

REQUEST FOR EARLY WARNING MEASURES AND
URGENT ACTION PROCEDURES

TO

**The United Nations Committee on the Elimination of Racial
Discrimination**

BY

**Honor the Earth, Giniw Collective, First Peoples Worldwide, and
the University of Colorado School of Law's American Indian Law
Clinic**

IN RELATION TO

The United States of America

PREPARED FOR

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Discrimination**

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Table of Contents

I.	Executive Summary.....	3
II.	Introduction and Background.....	3
III.	Previous CERD Recommendations to the U.S. Government.....	8
IV.	The submitting organizations invoke the early warning and urgent action procedures under CERD to prevent escalation of conflict and serious harm.....	10
	A. Domestic remedies do not sufficiently address these human rights violations.....	10
	B. Development of Line 3 pipeline violates numerous human rights of the Anishinaabe.....	12
	i. Line 3 will significantly contribute to climate change and impact the watersheds of the Anishinaabe’s wild rice, violating the Anishinaabe’s right to health under ICERD Article 5(e)(iv)	12
	ii. Line 3 will harm the Anishinaabe’s ability to practice their culture, violating the Anishinaabe’s right to culture under ICERD Articles 2(2), 5(e)(vi) & 7.....	15
	iii. Line 3 will significantly impact the Anishinaabe’s ability to practice their religion, violating the Anishinaabe’s right to religion under ICERD Article 5(d)(vii)	16
	iv. Line 3 increases the risk of violence against Indigenous women, violating the Anishinaabe’s right to security under ICERD Article 5(b).....	17
	v. Line 3 violates the Anishinaabe’s right to security under ICERD Article 5(b) and right to peaceful assembly under ICERD Article 5(d)(ix) because police and private security forces are suppressing peaceful assembly through militarized responses and harassment... 18	18
V.	UNDRIP informs ICERD violations relating to Indigenous Peoples.....	21
VI.	The Anishinaabe have never provided their free, prior, and informed consent.....	22
VII.	The U.S. Government has the responsibility to protect the Anishinaabe from human rights abuses by private businesses under the UN General Principles of Business and Human Rights.....	23
VIII.	Conclusions and Requests.....	24
IX.	Appendix.....	25

I. Executive Summary

Honor the Earth, Giniw Collective, First Peoples Worldwide, and the University of Colorado's American Indian Law Clinic thank you for this opportunity to submit this request for early warning and urgent action procedures on behalf of the Anishinaabe Indigenous Peoples ("the Anishinaabe"). The government of the United States ("the U.S. Government") has granted permits for the construction of a tar sands pipeline ("Line 3") through the designated treaty territories of the Anishinaabe without their free, prior, and informed consent. The Line 3 project violates not only Anishinaabe treaty rights but also significantly threatens many of their culturally held lands, waters, and resources, such as manoonim, the wild rice that grows in many of the watersheds the pipeline would pass through. Line 3 has further discriminatory impacts on the Anishinaabe's security, freedoms, and rights as enumerated in the International Convention on the Elimination of All Forms of Racial Discrimination ("ICERD").

II. Introduction and Background

The submitting organizations respectfully request a decision under the early warning and urgent action procedures of the United Nations Committee on the Elimination of Racial Discrimination ("CERD" or "the Committee") regarding the U.S. and State of Minnesota Governments' permitting of the Line 3 pipeline expansion through the treaty territory of the Anishinaabe. The Line 3 pipeline, which was first proposed in 2014 by Canadian energy company, Enbridge Energy ("Enbridge"), is intended to bring millions of additional barrels of tar sands per day from Alberta, Canada to Superior, Wisconsin, through the heart of the Anishinaabe's tribal treaty lands. Line 3 poses a significant risk to the land, ways of life, and culture of several Anishinaabe tribes, including those living on the Red Lake, Leech Lake, and White Earth Reservations in northern parts of the State of Minnesota. The pipeline and its expansion violates numerous rights of the Anishinaabe people as protected by the ICERD, including the rights to health, culture, religion, security, and assembly. Furthermore, Line 3 would contribute more to climate change than the entirety of Minnesota's economy combined;¹ this will significantly exacerbate the impacts of climate change, which disproportionately impacts Indigenous Peoples like the Anishinaabe. The serious harms inflicted on the Anishinaabe Peoples is consistent with the continued pattern of the U.S. Government perpetuating racial discrimination against Indigenous Peoples. The Anishinaabe Peoples are therefore asking CERD to address these human rights violations.

Anishinaabe is the traditional name for the original people of what is now the Great Lakes area of the United States and Canada. The Anishinaabe may be more commonly referred to as Chippewa or Ojibwe, but those terms were imposed by European and American colonizing forces, with many preferring to use the name Anishinaabe. The Anishinaabe have historical and present ties to a vast area of the Great Lakes region in the United States and Canada. It is important to note that country borders are a post-colonization concept that is not fully recognized by the Anishinaabe who have been living in both nations since before their creation. The culture and identity of the Anishinaabe is deeply connected to the land and waters of their traditional territories.

Both the U.S. and Canadian Governments have negotiated treaties with Indigenous Peoples in the Great Lakes region. In the United States, the federal government has entered into nearly fifty

¹ STOP LINE 3, <https://www.stopline3.org/#intro> (last visited Mar. 24, 2021).

treaties with the Indigenous tribes impacted by Line 3. In 1825, the U.S. Government began encroaching on tribal land and signed a treaty with the Anishinaabe people, which acknowledged Anishinaabe sovereignty over the area north of I-94 of modern-day Minnesota (see Appendix).² In the decades that followed, the federal government entered into new treaties with tribal nations within the Anishinaabe people. These treaties often required the tribes to cede title to land but did not otherwise impact the Indigenous peoples' rights to hunt, fish, and gather on the ceded land. The the United States Supreme Court has clearly held that tribes retain usufructuary rights to ceded territory.³ To uphold the treaties, the federal government has a responsibility to protect the lands in order to protect those usufructuary rights. The construction of Line 3 has had direct impacts on the spiritual and cultural rights of the Anishinaabe, and if the pipeline is completed and put into use it will permanently affect the Anishinaabe's treaty rights, including the rights to hunt, fish, gather medicines, and harvest wild rice.⁴ Congress has not abrogated these fishing rights that are exclusive from non-Indians. Additionally:

“Congress has specifically withheld from Minnesota any authorization to regulate Chippewa 'hunting, trapping, or fishing or the control, licensing, or regulation thereof' or “water property rights”. This means under federal and state *property laws* the State of Minnesota does not have the right to use state eminent domain laws to regulate Chippewa usufructuary and water property rights on or off reservation, without consent of the lawful Chippewa property holders.”⁵

The actions of the United States and Minnesota Governments, including their failure to respect treaty rights, are a continuation of the historical discrimination that the Anishinaabe – and all Indigenous Peoples – have been subjected to by the U.S. Government and its states.

