Between Negotiation and Legitimation: The International Criminal Court and the Political Use of Sovereignty Challenges

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Abstract

In contemporary international politics, states face numerous challenges to their sovereignty, especially in the realm of human rights. We argue that rather than simply fight back when sovereignty is challenged, states sometimes instrumentalize sovereignty challenges in pursuit of their own domestic and international political agendas. We identify two key ways that governments frame sovereignty challenges to use in these pursuits, what we call negotiation and legitimation strategies, and outline the conditions under which states may choose to employ these strategies. In order to evaluate our argument, we present a case study of Colombia's interactions with the International Criminal Court over the course of the ICC's seventeen-year preliminary examination. Drawing on evidence gathered from ICC records and media archives from the Colombian executive, we show first that the ICC continually challenged Colombian sovereignty by threatening to intervene, especially during the peace negotiations with the FARC. Rather than fight back against the sovereignty challenge or instrumentalize the Court to punish enemies, we also show that three successive Colombian administrations used this challenge to frame debates around contentious domestic human rights policies.

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Introduction

In 2016, the Colombian government signed a peace agreement with the *Fuerzas Armadas Revolucionarias de Colombia* (FARC), ending the longest running civil war in the Western Hemisphere. The peace accords, one of the most comprehensive in history, included detailed provisions creating an integrated system of transitional justice for both the FARC and the Colombian armed forces, among others. The government, which had promised to put the agreement up for a national referendum, needed to gain public support for the accords in a country increasingly polarized around the peace process. It did so by using the threat posed by the International Criminal Court (ICC) to persuade members of the public that the accords were a necessary commitment to make. More generally, over the twenty years of Colombia's participation in the Rome Statute system, multiple presidential administrations have used the threat of the ICC to further both domestic and international political agendas. Why respond to the sovereignty challenge posed by the ICC by using it to sell the peace process to skeptical members of the public instead of pushing back against the Court?

In this article, we describe some of the strategies states use to navigate sovereignty challenges, or external threats to a state's internal jurisdiction (Duursma, 2021; Krasner, 1999; Montgomery, 2002). We focus on challenges presented by global governance institutions, especially those related to human rights and international humanitarian law. We identify two key ways that governments frame sovereignty challenges to pursue policy agendas, what we call *negotiation* and *legitimation*. Negotiation strategies use sovereignty challenges to rally domestic audiences behind political projects like the Colombian peace process. Legitimation strategies instead use challenges as mechanisms to highlight successes to domestic and international audiences, shifting attention away from other concerns.

In order to describe how these two strategies operate in more detail, we present a case study of Colombia and the ICC. Drawing on evidence gathered from ICC records and media archives from the Colombian executive, we use this case study to trace Colombia's interactions with the Court from 2002 to 2022, across twenty years and three successive presidential administrations. We show first that the ICC continually challenged Colombian sovereignty by threatening to intervene if the Colombian government

did not address important abuses like sexual violence, forced displacement, and the murder of civilians. We also show that the Colombian administrations used this challenge to frame debates around important policy areas via the use of legitimation and negotiation strategies.

In showing that states use strategies of negotiation and legitimation, we contribute to the literature on global governance and human rights by highlighting the variation in ways that states instrumentalize institutions like the ICC. This nuanced understanding of instrumentalization further contributes to the literature on how states respond to human rights pressure, especially from above. We also show how domestic political actors use international politics to help make policy. Finally, we contribute to the literature on Colombian politics specifically by showing how successive governments have pursued their political agendas in the face of international pressure on human rights issues.

Sovereignty Challenges and Human Rights

Sovereignty has long been a key organizing principle of international politics; it is seen as a way to impose organization and compartmentalization on the international system (Morgenthau, 1948). But contemporary international politics has seen states face and respond to sovereignty challenges from international institutions and local activists, especially regarding human rights policy and practice (Risse et al., 2013). In this article, we focus on one kind of sovereignty challenge in the realm of human rights and international humanitarian law, the challenge posed by global governance institutions like the International Criminal Court. States opt into these institutions by ratifying treaties, which in theory delineate the limits of sovereignty by outlining the conditions under and the extent to which sovereignty can be infringed upon. For example, the Rome Statute of the ICC outlines the terms of the Court's temporal, territorial, and subject matter jurisdiction, and explains in detail the role that issues like complementarity should play in the Court's evaluation of the admissibility of cases brought before it (Rome Statute of the International Criminal Court, 1998).

However, when faced with pressure from global governance institutions in accordance with these treaties, states often resist. For example, both Burundi and the Philippines withdrew from the Rome Statute system after the ICC's Office of the Prosecutor (OTP) began investigating allegations of

atrocities, despite having ratified the treaty in the decade prior (Hillebrecht, 2021b; Moore, 2017). That states sometimes resist these legal forms of intervention suggests that they do see intervention by institutions like the ICC as challenges to their sovereignty, despite what they agree to when ratifying human rights related treaties. In this context, we build on existing definitions of external sovereignty challenges and define a sovereignty challenge as *an explicit or implicit threat to a state's internal jurisdiction from a global governance institution, regardless of the legality of that threat*.

