Ottawa to petition war-crime probe by ICC

By SEAN FINE, STEVEN CHASE

Even as bombs fall on Ukrainian cities, the International Criminal Court is beginning an investigation into potential war crimes - with an assist from Canada.

Canada is making its intervention after ICC prosecutor Karim Khan said he had decided to open an investigation by any party to the conflict in Ukraine, and that the process could be sped up if a member state referred the matter to his office. Otherwise, he would have had to seek authorization from a three-judge body, which would have taken more time. Because Ukraine is not a member of the court, it could not make the referral itself.

Canada, which helped spearhead the court's creation nearly a quarter-century ago, answered the call.

Foreign Affairs Minister Mélanie Joly told reporters in Geneva on Tuesday that Canada will petition the ICC to investigate crimes against humanity and war crimes, saying it was "important for us to show that we are steadfast in terms of our support to Ukraine."

"We do not take this decision lightly. We have repeatedly called on Russia to cease its unprovoked and completely unjustifiable attacks on Ukraine and engage in meaningful dialogue. However, as the horrific events in Ukraine unfold before our eyes, it is now clear that more must be done," she said in a statement.

Lloyd Axworthy, who was foreign affairs minister when Canada pushed for the court's establishment in the 1990s, said in an interview that the investigation holds great promise as a deterrent.

"I think it sends a real shot across the bow to [Russian President Vladimir] Putin and company because they realize that for all of the other kinds of pressures and sanctions, this is one that is going to hit them directly, personally; having a legacy of being a war criminal is not something you want to turn over to your grandchildren."

The statute that sets the rules for the ICC allows Ukraine to accept jurisdiction, even though it is not a signatory, and it has done so, allowing for an investigation. Russia, like China and the United States, is also not a signatory, but can be investigated because its conduct occurred on the territory of a country that has accepted the ICC’s jurisdiction.

Mr. Khan has announced there is reason to believe that war crimes and crimes against humanity have been committed in Ukraine.

It's not difficult to identify a war crime in this conflict, said Mark Kersten, a senior researcher at the University of Toronto's Munk School of Global Affairs and Public Policy. "If you look at the use of cluster bombs in a Ukrainian city, I think we already have an assumption that there's no military necessity, there's no proportionality." But he said, "What's hard is to find out is who's ultimately responsible for that war crime."

To point the finger at Mr. Putin, it's not enough to show he sent the troops, said Darryl Robinson, a Queen's University professor.

The prosecutor would need to show that Mr. Putin directed or willed illegal conduct, or that he and other political leaders knew of or foresaw the illegal conduct and failed to meet their obligations to supervise their troops, he said.
"Start with the crimes and follow the evidence up. You can only go as far as the evidence goes," he said.

Evidence-gathering and preservation in real time - as the bullets are flying, as Prof. Robinson put it - can be a deterrent. "I'm not talking necessarily about deterring someone at the top like Putin but deterring commanders lower down. They might be mindful," Prof. Robinson said.

A real-time investigation provides an advantage in evidence gathering, said Prof. Kersten. "Any orders people hear, any statements people have, physical evidence of the destruction of buildings, doctors reports, collecting and collecting it as soon as possible."

But crime scenes are unlikely to be safe for witnesses or investigators.

"The court has neither the possibility nor the means to do impartial and real investigations unless it is satisfied with NATO and Ukrainian government reports," University of Ottawa professor Jabeur Fathally said.