tribunals would be specially qualified to judge and which would appear to be unsuitable to leave to the decision of a jury.

All belligerent forces recognize, or ought to recognize, that they are liable to be tried for war crimes by military tribunals, and in that sense no retrospective legislation would be required . . .