FOREIGN RELATIONS LAW — FOREIGN SOVEREIGN IMMUNITIES ACT — D.C. CIRCUIT INTERPRETS EXPROPRIATION EXCEPTION TO ALLOW GENOCIDE VICTIMS TO SUE THEIR OWN GOVERNMENT. — *de Csepel v. Republic of Hungary*, 859 F.3d 1094 (D.C. Cir. 2017), *reh'g denied*, No. 16-7042 (D.C. Cir. Oct. 4, 2017).

The Foreign Sovereign Immunities Act of 1976[1] (FSIA) says that U.S. courts cannot exercise jurisdiction over a claim against a foreign sovereign unless the claim fits into a few limited categories. One of those categories is the "expropriation exception," which allows U.S. courts to hear a claim against a foreign state if that state takes a plaintiff's property "in violation of international law."[2] For over four decades after the FSIA was enacted, the expropriation exception was used successfully only to challenge takings by foreign states that violated the international law of alien expropriation — specifically, to challenge takings by the defendant state of a noncitizen's property that were unaccompanied by prompt, adequate, and effective compensation.[3] Recently, however, in *de Csepel v. Republic of Hungary*,[4] the D.C. Circuit interpreted the expropriation exception to allow U.S. courts to hear claims by genocide victims against their own governments for property losses arising from genocide, since genocide is a violation of international law. This interpretation is relatively new. It also flows from a question of statutory interpretation — whether genocide is a "violation of international law" under the expropriation exception to the FSIA — that is much more difficult to answer than courts have so far acknowledged.

De Csepel arose from the Hungarian government's taking of artwork from a Jewish family during the Holocaust. Before World War II, the Hungarian-Jewish art collector Baron Mór Lipót Herzog had amassed "one of Europe's great private collections of art, and the largest in Hungary."[5] He died in 1934 and left the collection to his children.[6] When World War II started, Hungary joined the Axis Powers and carried out many of the policies of the Third Reich, including the systematic

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[1] Pub. L. No. 94-583, 90 Stat. 2891 (codified as amended in scattered sections of 28 U.S.C.).

[2] 28 U.S.C. § 1605(a)(3) (2012). The property must also satisfy a requirement of a commercial nexus with the United States. *Id.*

[3] *See, e.g.*, RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 712 (AM. LAW INST. 1987). The law of alien expropriation also prohibits takings of alien property that are arbitrary or discriminatory. *Id.*

[4] 859 F.3d 1094 (D.C. Cir. 2017), *reh'g denied*, No. 16-7042 (D.C. Cir. Oct. 4, 2017).

[5] *Id.* at 1097 (quoting Complaint at 16, de Csepel v. Republic of Hungary, 808 F. Supp. 2d 113 (D.D.C. 2011) (No. 10-1261), 2010 WL 2940163).

[6] *Id.*

confiscation of valuable artwork owned by Jewish citizens.[7] In response, the children of Baron Herzog hid their art collection in the basement of a factory in Budapest.[8] Hungarian officers discovered the cache and delivered the artwork to senior Nazi official Adolf Eichmann, who had traveled to Hungary to oversee the deportation of hundreds of thousands of Hungarian Jews to Nazi death camps.[9] Eichmann sent some of the paintings to Germany and gave the rest to the Hungarian Museum of Fine Arts.[10] For seventy years, the Herzog family has been trying to get the paintings back.[11]

In 2011, survivors and descendants of the Herzog family filed suit in the U.S. District Court for the District of Columbia against Hungary, three Hungarian art museums, and one Hungarian university for breach of an implied bailment agreement.[12] Because the family was suing a foreign sovereign, the first hurdle was establishing that U.S. federal courts had jurisdiction under the FSIA.[13] The first court to hear the case denied the defendants' motion to dismiss for lack of subject matter jurisdiction, holding that jurisdiction was proper under the expropriation exception.[14] On appeal, the D.C. Circuit held, "without ruling on the availability of the expropriation exception," that the claim "[fell] comfortably" within a separate exception to the FSIA.[15] Back in the district court, and after discovery,[16] Hungary moved to dismiss again for lack of subject matter jurisdiction.[17] The court held that the separate exception to the FSIA actually did not apply, but that jurisdiction was still proper under the expropriation exception.[18] Hungary appealed this denial of its motion to dismiss.[19]

The D.C. Circuit affirmed in part and reversed in part.[20] Writing for the panel, Judge Tatel[21] directly addressed the applicability of the

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[7] *Id.* at 1097–98. *See generally* Randolph L. Braham, *The Holocaust in Hungary: A Retrospective Analysis*, *in* THE NAZIS' LAST VICTIMS 27, 36–42 (Randolph L. Braham & Scott Miller eds., 1998).