The original Line 3 pipeline, built in 1961, was constructed with defective steel.⁶ Since then, the pipeline has ruptured and spilled numerous times, and was reduced to running at half

² “Ojibwe Treaty Rights” PEACE TREATIES, <https://www.mpm.edu/content/wirp/ICW-110> (last visited Mar. 24, 2021). See also Appendix.

³ In *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172 (1999), the Supreme Court found held that an 1855 treaty with the Chippewa “was designed to transfer Chippewa land to the United States, not terminate usufructuary rights.” *Id.* at 173. Most recently in 2015, the United States Court of Appeals for the Eighth Circuit relied on the U.S. Supreme Court’s analysis in *Mille Lacs* to uphold usufructuary rights implicated in other treaties with the Leech Lake tribe. See also “Treaty Rights and Oil Pipelines: What You Need to Know,” HONOR THE EARTH, <https://static1.squarespace.com/static/58a3c10abebafb5c4b3293ac/t/5bea2acc89858370442dec08/1542073038236/factsheet+TREATY+RIGHTS.pdf>.

⁴ “Take Action,” STOP LINE 3 <https://www.stopline3.org/take-action> (last visited Mar. 24, 2021). “The Project will cross and impact the Fond du Lac Indian Reservation, and cross or otherwise impact land ceded to the United States government under a number of treaties with the affected Tribes, including the 1837 Treaty; the 1855 Treaty; the 1863 Treaty; and the 1867 Treaty. The Project will cross land, and will impact land and waters, where the Chippewa Indians in general and the Tribes in particular, hunt, fish, and gather wild rice.” Complaint for Declaratory and Injunctive Relief at 30, *Red Lake Band of Chippewa Indians et al. v U.S. Army Corps of Engineers*, 1:20-cv-03817 (D.D.C. 2020).

⁵ Tribal Supplement to Joint Petitioner’s Brief, In the Matter of the Contested Case Hearing Requests on the Draft 401 Certification for the Line 3 Replacement Project, Line 3 OAH 60-2200-36909 (Sept. 15, 2020).

⁶ “Issues,” STOP LINE 3 <https://www.stopline3.org/issues> (last visited Mar. 23, 2021).

pressure because of corrosion.⁷ After years of spills,⁸ Enbridge signed a consent decree with the U.S. Government, agreeing to replace it by December 2017 or to take efforts to prevent ecological harm.⁹ In 2018, the State of Minnesota approved Enbridge's request to replace Line 3 by rerouting and expanding the pipeline's capacity to 760,000 barrels of crude oil per day, or 11 billion gallons per year.¹⁰

Throughout this project, Enbridge has had to obtain several permits from state agencies. In 2015, Enbridge applied for a certificate of need and a route permit from the Minnesota Public Utilities Commission ("Minnesota PUC").¹¹ The Minnesota Department of Commerce ("Minnesota Commerce") along with other state agencies issued a Final Environmental Impact Statement ("FEIS") in February 2018.¹² In response, three separate groups filed challenges to the EIS in August 2018, declaring it inadequate.¹³ The lawsuits were filed against the Minnesota PUC in the Court of Appeals by (1) Honor the Earth,¹⁴ (2) Friends of the Headwaters, a citizen group in Park Rapids, Minnesota,¹⁵ and (3) a joint filing of the Fond du Lac, Mille Lacs, Red Lake, and White Earth Bands of Ojibwe tribal governments.¹⁶ These filings argued that Minnesota PUC only made available the draft EIS prior to permitting proceedings, that the scope of the FEIS did not adequately analyze certain aspects or alternatives, and that the FEIS did not include tribal consultation data, tribal cultural properties survey, and other impacts to Indigenous Peoples.¹⁷

After the Minnesota PUC issued the certificate of need and a route permit for Line 3,¹⁸ additional lawsuits were brought against the Minnesota PUC to contest the issuance of the

⁷ *Id.*

⁸ Mike Hughlett, *Federal Enbridge settlement could affect timelines of Minnesota Pipelines*, STAR TRIBUNE (Jul. 20, 2016) <https://www.startribune.com/federal-enbridge-settlement-could-affect-timelines-of-minnesota-pipelines/387699551/> (last visited Mar. 28, 2021).

⁹ Alleen Brown, *Tribal Liaison in Minnesota Pipeline Review is Sidelines after Oil Company Complains to Governor*, THE INTERCEPT (Aug. 12, 2017) <https://theintercept.com/2017/08/12/tribal-liaison-in-minnesota-pipeline-review-is-sidelines-after-oil-company-complains-to-governor/> (last visited Mar. 28, 2021).

¹⁰ Elizabeth Curious, *Climate Curious: How Could the Line 3 oil pipeline affect our climate?*, MPR NEWS (Nov. 6, 2019) <https://www.mprnews.org/story/2019/11/06/climate-curious-how-could-the-line-3-oil-pipeline-affect-our-climate> (last visited Mar. 29, 2021).

¹¹ "Line 3 Pipeline Replacement," MINNESOTA COMMERCE DEPARTMENT <https://mn.gov/commerce/energyfacilities/line3/> (last visited Mar. 26, 2021).

¹² *Id.*

¹³ "Three Lawsuits Filled to Challenge Line 3 Environmental Impact Statement," STOP LINE 3 (Aug. 8, 2018) <https://www.stopline3.org/news/eislawsuits> (last visited March 28, 2021).

¹⁴ Letter from Richard Smith, President, Friends of the Headwaters and Scott Strand, Attorney, Friends of the Headwaters to Daniel P. Wolf, Executive Sec'y, Minn. Pub. Utilities Comm'n (July 30, 2018) (available at: <https://healingmnstories.files.wordpress.com/2018/07/friends-of-the-hw.pdf>).

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ "Three Lawsuits Filled to Challenge Line 3 Environmental Impact Statement," STOP LINE 3 (Aug. 8, 2018) <https://www.stopline3.org/news/eislawsuits> (last visited Mar. 28, 2021).