The human rights literature has outlined a variety of ways states respond to sovereignty challenges by global governance institutions. They may, for example, fight back against the institutions providing pressure, outright refusing to cooperate or only cooperating if institutions respect their non-negotiables (Ba, 2020; Hillebrecht & Straus, 2017; Nouwen & Werner, 2010). States may instead try to undermine the institutions placing pressure on them, using the technical framework outlined by treaties to push against an institution's mandate (Duursma, 2021; Hillebrecht & Straus, 2017). They may also try to instrumentalize the institution in pursuit of political outcomes like regime stability (Hashimoto, 2020; Tiemessen, 2016). Finally, if human rights norms have been accepted as valid, states may respond to challenges by engaging in true cooperation with the institution (Risse et al., 2013).

Research has increasingly focused on the strategies states use to undermine and instrumentalize institutions when responding to pressure on matters related to human rights and international law. For example, states accept peacekeepers to stave off criticism and challenges to external sovereignty, but then prevent them from fully carrying out their duties in order to do what they see as necessary to protect internal sovereignty (Duursma, 2021). They also engage in pro forma cooperation with institutions like the ICC, providing minimal cooperation and posing technical challenges to hamper the institution's work (Hillebrecht, 2021a; Hillebrecht & Straus, 2017)**.** The research on instrumentalization has focused especially on how states use institutions like the ICC to target domestic regime opponents for punishment (Ba, 2020; Hashimoto, 2020; Hillebrecht & Straus, 2017; Tiemessen, 2016). We build on this work by outlining different ways that states can instrumentalize institutions, and by explaining the conditions under which we expect to see these new forms of instrumentalization occur.

We argue that sometimes, states use sovereignty challenges by institutions like the ICC to signal about important policy concerns to both domestic and international audiences. Rather than instrumentalizing institutions in an effort to punish their enemies and protect themselves, governments can instead use sovereignty challenges posed by these institutions as tools for what we call *negotiation* or *legitimation*.

Negotiation occurs when governments use sovereignty challenges to rally domestic audiences around contentious preferred political outcomes. That is, they instrumentalize sovereignty challenges by arguing that by supporting specific domestic policies, the challenge can be resolved. Negotiation in this context is between the state and its own domestic opposition: by using sovereignty challenges as tools of negotiation, states seek to convince opponents to support specific contentious policies. Evidence of this strategy includes (1) state references to pressure from the global governance institution as justification for supporting a particular policy position and (2) similar claims as a justification for why others should support the policy position as well. What matters most is the purpose of framing the sovereignty challenge — in an effort to gain domestic support for a particular political outcome — and the target of the framing, domestic political audiences.

States are therefore more likely to use a strategy of negotiation precisely when a certain set of human rights-related policies are both salient and contentious. That is, states use these strategies when facing a domestic opposition focused on particular human rights policies, either because opponents believe the proposed policies are insufficient or because they oppose the larger political project associated with the policies. While we focus on Colombia, this is also something that occurred in Kenya, when President Uhuru Kenyatta and Deputy President William Ruto used the ICC investigation against them to rally supporters and win the contentious 2013 elections. They did so by arguing that they were being unfairly targeted by the ICC (Chaudoin, 2016; Lynch, 2014).[1]

Legitimation instead targets domestic audiences, international audiences, or both. Using a sovereignty challenge as a legitimation tool involves framing the challenge to point out perceived successes around salient policy issues to skeptics of the government. By showing that a sovereignty

challenge over a policy issue has been successfully addressed, governments engaging in the practice of legitimation can quell opposition by proving naysayers wrong. States are more likely to employ this strategy when facing criticisms from domestic or international audiences over a certain aspect of governance and/or a certain state of affairs regarding human rights. Evidence of a legitimation strategy includes the state regularly referring to successes on separate but related human rights issues.[2]

Table 1: Observable Implications of Negotiation and Legitimation Strategies

Conditions for strategy	**Strategy**	**Observable implications**
Salient and contentious domestic human rights policies	Negotiation	State references to global governance institution pressure as justification for state policy position State references to global governance institution pressure as justification for why domestic opposition should support the state's policy position
Criticism of the state over a certain aspect of governance or state of affairs related to human rights	Legitimation	State references to successes on separate but related human rights issues

Table 1 provides an overview of these two strategies of instrumentalization, outlining the conditions under which we expect to see each strategy, as well as the behavioral evidence that provides observable implications of each strategy. As explained above, this is not an exhaustive list of the ways in which states respond to sovereignty challenges by global governance institutions, nor does it paint a complete picture of how states instrumentalize these institutions. It instead describes two specific strategies that have been underexplored in current research, especially as it relates to the ICC, and provides an explanation of the conditions under which states are likely to use each strategy.