[8] *de Csepel*, 859 F.3d at 1098.

[9] *Id.*; *see also* Braham, *supra* note 7, at 36–37.

[10] *de Csepel*, 859 F.3d at 1098.

[11] *Id.*

[12] de Csepel v. Republic of Hungary, 808 F. Supp. 2d 113, 120 (D.D.C. 2011).

[13] *See* Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428, 434–35 (1989).

[14] *de Csepel*, 808 F. Supp. 2d at 132–33.

[15] de Csepel v. Republic of Hungary, 714 F.3d 591, 598 (D.C. Cir. 2013). The separate exception was the commercial activity exception, *see* 28 U.S.C. § 1605(a)(2) (2012).

[16] During discovery, Hungary once again moved to dismiss, but the court denied the motion. de Csepel v. Republic of Hungary, 75 F. Supp. 3d 380, 381–82 (D.D.C. 2014).

[17] de Csepel v. Republic of Hungary, 169 F. Supp. 3d 143, 147 (D.D.C. 2016).

[18] *Id.*

[19] *de Csepel*, 859 F.3d at 1099.

[20] *Id.* at 1097.

[21] Judge Tatel was joined by Judge Henderson.

expropriation exception to property losses arising from genocide.[22] The exception has two prongs. First, there must be property "taken in violation of international law," and second, there must be a commercial nexus — some connection between the defendants or the property and a commercial activity in the United States.[23] For the first prong, the court cited *Simon v. Republic of Hungary*[24] for two key propositions. First, the *de Csepel* plaintiffs' allegation of breach of an implied bailment agreement was the type of common law claim that could proceed under the expropriation exception.[25] Second, the Hungarian government's seizure of property from Jewish citizens constituted genocide, and genocide is a violation of international law.[26] Based on these two propositions, Judge Tatel concluded that the plaintiffs had described a taking of property in violation of international law that could be covered by the expropriation exception.[27]

The commercial nexus prong proved to be more difficult. The text of the statute provides that "[a] *foreign state* shall not be immune"[28] when the property is "present in the United States in connection with a commercial activity carried on in the United States by the *foreign state*," or the relevant property is "owned or operated by an *agency or instrumentality* of the foreign state and that *agency or instrumentality* is engaged in a commercial activity in the United States."[29] Each party put forward a plausible reading of this text. Hungary argued that if the commercial nexus was satisfied only by an agency or instrumentality's commercial activity in the United States, then only the agency or instrumentality should be subject to jurisdiction.[30] The Herzogs disagreed, arguing that the sweeping language of the exception meant that a state could be subject to jurisdiction based on the actions of its agents and instrumentalities.[31] Both sides cited to D.C. Circuit precedent. In *Simon*, the court had interpreted the commercial nexus provision to impose different requirements for asserting jurisdiction over defendants

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22 *de Csepel*, 859 F.3d at 1101–08.

23 28 U.S.C. § 1605(a)(3) (2012).

24 812 F.3d 127 (D.C. Cir. 2016).

25 *de Csepel*, 859 F.3d at 1101–02.

26 *Id.* In *Simon*, the court had held that "[e]xpropriations undertaken for the purpose of bringing about a protected group's physical destruction qualify as genocide." 812 F.3d at 143.

27 *de Csepel*, 859 F.3d at 1101–02. The court rejected an argument by Hungary that the plaintiffs' claim better fit within a separate exception to the FSIA and therefore the court could not exercise jurisdiction under the expropriation exception. The court explained that there was no rule that required a claim to fit into *only* one of the FSIA exceptions. *Id.* at 1103. The court also remanded the question of whether Hungary's repossession of some of the art that it had earlier returned to the Herzogs fell within the exception. *Id.* at 1103–04.