¹⁸ *Supra* note 11.

certificate of need in December 2018.¹⁹ These lawsuits argued that the pipeline is not needed for declining future oil demand, which is what the certificate of need is required to demonstrate. These lawsuits were brought by (1) Minnesota Commerce,²⁰ (2) Youth Climate Intervenors,²¹ (3) Friends of the Headwaters,²² and (4) the White Earth and Red Lake Bands of Ojibwe, Honor the Earth and Sierra Club.²³

Significantly, the State of Minnesota Commerce – now suing Minnesota PUC – had reversed its position and argued that Enbridge’s actions were illegal. In support of the lawsuit, the outgoing Governor of the State of Minnesota, Mark Dayton, stated: “Enbridge failed to provide a future demand forecast for its product, which is required by state law. Instead, the company presented its analysis of the future oil supply from Canadian tar sands extractions. It failed to demonstrate that Minnesota needs this pipeline to meet our future oil demand. In fact, most of the product would flow through our state to supply other states and countries.”²⁴

The State has also argued that Minnesota Commerce should reject Enbridge’s application for liability insurance and that its plan to create a trust fund to pay for removal of pipeline is not compatible with state law.²⁵ This lawsuit, along with others that were brought about the route permit that was issued, was remanded to the Minnesota PUC until Enbridge produced an adequate FEIS.²⁶ On April 10, 2020, in addition to Joint Comments submitted by friends of the Headwaters, Sierra Club, and Honor the Earth, with the Red Lake Band of Chippewa Indians and White Earth Band of Ojibwe, the Red Lake Band of Chippewa Indians and White Earth Band of Ojibwe, submitted public comments to the Minnesota PUC “to raise concerns regarding federally and treaty protected Chippewa Tribal Water Rights and Environmental Jurisdiction, which ultimately require *free, prior, informed consent* before the Minnesota Pollution Control Agency may grant a regulatory easement or permit across water resources in which the state and Tribes have a common property interests, but individual rights.”²⁷ This letter articulated that the Minnesota PUC “must defer to the sovereign authority of the impacted tribes to adopt and enforce their own environmental protection and water quality regulations... [and] the MPCA may not properly assert jurisdiction over the impacted tribes.”²⁸ Following revisions and further procedural processes for those permits, Minnesota PUC issued an order finding that the FEIS

¹⁹ Dan Kraker, *Line 3 pipeline opponents file suit challenging state approval*, MPR NEWS (Dec. 20, 2018) <https://www.mprnews.org/story/2018/12/19/line-3-pipeline-opponents-file-suit-challenging-state-approval> (last visited Mar. 29, 2021).

²⁰ “Minnesota Sues Itself over Line 3 Approval,” STOP LINE 3 (Dec. 24, 2018) <https://www.stopline3.org/news/mnsuesitself> (last visited Mar. 28, 2021).

²¹ Steve Karnowski, *Foes of Enbridge Line 3 pipeline file appeals in Minnesota*, AP NEWS (Dec. 19, 2018) <https://apnews.com/article/87ee2eeb44e648159d291e3677d72eae> (last visited Mar. 28, 2021).

²² *Supra* note 14.

²³ *Supra* notes 15 and 20.

²⁴ *Supra* note 20.

²⁵ *Id.*

²⁶ Julie Evelyn, “The history and future of Line 3 resistance,” MN 350 <https://mn350.org/2019/12/the-history-and-future-of-line-3-resistance/> (last visited Mar. 26, 2021).

²⁷ Letter from Joseph Plummer, Attorney, Red Lake Band of Chippewa Indians, and Frank Bibeau, Attorney, White Earth Band of Ojibwe, to Commissioner Laura Bishop, “Re: Clean Water Act Section 401 Permitting for Enbridge Line 3 Project Tribal Water Rights and Environmental Jurisdiction Comments” (April 10, 2020) (emphasis added).

²⁸ *Id.* at 5.

was adequate and again granted the certificate of need and route permits as modified on May 5, 2020.²⁹

In November 2020, both the Minnesota PUC and the federal Army Corps of Engineers (“the Corps”) issued water crossing permits to Enbridge.³⁰ Many members of the public advisory board resigned in protest to the state decision.³¹ Their resignation letter stated, “We cannot continue to legitimize and provide cover for the MPCA’s war on Black and brown people.”³²

Upon the issuing of the final federal and state permits, a new round of lawsuits was brought at the end of 2020.³³ In November 2020, Friends of the Headwaters filed in Minnesota Appellate Court on behalf of itself; the Red Lake and White Earth Tribes; Honor the Earth, and Sierra Club to contest the state’s MPCA’s 401 certification.³⁴ In December 2020, both the Red Lake and White Earth Tribes and Friends of the Headwaters asked the PUC, and then the Minnesota Court of Appeals to stay Minnesota PUC’s order to begin pipeline construction.³⁵ The Court rejected this petition in February 2021.³⁶

Also in December 2020, in federal district court in Washington D.C., Earthjustice filed a lawsuit against the federal Corps on behalf of the Red Lake Band and White Earth Tribes; Honor the Earth and the Sierra Club. This lawsuit requested a temporary and permanent injunction of the pipeline.³⁷ Enbridge filed a Motion to Intervene in this case.³⁸ On February 7, 2021 the judge denied the motion and found that the Plaintiffs failed to demonstrate a likelihood of success on the merits or that they would suffer irreparable harm.³⁹

²⁹ “Commission Orders for Line 3 Project,” MINNESOTA COMMERCE DEPARTMENT, <https://mn.gov/eera/web/file-list/13925/> (last visited Mar. 26, 2021).

³⁰ “Chronicles the Fight to Stop the Line 3,” STOP LINE 3 <https://www.stopline3.org/chronicles> (last visited Mar. 26, 2021).

³¹ Letter from the MPCA Environmental Justice Advisory Group Resignation Letter to Commissioner Laura Bishop (Nov. 17, 2020) (available at: <https://beta.documentcloud.org/documents/20407703-nov-16-2020-ejag-group-letter-of-resignation-1>).

³² *Id.*

³³ “Breaking: New Legal Challenges to Line 3’s Construction in Northern Minnesota are Being filed in State and Federal Courts,” HONOR THE EARTH, <https://www.honorearth.org/in3-legalchallenges-122020> (last visited Mar. 26, 2021).

³⁴ Petition for Writ of Certiorari, *Friends of the Headwaters et al. v. Minn. Pollution Control Agency*, 2014-01071-TJH (Minn. App. Ct. 2020) (available at: http://blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/case-documents/2020/20201130_docket-A20-1513_petition-for-writ-of-certiorari.pdf).

³⁵ Mike Hughlett, *Ojibwe bands ask appeals court to stop Enbridge Line 3 construction*, STAR TRIBUNE (Jul. 20, 2016) <https://www.startribune.com/ojibwe-bands-ask-appeals-court-to-stop-enbridge-line-3-construction/600005130/> (last visited Mar. 28, 2021).

³⁶ Mike Hughlett, *Appeals Court Rejects petition to halt construction on Enbridge’s Minnesota Pipeline*, STAR TRIBUNE (Feb. 2, 2021) <https://www.startribune.com/appeals-court-rejects-petition-to-halt-construction-on-enbridge-s-minnesota-pipeline/600018212/> (last visited Mar. 28, 2021).