Research Design and Data

In order to show how negotiation and legitimation strategies operate, we present a case study of Colombia and the ICC. States can use these strategies in a variety of contexts with different intentions, as the Kenyan case described above highlights. In this article we focus on the Colombian case for several reasons. First, it is useful because of the temporal coverage of the Court's preliminary examination: the

longest in the history of the ICC, the preliminary examination lasted over 17 years, and across three presidential administrations in Colombia and all three Chief Prosecutors of the ICC.[3] The temporal scope of the preliminary examination in Colombia allows us to move beyond a specific snapshot in time to trace the evolution of the relationship between the Court and the Colombian government. While some aspects of the Colombia case study—including the length of the preliminary examination and the extent of the OTP's interactions with Colombian authorities—appear to be unique, they are increasingly common. For example, Afghanistan, Guinea, and Nigeria all had preliminary examinations that lasted in excess of a decade, with varying degrees of OTP involvement (Office of the Prosecutor, 2019).

Furthermore, the complex dynamics of the Colombian conflict, including the involvement of powerful anti-ICC actors like the United States, makes Colombia a hard case for providing an empirical example of our theory. The Colombian government had the international support, the presumed domestic institutional capacity, and at some points, the political incentive to actively push against the ICC's interference, or to undermine or instrumentalize the Court in other ways. Persistent human rights abuses across all three administrations suggests that full acceptance of human rights norms was highly unlikely. But the Colombian government nevertheless chose to acknowledge the Court's legitimacy by engaging in a process of cooperation with the OTP, framing the sovereignty challenge as both necessary and legitimizing to the Colombian and international public. How this process developed in Colombia, and what happened as a result, allows us to understand how states use negotiation and legitimation strategies to instrumentalize sovereignty challenges.

We use data gathered from media reports, as well as documents from the OTP. Media reports are particularly important because they present in real time the discourse around communications between the ICC and the Colombian government. They show how each actor presented their understanding of the role of the ICC to the Colombian public and to the rest of the world. The documents collected from the OTP, in particular the Office's press releases and annual preliminary examination reports, are similarly public-facing: press releases and public statements are written and disseminated with the purpose of circulating

in the media. The preliminary examination reports are not targeted towards the media, but are nevertheless prepared with the understanding that such information will be made public.[4]

We collected the media reports from the Colombian Presidential media archive, as well as the archives of other key ministries within the Colombian executive, most importantly the Attorney General's Office.[5] We collected the OTP documents from the ICC's online archive. The archive provides a comprehensive digital record of all publicly available information from the ICC, including records of referrals and declarations made to the Court, and strategies and reports on Court activities.[6] We acknowledge that the information gathered from these archives may not present a complete collection of all facts related to the ICC's preliminary examination in Colombia or the Colombian government's response—archives are curated and what is *not* included may be just as important as what is.[7] However, when possible, we address this issue by triangulating our information using multiple data sources, including supplementary data from secondary sources.

Case Study: The ICC in Colombia

In this section, we analyze the OTP's activities throughout the preliminary examination process, as well as the Colombian government's response to the OTP activities, focusing in particular on how successive administrations framed the challenges to Colombian sovereignty posed by the ICC. We suggest that in Colombia, the ICC's preliminary examination was used as a tool of both legitimation and negotiation, depending on the pressure from the OTP and the administration's priorities. Table 2 presents the strategies of each presidential administration and the specific acts undertaken in pursuit of these strategies.

Following a series of human rights-related scandals and increased pressure from the OTP, the Colombian government under Alvaro Uribe (2002-2010) took a dual approach, publicly signaling a willingness to work with the OTP in a process of legitimation while also using a negotiation strategy to gain support for its domestically contentious demobilization process with the paramilitaries. Under the two subsequent presidential administrations, the politics surrounding the peace process with the FARC led the government to more explicitly address the ICC's sovereignty challenge. Juan Manuel Santos's

Table 2: Strategies for Instrumentalizing Sovereignty Challenges in Colombia (2002 - 2022)

Administration	Conditions	Strategy	Activities
Uribe (2002 - 2010)	Demobilization negotiations with paramilitaries	Negotiation	Formally invoke Article 124 of the Rome Statute to protect amnesty for the paramilitaries
	Scandals related to human rights abuses	Legitimation	Publicly cooperate with ICC by meeting with OTP investigators
Santos (2010 - 2018)	Peace negotiations with the FARC	Negotiation	Invoke the threat of the ICC to promote the peace process with the FARC
	Justice provisions of peace agreement	Legitimation	Identify the ICC's approval of the peace process as a sign of success on human rights issues
Duque (2018 - 2022)	Rising human rights abuses and assassinations of human rights defenders	Legitimation	Sign cooperation agreement with OTP; highlight contrasts with Venezuela

administration (2010-2018) engaged in both negotiation and legitimation, as Santos worked to sell the peace agreement in an increasingly polarized Colombia. Ivan Duque's (2018-2022) administration faced widespread calls to address rising violence and human rights violations. The Duque administration responded by pursuing a policy of legitimation, highlighting its cooperation with the ICC on matters related to the peace process and contrasting it with other states in the region.