28 28 U.S.C. § 1605(a) (emphasis added).

29 *Id.* § 1605(a)(3) (emphases added).

30 *de Csepel*, 859 F.3d at 1104.

31 *Id.* at 1105.

that were states and defendants that were agencies or instrumentalities.[32] In *Agudas Chasidei Chabad v. Russian Federation*,[33] however, the court had made no such distinction.[34] The *de Csepel* court resolved this contradiction by reading *Chabad* not to have decided the issue of how to interpret the commercial nexus requirement,[35] and then treating the interpretation in *Simon* as binding precedent.[36] As a result, the court concluded that the expropriation exception did not confer jurisdiction over the claim against Hungary but did confer jurisdiction over the claims against the museums and university.[37]

The court also resolved several other questions dealing with the FSIA. First, the court held that a previous treaty between the United States and Hungary that dealt in part with restoration of property taken during the war did not foreclose the United States from exercising jurisdiction under the FSIA.[38] Second, the court remanded the question of whether the claims of one of the plaintiffs, who had become a U.S. citizen in 1952, were barred by a settlement reached between the United States and Hungary in 1973.[39] Third, the court held that the circuit court could not properly exercise appellate jurisdiction over the district court's denial of defendant's motion to dismiss on exhaustion grounds, since the lower court's action was not a final decision.[40] Finally, the court authorized the plaintiffs to amend their complaint "in light of the Holocaust Expropriated Art Recovery Act."[41]

Concurring in part and dissenting in part, Senior Judge Randolph protested the majority's interpretation of the commercial nexus requirement of the expropriation exception. First, he claimed that *Chabad* had, in fact, resolved the issue of how to interpret the expropriation

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[32] 812 F.3d 127, 146 (D.C. Cir. 2016).

[33] 528 F.3d 934 (D.C. Cir. 2008).

[34] *Id.* at 946, 955.

[35] *de Csepel*, 859 F.3d at 1105–06.

[36] *Id.* at 1107–08. The court went on to say that "even were [it] not bound by *Simon*," it would reach the same conclusion, based on the structure of the FSIA and the "anomalous result[s]" that would flow from the *Chabad* interpretation. *Id.* at 1107.

[37] *Id.* at 1110.

[38] *Id.* at 1100–01. The FSIA says that sovereign immunity is "[s]ubject to existing international agreements to which the United States [was] a party at the time of [the Act's] enactment." 28 U.S.C. § 1604 (2012). Although the United States and Hungary had entered a treaty in 1947 dealing with property claims arising from the Holocaust, the court in *Simon* ruled that the treaty did not establish an *exclusive* means for Holocaust victims to seek a remedy from the Hungarian government. 812 F.3d 127, 137 (D.C. Cir. 2016).

[39] *de Csepel*, 859 F.3d at 1108.

[40] *Id.* at 1109.

[41] *Id.* at 1110; *see also* Holocaust Expropriated Art Recovery Act of 2016, Pub. L. No. 114-308, 130 Stat. 1524 (to be codified at 22 U.S.C. § 1621 note). The Act expressly preempts all statutes of limitations that had barred victims of art theft during the Holocaust from suing and gives plaintiffs six years to file. § 6, 130 Stat. at 1526–27.

exception.[42] Since *Chabad* preceded *Simon*, circuit precedent held that the earlier *Chabad* decision should be controlling.[43] Second, Senior Judge Randolph claimed that the majority's interpretive arguments based on statutory structure were incorrect and contradicted previous interpretations in the D.C. and Ninth Circuits.[44]

De Csepel is a recent instance of a relatively new trend: courts interpreting the expropriation exception to the FSIA to allow foreign plaintiffs to sue their own government in U.S. courts for property losses arising from genocide.[45] To date, courts in three circuits have interpreted the expropriation exception in this way.[46] None of those courts, however, have fully acknowledged the closeness of the underlying interpretive question: in the expropriation exception of the FSIA, should the phrase "in violation of international law" be construed to encompass the commission of genocide?[47] There are several principles and precedents that suggest the answer is "no," or at least that it is a difficult question. For example, federal courts tend to adjudicate controversial foreign affairs issues only to the extent they are clearly instructed to by Congress. Additionally, the current trend is reminiscent of an effort by genocide

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[42] *de Csepel*, 859 F.3d at 1110 (Randolph, J., concurring in part and dissenting in part).