³⁷ *Supra* notes 4 and 33.

³⁸ Memorandum Opinion, *Red Lake Band of Chippewa Indians et al. v. U.S. Army Corps of Engineers et al.*, 1:20-cv-03817 (D.D.C. 2020) (available at: http://blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/case-documents/2021/20210109_docket-120-cv-03817_memorandum-opinion-1.pdf).

³⁹ *Id.*

Despite the ongoing nature of these legal challenges, the permits have been issued and Enbridge has “launch[ed] construction while the overall need and legality of the pipeline are being fought in court.”⁴⁰ Although federal and state approval of this project occurs amid a global pandemic, Enbridge has begun transporting thousands of workers into the State.⁴¹

For these reasons, the submitting organizations respectfully request that CERD review these concerns under the early warning and urgent action procedures. As further detailed below, these actions by the U.S Government are sufficient to trigger the Committee’s early action procedures.⁴² The rights enumerated under the United Nations Declaration on the Rights of Indigenous Peoples (“UNDRIP” or “the Declaration”) also help inform this request. Finally, since Line 3 will be accomplished through government leases and permits to private companies, the parties invoke the United Nations Guiding Principles of Business and Human Rights (“UNGPs”) under the ICERD obligation that State parties also prevent private actors from engaging in human rights abuses.

III. Previous CERD Recommendations to the U.S. Government

As part of its concluding observations in 2014,⁴³ the Committee articulated concerns regarding certain practices in the United States. Many of which are relevant to the Line 3 pipeline, including concerns that:

1. “[T]he definition of racial discrimination used in federal and state legislation, as well as in court practice, is not in line with [the ICERD], which requires State parties to prohibit and eliminate racial discrimination in all its forms, including practices and legislation that may not be discriminatory in purpose, but are discriminatory in effect”;
2. Despite the United States’ acknowledgement “that racial or ethnic profiling is not effective law enforcement practice and is inconsistent with its commitment to fairness in the justice system,” it still has a “practice of racial profiling of racial or ethnic minorities by law enforcement officials”;
3. “[I]ndividuals belonging to racial and ethnic minorities, as well as indigenous peoples, continue to be disproportionately affected by the negative health impact of pollution caused by the extractive and manufacturing industries”;
4. Indigenous peoples face “the adverse effects of economic activities related to the exploitation of natural resources in countries outside the United States by transnational corporations registered in the State party on the rights to land, health, environment and the way of life of indigenous peoples and minority groups living in those regions”;
5. “[T]he brutality and excessive use of force by law enforcement officials against members of racial and ethnic minorities, including against unarmed individuals . . . remains a widespread problem”;

⁴⁰ *MN350 decries approval of Line 3 permits as leadership failure, denial of Climate reality*, MN 350 (Nov. 12, 2020) <https://mn350.org/news/mn350-decries-approval-of-line-3-permits-as-leadership-failure-denial-of-climate-reality/> (last visited Mar. 28, 2021).

⁴¹ *Supra* note 30.

⁴² Revised Guidelines 2007 CERD, Annual report A/62/18, Annexes, Chapter III.

⁴³ CERD/C/USA/CO/7-9.

6. There is a “disproportionate number of women from racial and ethnic minorities, particularly African American women, immigrant women and American Indian and Alaska Native women, who continue to be subjected to violence, including rape and sexual violence”;
7. “[I]ndigenous women are denied the right to access justice and to obtain adequate reparation or satisfaction for damages suffered”;
8. “Lack of concrete progress to guarantee, in law and in practice, the free, prior and informed consent of indigenous peoples in policy-making and decisions that affect them” remains a problem; and
9. There are “[i]nsufficient measures taken to protect the sacred sites of indigenous peoples that are essential for the preservation of their religious, cultural and spiritual practices against polluting and disruptive activities, resulting from, inter alia, resource extraction, industrial development, construction of border fences and walls, tourism and urbanization.”⁴⁴

Given these concerns, the Committed recommended that the U.S. Government:

- a. “Prohibit racial discrimination in all its forms in federal and state legislation, including indirect discrimination, covering all fields of law and public life, in accordance with article 1, paragraph 1, of the Convention;”
- b. “Improve the system of monitoring and response by federal bodies to prevent and challenge situations of racial discrimination”;
- c. “Adopt[] and implement[] legislation which specifically prohibits law enforcement officials from engaging in racial profiling, such as the End Racial Profiling Act;”
- d. “Undertak[e] prompt, thorough and impartial investigations into all allegations of racial profiling, surveillance, monitoring and illegal intelligence-gathering; hold[] those responsible accountable; and provid[e] effective remedies, including guarantees of non-repetition”;
- e. “Ensure that federal legislation prohibiting environmental pollution is effectively enforced at state and local levels;”
- f. “Undertake an independent and effective investigation into all cases of environmentally polluting activities and their impact on the rights of affected communities; bring those responsible to account; and ensure that victims have access to appropriate remedies;”
- g. “Take appropriate measures to prevent the activities of transnational corporations registered in the State party which could have adverse effects on the enjoyment of human rights by local populations, especially indigenous peoples and minorities, in other countries”;
- h. “[I]ntensify its efforts to prevent and combat violence against women, particularly American Indian and Alaska Native women, and ensure that all cases of violence against women are effectively investigated, perpetrators are prosecuted and sanctioned, and victims are provided with appropriate remedies”;
- i. “Guarantee, in law and in practice, the right of indigenous peoples to effective participation in public life and in decisions that affect them, based on their free, prior and informed consent;” and
- j. “Adopt concrete measures to effectively protect the sacred sites of indigenous peoples in the context of the State party’s development or national security projects and exploitation

⁴⁴ *Id.*

of natural resources, and ensure that those responsible for any damages caused are held accountable.”⁴⁵

Because the U.S Government has failed to adequately respond to these recommendations, violations of Indigenous Peoples’ rights continue. Accordingly, these organizations submit this request to bring the Committee’s attention to the continuing violations and to seek relief under the early warning and urgent action procedures.

IV. The submitting organizations invoke the early warning and urgent action procedures under CERD to prevent escalation of conflict and serious harm.

CERD early warning measures are part of the international community’s efforts at preventative diplomacy. Treaty bodies have an important role in seeking to prevent as well as to respond to human rights violations. In his keynote speech to the Stockholm International Forum on Preventing Genocide held in 2004, then Secretary-General, Mr. Kofi Annan, stated that, “There can be no more important issue and no more binding obligation than the prevention of genocide.”⁴⁶ Indigenous Peoples in the United States, including the Anishinaabe people, have faced the systematic destruction of their people, culture, and way of life for 500 years, and continue to face the repercussions of systemic racism to this day. Early warning and urgent action procedures are necessary to prevent the continued genocide of the Anishinaabe people.