Background

The Colombian civil war began in the 1960s as an ideological conflict between the government and a collection of leftist groups that ultimately became the FARC. In the 1970s and 80s, widespread FARC activity — especially the kidnapping of wealthy landowners and increasingly powerful narcotraffickers — spurred the creation of so-called self-defense groups. These groups ultimately coalesced into the *Autodefensas Unidas de Colombia* (AUC), a right-wing paramilitary organization notable for its campaign of forced-displacement and widespread social cleansing in Colombia, as well as its ties to the Colombian military and politicians at every level of government (Bagley, 1988; Dudley & Murillo, 1998).

While the FARC have primarily been associated with kidnappings, and the AUC and its successors have primarily been associated with forced displacement and massacres, the Colombian military has primarily been associated with what has become known as the false positives scandal.[8] From 2002-2008, between 5,000 and 10,000 Colombian civilians were executed by the military. Members of the military would lure civilians to a meeting place with the promise of employment, where they would be murdered (Gordon, 2017; O'Driscoll, 2011). Their bodies would then be moved to another location, put into guerrilla uniforms, and staged to manipulate an image of a lawful combat death. They were later buried in unmarked graves (Volkmann, 2012).

This practice was a result of pressure and incentives from military command, including Uribe and Santos, to produce results. These incentives increased substantially during the period in which the number of false positives escalated (Acemoğlu & Robinson, 2016). Units which failed to demonstrate results in the number of combatants killed or were hesitant to kill civilians were punished (Wood, 2009).

It was in the context of these widespread and continued abuses that the OTP became involved in the debates surrounding justice in Colombia. Using violent deaths as its key metric for determining which cases to prioritize, it identified Colombia as an urgent case in 2002. Ultimately, the OTP's decision-making process was overtaken by the direct referral of several situations in Africa (Bosco, 2014).

But from the very beginning of Colombia's relationship with the ICC, the government instrumentalized the prospect of a court investigation for its own domestic and international political agenda. The Uribe administration pursued a dual strategy, first presenting the sovereignty challenge — and its solution to that challenge — as a tool of negotiation, and publicly cooperating with the OTP in a strategy of legitimation after the preliminary examination began.

Uribe Administration (2002-2010)

Prior to the opening of the preliminary examination, the Uribe administration highlighted how the threat posed by the ICC could limit opportunities for amnesty to various armed actors (Urueña, 2017). Just as Uribe took office, Colombia announced that it would make use of the Rome Statute's opt-out clause, Article 124, which allowed states to refuse ICC jurisdiction for war crimes for up to seven years

(Rome Statute of the International Criminal Court, 1998).[9] The government submitted its declaration upon ratifying the treaty, precluding Court intervention regarding war crimes until 2009. While the government argued that the Article 124 declaration was to address concerns about both the guerrilla groups and the paramilitaries, the Uribe administration primarily sought to promote the idea of amnesty for the AUC (Schneider & Taborda Ocampo, 2011; Tabak, 2008). The AUC informally began demobilizing shortly after Uribe took office, and the organization was concerned about the ICC as it began formal discussions with the government (Tabak, 2008). The Uribe administration used the Article 124 declaration and its proposed Alternative Sentencing Law to sell the idea of a de facto amnesty for the AUC to a domestic audience largely opposed to the idea (Schneider & Taborda Ocampo, 2011; Urueña, 2017). The Colombian congress ultimately rejected the proposed bill, instead passing the Justice and Peace Law in 2005.

In 2004, as the AUC demobilization process was ongoing, the OTP officially opened a preliminary examination in Colombia, though it did not become public until 2006 (Bosco, 2014). The preliminary examination focused primarily on crimes against humanity since 2002 and war crimes since 2009 that had been committed by the government forces, paramilitaries, and rebels. While the OTP increasingly focused its attention on the armed forces — namely the false positives killings — the preliminary examination broadly focused on several categories of offenses, including forced displacement and sexual violence (Stewart, 2015).