[43] *Id.* (citing Sierra Club v. Jackson, 648 F.3d 848, 854 (D.C. Cir. 2011)).

[44] *Id.* at 1112–13 (first citing Agudas Chasidei Chabad v. Russian Federation, 528 F.3d 934 (D.C. Cir. 2008); then citing Siderman de Blake v. Republic of Argentina, 965 F.2d 699 (9th Cir. 1992)).

[45] It is worth emphasizing the novelty of the *de Csepel* court's construction of the expropriation exception. After the FSIA was enacted in 1976, the exception was typically invoked successfully only by plaintiffs whose property had been taken by foreign states of which they were not citizens without prompt, adequate, and effective compensation. *See, e.g.*, Kalamazoo Spice Extraction Co. v. Provisional Military Gov't of Socialist Eth., 616 F. Supp. 660, 663–64 (W.D. Mich. 1985); *see also* Zappia Middle E. Constr. Co. v. Emirate of Abu Dhabi, 215 F.3d 247, 251 (2d Cir. 2000). In fact, throughout the twentieth and into the twenty-first century, U.S. courts said that a state could *not* violate international law by taking the property of its own citizen. *See, e.g.*, United States v. Belmont, 301 U.S. 324, 332 (1937); *cf.* Bolivarian Republic of Venezuela v. Helmerich & Payne Int'l Drilling Co., 137 S. Ct. 1312, 1321 (2017) ("A sovereign's taking or regulating of its own nationals' property within its own territory is often just the kind of foreign sovereign's public act . . . that the restrictive theory of sovereign immunity ordinarily leaves immune from suit."). The rationales were that the constitutional requirement of just compensation for takings had "no extraterritorial operation," *Belmont*, 301 U.S. at 332, and that a state's taking of the private property of its own citizens "is not so universally abhorred" that it is prohibited by customary international law, Jafari v. Islamic Republic of Iran, 539 F. Supp. 209, 215 (N.D. Ill. 1982). The interpretation of the expropriation exception used by the *de Csepel* court has been called a new "human rights" exception to sovereign immunity. Vivian Grosswald Curran, *Harmonizing Multinational Parent Company Liability for Foreign Subsidiary Human Rights Violations*, 17 CHI. J. INT'L L. 403, 427 (2017).

[46] *See, e.g.*, Simon v. Republic of Hungary, 812 F.3d 127, 143–44 (D.C. Cir. 2016); Abelesz v. Magyar Nemzeti Bank, 692 F.3d 661, 674–75 (7th Cir. 2012); Davoyan v. Republic of Turkey, 116 F. Supp. 3d 1084, 1103 (C.D. Cal. 2013).

[47] Judge Srinivasan of the D.C. Circuit has provided the most thorough analysis of why the expropriation exception should cover property losses arising from genocide. *See Simon*, 812 F.3d at 142–46. He made no mention, however, of how the new interpretation squares with courts' normal approach to cases relating to foreign affairs, or how it fits in with previous interpretations of the FSIA in claims arising from genocide. *Id.*

victims in the 1990s and 2000s to use a different provision of the FSIA — the waiver exception — to file genocide-based claims against foreign states. Federal courts interpreted the waiver exception not to cover those claims, and many of their rationales would apply with almost equal force to the expropriation exception.