The Committee shall act under its early warning and urgent action procedure when it deems it necessary to address serious violations of the Convention in an urgent manner.⁴⁷ The revised guidelines include various situations that may trigger these procedures; relevant here is the “encroachment on the traditional lands of indigenous peoples...in particular for the purpose of exploitation of natural resources” and “polluting or hazardous activities that reflect a pattern of racial discrimination with substantial harm to specific groups.”⁴⁸ By permitting Enbridge to construct a new Line 3 pipeline through Anishinaabe territory and to abandon the existing Line 3 pipeline where it is currently, the U.S. and Minnesota and Governments are engaging in discriminatory practices harmful to the Anishinaabe that violate the Anishinaabe’s rights to maintain their cultural, traditional, and historical relationship to the land and its resources.

A. Domestic remedies do not sufficiently address these human rights violations.

Indigenous Peoples’ rights are not sufficiently protected in the domestic remedies available to prevent the continued construction and use of the Line 3 pipeline. There is no framework that adequately protects Indigenous rights nor that articulates and protects the value of wild rice to the Anishinaabe. These remedies do not address the underlying discriminatory principles that allow for these violations to take place. Furthermore, any domestic recourse that the Anishinaabe have to address their human rights as Indigenous Peoples has historically been inadequate and not provided a meaningful forum for the Anishinaabe to seek recourse for these rights violations.

⁴⁵ *Id.*

⁴⁶ Rep. of the Comm. on the Elimination of Racial Discrimination, Guidelines For The Early Warning And Urgent Action Procedure I, U.N. Doc. A/62/18, Annex III (2007).

⁴⁷ *Id.*

⁴⁸ Guidelines for the Early Warning and Urgent Action Procedures, Annual report A/62/18, Annexes, Chapter III, ¶ 12(h).

This Committee itself has reiterated its concern that “the definition of racial discrimination used in federal and state legislation, as well as in court practice, is not in line with [the ICERD], which requires States parties to prohibit and eliminate racial discrimination in all its forms, including practices and legislation that may not be discriminatory in purpose, but are discriminatory in effect.”⁴⁹ In her report to the United States in 2017, the Special Rapporteur on the rights of Indigenous Peoples noted that the U.S. Government does not have a framework that ensures full access to redress to Indigenous Peoples for violations perpetrated on their lands and territories.⁵⁰ This is evidenced by the continuing rights violations by the U.S. Government against Indigenous Peoples attendant to the introduction of extractive industries on their lands, waters, and resources. In 2020, this Committee wrote to the U.S. Government twice, requesting more information about proposed drilling in the Coastal Plain of the Arctic Refuge affecting the Gwich’in Peoples.⁵¹ Line 3 is even further in the development process and is one of many ongoing matters within the United States demonstrating Indigenous Peoples’ lack of redress for ongoing and proposed violations of their rights.

Although a previous Minnesota Governor issued an executive order calling for meaningful consultation between the state agencies and tribes when an issue involves both entities, the Minnesota PUC that is overseeing the permitting of line 3 has claimed exemption from this requirement.⁵² Multiple tribal entities had requested to be designated cooperating agencies in the EIS process, but were denied by the Minnesota PUC.⁵³ The state agencies informed Anishinaabe people that the only way they can have meaningful consultation is at public hearings where they can merely make a 3-minute comment.⁵⁴ Additionally, the continued issuing of federal and state permits despite ongoing litigation – such as the Minnesota PUC’s issuance of permits – represents a failure of the domestic processes to protect the rights of Indigenous Peoples. Domestic remedies do not provide a way for the Anishinaabe to appropriately address the human rights violations that are occurring as a product of the Line 3 and those frameworks that do exist are not being applied meaningfully.

Legal claims brought under domestic law could result in the delay or even prevention of the Line 3 pipeline expansion, however, those laws do not directly address the human rights of the Anishinaabe. Not only does the domestic judicial response fail to consider the Indigenous rights of the Anishinaabe as articulated in this Petition, but the judicial process is also too slow to create and recognize these rights before the serious harm has occurred. With ongoing litigation, protests, and no meaningful consultation or free, prior, and informed consent, Line 3 is already beginning to damage and impact these rights. Without other actions to remedy the situation, the Anishinaabe’s cultural and natural resources are continually at risk of being destroyed.

⁴⁹ *Id.*

⁵⁰ A/HRC/36/46/Add.1.

⁵¹ “UN Investigates Allegations that the U.S. Violated the Human Rights of the Gwich’in with Proposed Oil and Gas Development,” FIRST PEOPLES WORLDWIDE (Sept. 1, 2020) <https://www.colorado.edu/program/fpw/2020/09/01/un-investigates-allegations-us-violates-human-rights-gwichin-proposed-oil-and-gas> (last visited Mar. 28, 2021).

⁵² “Issues” STOP LINE 3, <https://www.stopline3.org/issues> (last visited Mar. 24, 2021).

⁵³ *Id.*

⁵⁴ *Id.*

The discriminatory effect of the U.S. Government's permitting of Line 3 will harm and encroach on Anishinaabe land; impact the health of the Anishinaabe through climate change, pollution, and potential oil spills; endanger the cultural and religious practices of the Anishinaabe; increase the risk of violence against Anishinaabe women and girls; and harm the Anishinaabe's rights to security and peaceful assembly. Therefore, the Anishinaabe now turn to CERD for assistance in addressing the discriminatory legal framework that is allowing these human rights abuses to be perpetuated against them.

B. Development of Line 3 violates numerous human rights the Anishinaabe.

Any harm to lands, waters, and resources will also be a harm to the Anishinaabe. A loss of this ecosystem will impact the Anishinaabe's health and nutrition, the expression of their culture and their religious practices, their security and the right to peacefully assemble. The U.S. Government and the Minnesota Government both acknowledge that Line 3 will have a negative impact on the environment that it passes through, irreparably damaging the water quality of that area, and that the Indigenous Peoples will be disproportionately harmed by this impact. This area will be impacted by large-scale human development, irrevocably impacting the fragile ecosystem that is central to the Anishinaabe. Through the construction of Line 3, the greenhouse gases it will admit, and the likelihood of a large-scale spill from the pipeline, the Anishinaabe's ability to ensure their rights to health, culture and religion, safety, and assembly will be at risk.

i. Line 3 will significantly contribute to climate change and impact the watersheds of the Anishinaabe's wild rice, violating the Anishinaabe's right to health under ICERD Article 5(e)(iv).