Once the preliminary examination began, the Uribe administration was relatively silent about the ICC. When the administration addressed the preliminary examination at all, it was to engage in a practice of legitimation, pointing to its cooperation with the OTP. For example, the Uribe administration hosted investigators from the OTP a number of times, including in 2007 and 2008, when Chief Prosecutor Luis Moreno Ocampo and his team took trips to Colombia to meet with local government officials and discuss the status of national proceedings (Office of the Prosecutor, 2012). Lines of communication also remained open as the OTP followed the paramilitary demobilization and the implementation of the Justice and Peace Law (Office of the Prosecutor, 2012). We suggest that the Uribe administration pursued a

legitimation approach precisely because of the ongoing scandals: by showing cooperation with the OTP, the administration could signal to both domestic and international skeptics that it was committed to human rights efforts.

Santos Administration (2010-2018)

The most public-facing focus on the Colombian preliminary examination began in earnest in 2012, when the peace negotiations between the Colombian government and the FARC became public. Relatedly, the Santos administration introduced the Legal Framework for Peace, an amendment to the Colombian constitution, which gave Santos the authority to prioritize and suspend cases and sentences against members of armed groups during peace processes (International Center for Transitional Justice, n.d.). The June 2012 approval of the amendment by the Colombian Senate put justice squarely at the center of public discourse regarding the peace negotiations.

In November 2012, the OTP issued an interim report focused specifically on its preliminary examination in Colombia. It concluded by noting that cases against guerrilla and paramilitary groups would be unlikely at the ICC, but also expressed initial reservations about the Legal Framework for Peace, arguing that suspension of legal processes against even low-level perpetrators "could negatively impact a State's efforts to conduct genuine proceedings in respect of those bearing the greatest responsibility for the most serious crimes" (Office of the Prosecutor, 2012, p. 64).

The report, believed to initially be aimed at easing complaints from local civil society that the OTP was not doing enough, ultimately laid the foundation for future interactions between the OTP and the Colombian government (Human Rights Watch, 2018). It highlighted the sovereignty challenge posed by the OTP by identifying the implementation of the Legal Framework for Peace and negotiations with the FARC as a key area of interest for the Prosecutor (Office of the Prosecutor, 2012). The OTP drove this point home in the summer of 2013, when Fatou Bensouda sent a letter to the president of the Colombian Constitutional Court, which was subsequently published in the well-known Colombian magazine, *Semana*. The letter noted the OTP's concerns about the possibility of suspending sentences for

human rights abusers: it "would go against the purpose of the Rome Statute because it would in practice impede the punishment of those who have committed the most serious crimes" (Semana, 2013).

The Colombian government initially pushed back against these criticisms, with Attorney General Eduardo Montealegre Lynett noting that "the State can judge and convict the top ringleaders, but at the same time it can impose a substitute sentence" (Fiscalía General de la Nación, 2013). In the same public statement, Montealegre indicated his support for a proposed plebiscite, which would allow the population to weigh in on a final agreement. Montealegre continued to point to Colombian successes on justice issues throughout the peace negotiations, explaining in 2015 that Colombia was "building a model that implies that the most serious violations of human rights, crimes under the jurisdiction of the International Criminal Court … are being investigated, accused, and punished" (Fiscalía General de la Nación, 2015).

But in 2015, the Colombian government and FARC leadership announced an agreement to establish a Special Jurisdiction for Peace (JEP). Under the rules of the JEP, those accused of atrocities have the opportunity to voluntarily appear before the tribunal and testify about their involvement. If they do so, they may receive a reduced sentence. If they do not appear, they face a traditional criminal trial where they may face up to 20 years in prison if found guilty (Bates & Zvobgo, 2021). While the OTP expressed optimism over the provisions, the public was divided. The JEP and other transitional justice provisions were among the most polarizing features of the final agreement, galvanizing in particular the political right because they believed the system would be too lenient on the FARC (Meernik et al., 2019).

The Santos administration thus began to explicitly and publicly express ties between the peace process and the "promises Colombia has made to the ICC" (Presidential Press Release, 2015). In a process of negotiation, Santos worked to build public support for the peace process. This was important because he had previously agreed to put the final agreement to a national plebiscite, and thus needed to ensure that a sizable portion of the Colombian public would vote in favor of the accords. By pointing out Colombia's obligations, Santos signaled to the public that they should support the peace process: "[t]he whole world is looking to us as an example, as a grand precedent, where we also need to achieve

inclusive international standards—those of human rights organizations, of the ICC, and of course, of the Rome Statute" (Presidential Press Release, 2016a).

Santos also used the satisfaction that the OTP had publicly expressed over the issue of amnesty to legitimize the justice provisions in the agreement for international and domestic skeptics, who had expressed concerns about the human rights implications of the JEP (Meernik et al., 2019). Santos pointed out the administration's cooperation with the Court and the OTP's approval of the process as part of this strategy of legitimation. This point was particularly stressed in his public addresses following the narrow failure of the plebiscite vote.[10] He noted that, "[i]t is difficult, very difficult to understand the criticisms and accusations that there will be impunity when the greatest world authority on justice in relation to the gravest of crimes against humanity not only supports the [peace] process, but also publicly recognized that the rights of victims will be guaranteed [in this process], including the right to justice" (Presidential Press Release, 2016b). While the plebiscite failed, the agreement was renegotiated in November 2016 and was ultimately approved by Congress — the provision outlining justice processes included the largest number of changes (Hayner, 2018).