The new interpretation of the expropriation exception strays from the approach that federal courts often take toward controversial foreign relations issues, which is to get involved only to the degree that acts of Congress have clearly directed them to.[48] Motivated by concerns like international comity and the primacy of the executive branch in foreign relations,[49] federal courts have employed several doctrines to decline to resolve touchy foreign relations questions. These include the act of state doctrine,[50] the political question doctrine,[51] and sovereign immunity itself (before the enactment of the FSIA).[52] Even when Congress has passed statutes that seem to encourage federal courts to hear claims arising from international disputes, courts have been assiduous in construing these statutes narrowly.[53] The Supreme Court has applied this cautious approach directly to the interpretation of the FSIA. In *Argentine Republic v. Amerada Hess Shipping Corp.*,[54] for example, the Court pointed to the "settled proposition" that the bounds of federal jurisdiction under the FSIA should be determined "in the exact degrees and character which to Congress may seem proper for the public good."[55]

Relying in part on these background principles, federal courts have already concluded that other potentially ambiguous exceptions to sovereign immunity in the FSIA do not cover genocide-based claims. In the 1990s and early 2000s, Holocaust victims tried to file claims against Germany under the waiver exception to the FSIA, which allows claims against a foreign sovereign that "has waived its immunity . . . by implication."[56] The plaintiffs claimed that Germany's violation of the international prohibition against genocide was an implicit waiver of immunity.[57] The interpretive question for the courts was what counted as a

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[48] *See, e.g.*, Curtis A. Bradley, Chevron *Deference and Foreign Affairs*, 86 VA. L. REV. 649, 709–15 (2000).

[49] *See, e.g.*, *id.* at 650.

[50] *See, e.g.*, Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 401, 427–37 (1964).

[51] *See, e.g.*, Goldwater v. Carter, 444 U.S. 996, 1002–06 (1979) (Rehnquist, J., concurring in the judgment).

[52] *See, e.g.*, The Schooner Exch. v. McFaddon, 11 U.S. (7 Cranch) 116, 136 (1812).

[53] For example, federal courts have limited the scope of their own statutory authority to hear foreign relations cases under the Alien Tort Statute. *See, e.g.*, Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108, 124 (2013); Sosa v. Alvarez-Machain, 542 U.S. 692, 732 (2004).

[54] 488 U.S. 428 (1989).

[55] *Id.* at 433 (quoting Cary v. Curtis, 44 U.S. (3 How.) 236, 245 (1845)).

[56] 28 U.S.C. § 1605(a)(1) (2012).

[57] Sampson v. Federal Republic of Germany, 250 F.3d 1145, 1149 (7th Cir. 2001); Princz v. Federal Republic of Germany, 26 F.3d 1166, 1171 (D.C. Cir. 1994). Specifically, the plaintiffs alleged

"waiver." In finding that the commission of genocide was not a waiver, both the Seventh and D.C. Circuit courts made arguments based on legislative history and public policy. First, the courts looked to a House Report accompanying the FSIA, and said that the report's description of certain types of implied waiver suggested that other, dissimilar types of implied waiver were not covered by the FSIA.[58] Second, the courts cited policy concerns about overloading the dockets of federal courts and interfering in foreign relations.[59]

The same arguments apply with almost equal force to the expropriation exception. First, if we look to legislative history, the House Report accompanying the FSIA defines "taken in violation of international law" to refer to takings by foreign states of property belonging to noncitizens that are arbitrary, discriminatory, or unaccompanied by prompt, adequate, and effective compensation.[60] The fact that Congress specifically described a certain type of international law (that is, the law of alien expropriation) might suggest that the expropriation exception was not meant to include other types of international law.[61] Second, if we take public policy into account, the same concerns about a broad reading of the waiver exception — an influx of cases and interference in diplomatic relations — remain relevant, although perhaps not quite as strong,[62] for the expropriation exception.

An important difference between the waiver exception and the expropriation exception is the apparent ambiguity of the text — genocide might be a "waiver" of sovereign immunity, or it might not, but it certainly seems to be a "violation of international law." Given the clarity of the expropriation exception, courts may feel less empowered to look at things like legislative history and public policy to determine the statute's meaning.[63] Within the full context of the FSIA, however, the expropriation exception may contain sufficient ambiguity for courts to

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that Germany violated a *jus cogens* norm, which is nonderogable. Since violations of *jus cogens* norms are not recognized as sovereign acts, the plaintiffs claimed, Germany implicitly waived its sovereign immunity. *Sampson*, 250 F.3d at 1149; *Princz*, 26 F.3d at 1173.