In addition to the impacts of building Line 3 through untouched wetlands and lakes, putting both the Anishinaabe's water and resources like wild rice at significant risk, Line 3 will accelerate climate change, a phenomenon that disproportionately impacts Indigenous Peoples, including the Anishinaabe, in violation of ICER Articles 5(e)(iv) and (i)(vi).

Every mile of Line 3 crosses ceded lands of the Anishinaabe.⁵⁵ It is a 330-mile route which impacts 227 waterbodies, including three navigable waters, 78.3 miles of wetlands, 16 major watersheds and directly affecting 1000 acres of wetland during construction.⁵⁶ It will discharge dredge and fill materials into 10,507.1 acres – including wetlands.⁵⁷ This impact is significant but only one of the ways in which Line 3 harms the Anishinaabe's rights.

The climate in Minnesota is already experiencing significant impacts from climate change: higher temperatures, more extreme storms with intense flooding, and changes in the State's ecosystem. The State's average annual temperatures have increased by 3.2 degrees Fahrenheit from 1951 to 2012, which was faster than both the United States and global rates of

⁵⁵ *Line 3 Project Final Environmental Impact Statements*, Minn. Dep't of Commerce at 9-26 (Dec. 9, 2019) available at: <https://mn.gov/eera/web/file-list/13765/>.

⁵⁶ *Supra* note 52.

⁵⁷ Complaint for Declaratory and Injunctive Relief at 30, *Red Lake Band of Chippewa Indians et al. v U.S. Army Corps of Engineers*, 1:20-cv-03817 at 29 (D.D.C. 2020).

increase.⁵⁸ The Anishinaabe feel these effects more directly because of their direct connection to the land and reliance on it. For example, the Anishinaabe rely on harvesting wild rice from their lands for much of their sustenance and even economic security. These changes in the ecosystem due to climate change put the Anishinaabe at risk, because there is a very real possibility that the rise in temperature, and increased volatility of storms in Minnesota will destroy the wild rice ecosystem. Since the Anishinaabe rely on the wild rice for much of their food, the loss of this resource will have a devastating impact on the health – and culture – of the Anishinaabe.

The U.S. Government has failed to acknowledge the threat that climate change poses to the health of the Anishinaabe. President Biden has been asked repeatedly to denounce Line 3 and has failed to comment in any way about whether or not he supports the project. Minnesota’s Pollution Control Agency (MPCA) has failed to listen to experts and their own environmental justice committee and proceeded to permit Line 3. The FEIS acknowledges that Line 3 will have “disproportionate and adverse impacts” on Native peoples,⁵⁹ but the pipeline was approved, and construction has continued. In the United States, the market demand for oil has dropped by 6% nationally and 19% in the State of Minnesota.⁶⁰ Additionally, a Petition for Complaint and Investigation has been filed with the Minnesota PUC as Enbridge appears to have met its desired Line 3 increases already, via system pump upgrades in the other pipelines in the mainline system. No hearing has been scheduled to consider if need has already been met. And, yet, this unneeded oil is being produced at the expense of the Anishinaabe, and will be shipped overseas.

On top of contributing to climate change, Line 3 will irreparably harm the water of the Anishinaabe tribal lands. The Anishinaabe have a vested relationship with water because it is a source of life and health. There is a direct connection between the water and environment’s health and wellbeing and the Anishinaabe. The MPCA found that the proposed route for Line 3 would cause the most harm out of all the possible route options, and that it would severely damage the pristine waters in this area and the Environmental Impact Statement even stated that the project will have “disproportionate and adverse impacts” on Native people.⁶¹ This irreparable damage to the waters of Minnesota will have a direct correlation to the health of the Anishinaabe in violation of ICERD 5(e)(iv).

The risk to the Anishinaabe’s health is even more threatened by the possibility of a pipeline spill across their lands and waters. Enbridge has a proven relationship with pipeline spills in Minnesota -- with the old Line 3 being responsible for the United States’ largest inland oil spill ever.⁶² Line 3 should not be replaced when it has finally been operated more safely at half volume since 2010. A major oil spill in the Line 3 project area would be devastating to the Anishinaabe. These types of spills are also almost impossible to clean up, often leaving the oil and letting nature take its course in breaking it down and removing it are the only options available, and much of the long-term effects of oil spills last for decades after the spill occurs. Tar sands pipelines contain many dangerous chemicals, including benzene, which are known to

⁵⁸ “Effects of Climate Change in Minnesota,” MINNESOTA POLLUTION CONTROL AGENCY, <https://www.pca.state.mn.us/air/effects-climate-change-minnesota> (last visited Mar. 23, 2021).

⁵⁹ *Supra* note 55 at Chapter 11.

⁶⁰ *Supra* note 55.

⁶¹ *Id.*

⁶² *Id.*

cause leukemia and neurological disorders after long term exposure.⁶³ The impacts of Line 3 put the health of the Anishinaabe at severe risk, through their food source, their water supply, and their possible contact with deadly chemicals.

Additionally, local Indigenous communities impacted by Line 3 already experience socio-economic stressors that create health risks. Anishinaabe tribal members have testified in community meetings about the increase of stressors and effects to health, such as the detrimental mental health consequences such as alcoholism, depression and suicide, due to destruction of the culture and lands.⁶⁴ Not only does access to these resources improve mental health, but it also strengthens ties to culture and religion, and provides a “nutritional and medicinal buffer against poverty.”⁶⁵

It is well recognized that Indigenous Peoples experience socio-economic indicators of health at an increased rate compared to other ethnicities. The 2006 Indigenous World International Working Group for Indigenous Affairs stated: “Indigenous peoples remain on the margins of society: they are poorer, less educated, die at a younger age, are much more likely to commit suicide, and are generally in worse health than the rest of the population.”⁶⁶ For Indigenous Peoples who have been colonized and experienced genocide, the inherited historical trauma greatly impacts these issues.

Pipelines and development, too, are directly linked to negative health impacts.⁶⁷ According to the FEIS, “the impacts associated with the proposed Project and its alternatives would be an additional health stressor on tribal communities that already face overwhelming health disparities and inequities.”⁶⁸ There is no dispute that this pipeline will seriously affect the health of the Anishinaabe.

It is impossible to untangle these already exacerbated threats to health from the ongoing COVID-19 pandemic. With the continuing construction, the area is already facing increased traffic. The FEIS states that half of the 4,2000 workers will come from out of state, and advocates and physicians have drawn attention to the increased strain this puts on medical facilities as well as the ways it has exacerbated the health disparity of marginalized communities.⁶⁹ Line 3 will not only exacerbate the climate impacts on health, but also pre-

⁶³ Natural Resources Defense Council et al., “Tar Sands Pipelines Safety Risks” at 7 (Feb. 2011) available at: <https://www.nrdc.org/sites/default/files/tarsandssafetyrisks.pdf>.