In 2017, as the Colombian state began setting up the JEP, the OTP turned its focus to the legal foundations of the agreement. Its 2017 preliminary examination report produced another detailed analysis of the Legal Framework for Peace and the connected amnesty law, as they provided the foundation for the JEP (Office of the Prosecutor, 2017). Bensouda published another op-ed in *Semana* in January 2017, indicating that the OTP was taking seriously its concerns about the ramifications of the JEP framework for holding perpetrators accountable (Bensouda, 2017). Less than a month later, the OTP shared a report with Colombian authorities that explained its analysis of the ongoing national proceedings against military commanders implicated in the false positives crimes. The Santos administration responded by publicly highlighting their successes in investigating and prosecuting the false positive cases and agreeing to hold "technical cooperation meetings" in the subsequent months (Fiscalía General de la Nación, 2017).

In May 2018, ICC Deputy Prosecutor James Stewart presented at a conference on transitional justice in Colombia. Noting the challenges facing the JEP as a new institution, he explained that the

measures taken to achieve the JEP's mandate of addressing cases against "those possibly bearing the greatest responsibility for the gravest crimes committed in the context of the armed conflict … should be in alignment with the objectives of the Rome Statute, if they are to honor Colombia's commitment … and ensure that the most serious crimes do not go unpunished (Stewart, 2018a, p. 3). He ended his speech with a reminder that for her part, "the Prosecutor must fulfill her mandate under the Rome Statute. This will include satisfying herself that the … transitional justice measures applied … in Colombia meet, in a genuine way, the Rome Statute goals of ending impunity and contributing to prevention" (Stewart, 2018a, p. 22).

In the context of this continued pressure from the ICC, and continued polarization around the peace process, Santos fought harder to sell the JEP and the peace process in general to the domestic public. Towards the end of his term, Santos explicitly used the government's interactions with the OTP in a dual manner. The war crimes bill, which gave domestic legal authority to the creation of the JEP, had moved slower than expected, and was up for vote in Congress just as Santos was preparing to leave office (Gillooly & Zvobgo, 2019). His successor, Ivan Duque — a protege of Uribe himself — had campaigned on the platform of dismantling the peace accords (Amat, 2018). In an effort to pressure Duque to shift his rhetoric on the peace accords, Santos pushed forward with his framing of the OTP preliminary examination as a process of negotiation, but also as a tool of legitimation.

First, while the OTP had expressed concerns about the politicization of the JEP, Santos focused on the legitimating aspects of the OTP's comments, noting that, "[t]he head prosecutor of the ICC has released a very positive communique, supporting what the JEP is doing" (Presidential Press Release, 2018a). Supporting the JEP, he suggested, was a way of successfully addressing the sovereignty challenge posed by the OTP. The OTP was already supporting the JEP, so if domestic opponents would continue with his policy of supporting the peace process, they too would have similar success. Santos went even further in his efforts, embarking on a public campaign to shore up support of the peace accords and by extension, the JEP: "It is a process, and this justice complies not only with the Rome Statute, but also with the parameters of our own constitution, with the parameters of the ICC and the Interamerican

Court—the entire world is waiting, because this could become a precedent to solve other conflicts" (Presidential Press Release, 2018a).

But at times Santos also amplified the OTP's expressed concerns, using them as a threat to domestic opponents — including Uribe and Duque — as part of a process of negotiation over the implementation of the peace agreement. He pointed out that if the accords were not implemented as planned, the ICC would take matters into its own hands. For example, when Santos addressed the military's disgruntlement at being included in the JEP's jurisdiction he noted that, "[not being included in the JEP process] will not be convenient for our Armed Forces...because it will immediately put them, once again, under the magnifying glass of the ICC" (Presidential Press Release, 2018b). In sum, throughout his second term, Santos publicly signaled his commitment to the peace accords and to the OTP in order to garner more support for the polarizing peace negotiations. He also used the threat posed by the OTP as he prepared to leave office, indicating that if Duque did not implement the accords, the ICC would get involved.

Duque Administration (2018-present)

Duque made no public comment about the ICC when he took office in August 2018.[11] His public silence was related to two separate issues. First, he campaigned on the promise of dismantling the peace accords (Amat, 2018). Once in office, he moderated his position, but his administration's lack of action on key provisions in the accords and process of defunding agencies and programs related to the accords made his stance clear: constitutionally, he could not dismantle the accords, but he could slow them and make them less effective (Gillooly & Zvobgo, 2019). Second, the OTP had begun to shift its rhetoric around its involvement in Colombia, focusing on encouraging Colombian authorities to "allow the JEP magistrates to do their job" (Stewart, 2018b, p. 13).