58 *Sampson*, 250 F.3d at 1154; *Princz*, 26 F.3d at 1174.

59 *Sampson*, 250 F.3d at 1152; *Princz*, 26 F.3d at 1174 n.1.

60 H.R. REP. NO. 94-1487, at 19–20 (1976).

61 In response, one could argue that the definition of "in violation of international law" in the House Report is illustrative, not exclusive. This is an open question that depends on the meaning of the word "include" in the Report. *Id.* That said, both the discussion of the waiver exception and the expropriation exception in the House Report are phrased similarly, and both use the word "include," *id.* at 18, so the same interpretive moves the courts used to construe the waiver exception narrowly could likely be applied to the expropriation exception.

62 An expansion of the expropriation exception might lead to relatively less dire outcomes, since the statute would still require that property rights be at issue and that the property satisfy a commercial nexus with the United States.

63 When performing statutory interpretation, modern courts will generally consider only things like legislative history and public policy if the text of the statute is ambiguous. *See* JOHN F. MANNING & MATTHEW C. STEPHENSON, LEGISLATION AND REGULATION 60 (2d ed. 2013).

look to extratextual sources of meaning. For example, the stated purpose of the FSIA, as laid out in a separate provision of the Act, is for courts to determine sovereign immunity based on the principle that, under international law, a state does not enjoy sovereign immunity as far as its "*commercial* activities are concerned."[64] The fact that the stated purpose of the FSIA refers only to commercial activities, and that the expropriation exception explicitly includes a commercial nexus, may suggest that the exception should apply only to commerce-related expropriations. Moreover, in a separate FSIA exception that covers all cases in which rights in real property are in issue, the drafters included no commercial nexus requirement.[65] The drafting of this provision shows that Congress knows how to strip sovereign immunity in noncommercial contexts, which could indicate the importance of the commercial nexus requirement in the expropriation exception.[66] These interpretative arguments alone may not prove that the expropriation exception should be interpreted narrowly, but they might persuade a court that the text is sufficiently ambiguous to allow for reference to extratextual sources of meaning like legislative history and public policy.[67] And for the reasons described above, those extratextual sources may point to a construction that does not cover human rights abuses.

Federal courts in a few circuits have recently held that victims of a certain human rights abuse — genocide — can file suit against their own governments in U.S. courts for property losses arising from that abuse.[68] Although the plain text of the FSIA may support the interpretation, underlying principles and precedents about foreign affairs and sovereign immunity suggest that this extension is a closer question than courts have acknowledged.

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[64] 28 U.S.C. § 1602 (2012) (emphasis added).

[65] *Id.* § 1605(a)(4). The House Report accompanying the FSIA explained that a foreign state's actions did not need to be commercially motivated in order to fall within this exception. H.R. REP. NO. 94-1487, at 20.

[66] The Supreme Court has used this type of "Congress knows how to say" argument to construe the FSIA narrowly before. *See* Dole Food Co. v. Patrickson, 538 U.S. 468, 476 (2003).

[67] The Supreme Court followed a similar pattern of reasoning in *Yates v. United States*, 135 S. Ct. 1074 (2015), in which the Court had to define the term "tangible object" in an evidence spoliation statute. The Court acknowledged that the term had an unambiguous plain meaning, but noted that Congress probably would not have wanted to create such a far-reaching provision without more clearly indicating that intent. *Id.* at 1079, 1083. The Court then looked to a variety of sources of statutory meaning (canons of construction, legislative history, and public policy) to determine the appropriate scope of the term. *Id.* at 1084–88.

[68] Courts have already declined to apply the expropriation exception to human rights claims outside the context of genocide, but have not provided clear explanations for how this limitation arises from the text of the FSIA. *See, e.g.*, Mezerhane v. República Bolivariana de Venezuela, 785 F.3d 545, 549 (11th Cir. 2015) (holding that the expropriation exception does not cover violations of human rights treaties); Davoyan v. Republic of Turkey, 116 F. Supp. 3d 1084, 1103 (C.D. Cal. 2013) (interpreting the expropriation exception to cover only human rights abuses arising from genocide).