⁶⁴ *Supra* note 55 at 9-24, 9-40.

⁶⁵ Honor the Earth, “DRAFT Anishinaabe Cumulative Impact Assessment On the Proposed Enbridge Line 3 Expansion and Abandonment Plan” at Chapter 5, page 2 (available at: https://www.mnchippewatribe.org/impact_assessment.html).

⁶⁶ *Id.* at Chapter 5, page 77.

⁶⁷ *Id.* at Chapter 5, page 85.

⁶⁸ *Supra* note 55.

⁶⁹ Brett Benson, *Minnesota Health Professionals Implore Gov. Walz to Delay Pending Line 3 Construction in the Face of COVID-19 Crisis*, COMMON DREAMS (Dec. 2, 2020) <https://www.commondreams.org/newswire/2020/12/02/minnesota-health-professionals-implore-gov-walz-delay->

existing health inequities and will create further threats to health and violating the Anishinaabe's rights under ICERD.

The FEIS states that “any of the routes, route segments, and system alternatives would have a long-term detrimental effect on tribal members as a result of crossing treaty lands”⁷⁰ where the Anishinaabe access these resources and require a clean environment and waters. The Anishinaabe's enjoyment of their rights thus depends on the health of these waterways, which is seriously threatened by Line 3. By continuing the development of Line 3, the U.S. and Minnesota Government are continually threatening the Anishinaabe right to health, which is already disproportionately impacted because they are Indigenous Peoples.

ii. Line 3 will harm the Anishinaabe's ability to practice their culture, violating the Anishinaabe's right to culture under ICERD Articles 2(2), 5(e)(vi) & 7.

The Anishinaabe's life, religion, health, economy, and identity revolves around the water through which the Line 3 pipeline will be constructed, risking the continuity of the Anishinaabe's culture for future generations. Line 3 will irreparably harm the Anishinaabe's culture through the damaging of their lands, waters, and resources. The Anishinaabe's culture developed around the watersheds of northern Minnesota, they have had a relationship with that area since before the colonization of North America.⁷¹ Line 3 violates the Anishinaabe's right to culture under ICERD Articles 2(2), 5(e)(vi), and 7.

Wild Rice is a key component of the Anishinaabe's culture; they have relied on it as a food and economic resource since before they were forced into treaty agreements with U.S. Government. Wild rice is so culturally significant that when the Anishinaabe migrated from the east they were guided by prophecies that said “to go where the food grows on the water”; wild rice is the Anishinaabe's sacred food, and often the first solid food given to their babies.⁷² It is eaten daily by the Anishinaabe and it is a gift from their Creator and they have a responsibility to protect it.⁷³ According to the FEIS, Line 3 will impact a total of 389 acres of wild rice in 17 different wild rice waterbodies.⁷⁴ The Anishinaabe have already lost many wild rice waterbodies to previous development and the creation of reservations, which shrunk their lands significantly. Without wild rice, the Anishinaabe's entire culture will be severely altered. If the U.S. Government continues to allow the construction of Line 3 it will destroy a culture that has been subsisting on the land in this area for far longer than North America has been colonized.

[pending-line-3](#) (last visited Mar. 28, 2021). *See also*: “Update: Tribal Leaders Condemn Final Permit For MN Pipeline & Seek to Halt Imminent Pipeline Construction,” Stop Line 3 (Dec. 2, 2020) <https://www.stopline3.org/news/halt-imminent-pipeline-construction?fbclid=IwAROU7s9iCaO-Vh13SDtof3If8WHboOUTtXdJn86EBVO84k4twknpYF5lnQs> (last visited Mar. 28, 2021).

⁷⁰ *Supra* note 55.

⁷¹ “Anishinaabe Timeline,” BEMIDJI STATE UNIV., <https://www.bemidjistate.edu/airc/community-resources/anishinaabe-timeline/> (last visited Mar. 26, 2021).

⁷² *Supra* note 55.

⁷³ *Id.*

⁷⁴ *Supra* note 55 at 6-218.

Line 3 also threatens an untold number of historic, archaeological, cultural, and sacred sites which it would pass through and destroy or harm during its construction and the impacts of its construction. Line 3 runs through traditional Anishinaabe territory and numerous sacred and culturally significant sites, but also through the historical lands of the Dakota, Lakota, Nakota and other Indigenous Peoples. Their connection to sacred, cultural, and historical sites associated with their traditional lands and water is essential to maintaining their identity. However, the State of Minnesota has refused to require the proper archaeological survey of cultural resources along the Line 3 route, putting these sacred cultural sites at risk of destruction and depriving the Anishinaabe long-term access to their own culturally significant sites. Not only will Line 3 put the Anishinaabe's culture at risk, but it will also destroy the Anishinaabe's access to their own history, cultural practices, sacred sites, which ties them to the land that they have inhabited for thousands of years. The continuation of Line 3 is a violation of the Anishinaabe's right to their culture under ICERD Articles 2(2), 5(e)(vi), and 7.

iii. Line 3 will significantly impact the Anishinaabe's ability to practice their religion, violating the Anishinaabe's right to religion under ICERD Article 5(d)(vii).

*"The Anishinaabe person is inseparable from the land; identity, sense of place and history is intimately related to the land. We originated here. The North American Indigenous person did not migrate from anywhere else, nor originate from any other peoples. The Creator took four parts of Earth and molded the form of the first human person. Since then, all of humankind has been related to the Earth in a very intimate way -- the Earth, in fact, is our Mother. The human person is a relative to all other persons of the Earth, and, along with all creatures call the Earth, Mother."*⁷⁵

Fundamentally, the concern over Line 3 is not that the pipeline will leak – although that indeed is a concern – but rather that the construction and placement of the pipeline is damaging to sacred landscapes. Contamination created by the pipeline can wipe out access to manoomin, leading to loss of culture and religious ceremonies centered around wild rice.⁷⁶ One tribal member describes this perspective by saying:

"Clean water was always very important to us, caring for the water. Those Prophecies that were given a long time ago tell us that we were instructed to migrate westward to where we would find food that grows upon the water. This is the wild rice that we still enjoy today. When I was a little kid, we never put anything in the lake to keep the water pure where the rice grows. **Because wild rice was foretold that it would be there. It is considered to be a sacred gift from the Creator. So, where it grows in the water, we always keep that clean.** Nothing went into the water except tobacco, an offering of tobacco before we take the sacred gift provided for us...They would not want to contaminate it that way."⁷⁷

For the Anishinaabe, it is their sacred duty to protect the water and land. Line 3 has impeded the Anishinaabe's ability to their control these territories and cultural resources, resulting in a loss of

⁷⁵ *Supra* note 65 at Introduction, page 1 (citation omitted).