And by 2019, the JEP was up and running, and the OTP's language shifted again. In its 2019 report, it outlined the collection of cases within the JEP, ordinary justice, and prior transitional justice systems that were in the process of holding those responsible for violations accountable for their crimes. The OTP explained that "Colombian authorities appear to have advanced towards the completion of their

duty to investigate and prosecute conduct that constitutes war crimes and crimes against humanity in accordance with the Rome Statute" (Office of the Prosecutor, 2019, p. 14). It went on to explain that in 2020, the OTP would begin preparing a series of benchmarks and conditions that would govern the completion of the preliminary examination, subject to the continued satisfaction of certain conditions.[12]

And yet Duque remained silent on the investigation for several years. Only when Karim Khan, newly elected as the ICC's Chief Prosecutor, announced that he would visit Colombia did Duque's administration begin to publicly discuss the ICC probe. We suggest this was in part to legitimate Duque's human rights record, in spite of concerns raised in the international community and the Colombian public about rising human rights abuses and police brutality that had taken place during the 2021 National Strike protests in Colombia (Human Rights Watch, 2021).

The National Strike began in protest of increased taxes on basic goods, corruption in the Duque administration, and rising killings of human rights defenders and demobilized FARC combatants, and was exacerbated by Duque's handling of the COVID-19 pandemic. The administration's heavy-handed response to the protests drew widespread criticism, especially after officials began deploying riot police who shot rubber bullets in the eyes of protestors. There were more than 5,000 incidences of police brutality, including both sexual violence and homicide (Temblores, 2021).

Ahead of the Prosecutor's visit to Colombia, Vice President Marta Lucía Ramírez traveled to The Hague to begin agenda-setting for the visit (Presidential Press Release, 2021c). Around the same time, Duque began to explicitly engage in a process of legitimation, publicly citing the ICC when pointing out crimes against humanity in Venezuela, while simultaneously affirming Colombia's commitment to collaborating with the Court. While Duque noted that, "it is our wish that justice always proceeds with objectivity, impartiality, and celerity," he also explained that "the Rome Statute, which talks of the imprescriptibility of these crimes [committed by Maduro], has called for an effective and proportional sanction, which is something we embrace as a part of our foreign policy, and have taken to the point of multilateralism—more than 8 heads of state have denounced Nicolás Maduro in front of the ICC" (Presidential Press Release, 2021a, 2021b).[13] In pointing to concerns about Venezuela, Duque created a

clear dichotomy between the two countries: Colombia was cooperating with the Court, while Venezuela was engaging in continued abuses.

During Khan's visit in October 2021, Duque and Khan signed a cooperation treaty and Khan announced the closing of the preliminary examination in Colombia. The OTP was measured in its announcement; it made clear that "the [cooperation] Agreement recalls that the Prosecutor may reconsider his assessment of complementarity in light of any significant change in circumstances" (Khan, 2021). Duque, however, claimed the agreement as a victory for Colombia, and his administration in particular, as it continued to work toward peace and justice, despite more reports emerging about rising violence and human rights abuses during the implementation of the accords (Gillooly, 2021; Presidential Press Release, 2021d). The Presidential Press release from that same visit did not acknowledge the OTP's hedging around its closure of the preliminary examination, instead focusing entirely on the closure itself. Similarly, Attorney General Francisco Barbosa Delgado pointed to the cooperation between the Colombian government and the OTP, explaining that "we continue to work together, the two entities, in order to fight against human rights violations" (Infobae Colombia, 2021).

Following the visit and the official end of the ICC's preliminary examination, Duque cited his success often, and frequently accompanied those claims with his recurrent concerns about atrocities in Venezuela (Presidential Press Release, 2021e, 2021f). For example, in late 2021, Duque noted that "of course, we have backed the proposal that has moved forward in the OAS to denounce the atrocities and the human rights violations in Venezuela…that we also have brought to the General Secretary of the ICC" (Presidential Press Release, 2021f). By pointing out Venezuela's failures — and contrasting it with Colombia's successes with the ICC — the Duque administration publicly signaled its own legitimacy, despite historically low approval ratings and ever-increasing criticisms over human rights abuses.

Conclusion

In this article, we argued that states sometimes use sovereignty challenges in pursuit of their own domestic and international political agendas. We identified two key ways, legitimation and negotiation, that governments frame sovereignty challenges in these pursuits, and the conditions under which states

may use these strategies. We provided an illustrative case study to show how three successive administrations in Colombia used the threat posed by the ICC as tools of both strategies. In doing so, we have contributed to the literature on sovereignty, global governance, and human rights by highlighting the variation in ways that states instrumentalize institutions like the ICC. This nuanced understanding of instrumentalization further contributes to the literature on how states respond to human rights pressure.

While this article focuses on a single case study of Colombia, the strategies described may be relevant for understanding the impact of human rights-related global governance institutions in other contexts. Legitimation may be used in a broad fashion, in part because the strategy is often geared towards both domestic and international publics. That is, any state facing criticism over a particular human rights issue may use its cooperation with global governance institutions on other human rights issues to direct attention to perceived successes and thus silence critics. Negotiation, however, may be particularly prevalent in states with democratic regimes, where the government must appeal to domestic audiences in order to maintain support for controversial policies. States that are especially sensitive to human rights concerns, including places like Colombia where human rights-related policies have become particularly salient, are likely to make use of both strategies.

We also show how domestic political actors use international politics to help make policy. By using legitimation and negotiation tools, governments can rally domestic and international audiences behind controversial policies. This rallying effect may be easier for certain kinds of policies than others. The Santos administration was at least partially effective in the context of human rights, but that says little about the potential for success regarding, for example, fiscal or environmental policies. Future research can explore how states instrumentalize sovereignty challenges to influence other areas of domestic policy.

Finally, we contribute to the literature on Colombian politics by showing how different administrations have pursued their political agendas in the face of domestic and international pressure about human rights. By closing the preliminary examination in Colombia, the OTP signaled that Colombian authorities had successfully handled their own business. State authorities thus staved off further pressure from a key player in the international community to address the abuses committed during

the decades-long civil war. In contrast, advocates of the JEP and the implementation of the peace accords lost the ability to use the sovereignty challenge as a way of negotiating for their preferred policy outcome. For his part, Duque gained a key source of both domestic and international legitimacy: he continued to frame the closure of the preliminary examination as a sign of his success on justice and human rights issues, and shifted international attention away from the worsening human rights situation in Colombia.

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Endnotes

[1]Once elected, Kenyatta and Ruto pursued more explicit forms of resistance to the ICC, first by undermining the Court from within (Hillebrecht & Straus, 2017) and then by fighting back and actively obstructing the Court's work (Ba, 2020).

[2]We draw inferences about legitimation strategies using evidence of local context and explicit state behavior, but do not attempt to infer intent. That is, states may actively attempt to draw attention away from the source of criticisms, but they may also simply try to highlight their existing successes. For audiences who receive these signals, these intentions are indistinguishable. As such, we avoid making any assumptions about the intent of the legitimation strategy.

[3] The three Colombian administrations, in order, are Alvaro Uribe, Juan Manuel Santos, and Ivan Duque. The three Chief Prosecutors, in order, have been Luis Moreno-Ocampo, Fatou Bensouda, and Karim Khan.

[4] Reports describe the OTP's preliminary examination activities — meetings with counterparts, discussions with victims, and OTP analyses of both admissibility and complementarity considerations — in each of the situations under the OTP's consideration. They are issued at the end of each calendar year, and have been made public every year since 2011. We also use material from the secondary literature.

[5] We also attempted to access the archives of the Ministry of Defense, but the archives were unavailable. A search of the Ministry of Justice archives yielded no relevant results.

[6] The ICC's online archive can be accessed at https://www.icc-cpi.int/resource-library/.

[7] Online archives can regularly change, with new documents being added and old documents being moved or removed. Furthermore, the digital nature of these archives allows for constant reorganization, meaning that the process for accessing documents can change often.

[8] The FARC, paramilitaries, and military are all considered to be responsible for the commission of sexual and gender-based violence, though this is particularly true for the FARC and paramilitaries (ABColombia, 2013).

[9] Colombia ratified the Rome Statute and made its reservation pursuant to Article 124 just days before Uribe took office (Tabak, 2008). However, Uribe and his predecessor, Pastrana, had come to an agreement to make this reservation prior to the presidential transition, and the administration, the Congress, and the military itself all publicly addressed how Rome Statute ratification affected the conduct of the war and more importantly, prospects for peace with various armed groups (Schneider & Taborda Ocampo, 2011; Urueña, 2017).

[10] The agreement failed to pass the national plebiscite by a narrow margin of 49.8% to 50.2%.

[11] Searches of the presidential speech archives and presidential press releases since he took office yielded no results which explicitly mention the ICC from 2018-2021.

[12] Even as the OTP suggested it would take the next step towards closing its preliminary examination, it noted that it was conditional on the continuation of certain conditions, including that Colombian authorities impose appropriate sanctions on those found responsible for abuses (Office of the Prosecutor, 2019).

[13] The Venezuelan immigration crisis reached a new level of urgency in 2018, with millions of Venezuelans fleeing the country, many ending up in Colombia.