⁷⁶ *Supra* note 55 at 9-24 and 9-28.

⁷⁷ *Supra* note 65 at Chapter 5, page 24 (quoting Earl Hoagland) (emphasis added).

spirituality.⁷⁸ Line 3 would disrupt the traditional and sacred lands and waters of the Anishinaabe through the development process, and through the increased risk of oil leaks and contamination in violation of their rights under the Convention.

iv. Line 3 increases the risk of violence against Indigenous women, violating the Anishinaabe’s right to security under ICERD Article 5(b).

In addition to the harm the Line 3 pipeline would cause to the land, water, and resources, Line 3 will also bring a short-term influx of transient labor that will put the lives and wellbeing of Indigenous women at risk. Indeed, it already has. This is a violation of Article 5(b), which protects the “right to security of person and protection by the State from violence inflicted by the State or any individual group or institution.”

The United Nations Special Rapporteur, in her 2017 report on the rights of Indigenous People in the United States, noted the number of interlocutors who raised the concern that oil and gas permitting approvals do not take into consideration the impact that a short-term influx of well-paid men into isolated Indigenous communities has on the rate of sex trafficking, illegal prostitution, and violence against Indigenous women.⁷⁹ Multiple studies have shown that oil and gas development is linked to an increase of violence against women, particularly Indigenous women.⁸⁰

This type of harm to Indigenous women has been seen in other areas of the country that have had increased or developed oil production. After the discovery of oil in the Bakken Formation of North Dakota in 2006, the region experienced an increase in people flocking to the area and more importantly the creation of man camps.⁸¹ As a result, the area in recent years “has experienced an exponentially increasing level of violence against Native women.”⁸² This represents the real threat to Indigenous women and girls living near Line 3 construction. On February 23, 2021, two men working on Line 3 construction were arrested for sex trafficking and prostitution.⁸³ The investigation by local authorities resulted in the arrests and charges of seven men, including the two pipeline workers.⁸⁴

⁷⁸ *Supra* note 65 at Chapter 1, page 9.

⁷⁹ Rep. of the Special Rapporteur on the rights of indigenous peoples, ¶ 14, U.N. Doc. A/HRC/36/46/Add.1 (2017).

⁸⁰ Kimberly Martin et al., “Violent Victimization Known to Law Enforcement in the Bakken Oil-Producing Region of Montana and North Dakota, 2006 – 2012,” NAT’L CRIME STATS. EXCHANGE (Feb. 2019). *See also* Kathleen Finn et. al., “Responsible Resource Development and Prevention of Sex Trafficking: Safeguarding Native Women and Children on the Fort Berthold Reservation,” 40 HARV. J.L. & GENDER 1 (2017).

⁸¹ “Chasing out the Specter of Man Camps,” HONOR THE EARTH, https://d3n8a8pro7vhmx.cloudfront.net/honorearth/pages/62/attachments/original/1390350707/Man_Camps_fact_sheet.pdf?1390350707 (last visited Mar. 21, 2021) (explaining, that “North Dakota’s Uniform Crime Report shows that violent crime has increased 7.2 percent, while 243 reported rapes occurred in 2012 – an increase from 207 in 2011).

⁸² *Id.*

⁸³ Jimmy Lovrien, *2 Arrests in Human Trafficking Sting Were Line 3 Workers*, DULUTH NEWS TRIBUNE (Feb. 23, 2021), <https://www.duluthnewstribune.com/news/crime-and-courts/6901823-2-arrests-in-human-trafficking-sting-were-Line-3-workers> (last visited Mar. 28, 2021).

⁸⁴ *Id.*

Enbridge themselves have acknowledged these risks as well as the U.S. and State Governments. The FEIS, which was reviewed and accepted during the permitting process noted “the link between an influx of temporary workers and the potential for an associated increase in sex trafficking, which is well documented, particularly among Native populations” and “[t]he addition of a temporary, cash-rich workforce increases the like likelihood that sex trafficking or sexual abuse will occur.”⁸⁵ The statement further estimated that 4,200 workers will be employed by the construction, half of which are expected to come from outside the 15-county area along the route.⁵⁷ It is this increase of temporary and outside workers that threatens the Anishinaabe’s right to security and the risk of future harm will only increase as construction further develops.

v. Line 3 violates the Anishinaabe’s right to security under ICERD Article 5(b) and right to peaceful assembly under ICERD Article 5(d)(ix) because police and private security forces are suppressing peaceful assembly through militarized responses and harassment.

Line 3 deprives the Anishinaabe of their “right to security of person and protection by the State from violence inflicted by the State or any individual group or institution” under Article 5(b) as well as their right to peaceful assembly under Article 5(d)(ix). The increased presence of police and security, the militarization of said police, and the growing arrests and harassment violate this right.

When the final permit was issued, Enbridge quickly increased construction. In protest, Indigenous Water Protectors have camped and participated in tree sit-ins in freezing winter temperatures, chained themselves to machinery, marched and prayed on these sacred lands. Protest has been led by Anishinaabe organizations like Giniw Collective. As of March 1, 2021, more than 130 Water Protectors are facing criminal charges.⁸⁶ With increased protest, there has also been increased surveillance of protesters and Indigenous peoples, and a greater militarization of the police.

In December 2020, there were consistent protests at the second place that Line 3 crosses the Mississippi River. Protesters led a 10-day sit in, created a “water protector welcome center,” sat in prayer next to the drilling machinery, and later created a ceremonial lodge along the pipeline route.⁸⁷ Six protestors were ticketed for trespass during a December 5, 2020 action. On December 14, 22 water protectors were arrested during protest where Enbridge built a barbed wire fence on the drill pad.⁸⁸

On January 2, 2021 during a demonstration with prayer and song, two protestors were arrested, and “12 others cited for public nuisance, unlawful assembly and failure to leave an

⁸⁵ *Supra* note 55 at 11-20.

⁸⁶ *Supra* note 55 at 11-20.

⁸⁷ *Supra* note 30.

⁸⁸ *Id.*

unlawful assembly.”⁸⁹ Later, 14 others were arrested.⁹⁰ A week later, on January 9, a protest with hundreds of water protectors led to 8 arrests; seven people were booked on “possible charges of gross demeanor trespass on critical infrastructure” and one for unlawful assembly.⁹¹ Shortly after, two more arrests were made when two protestors locked themselves to a pipe.⁹² Protests continued into February 2021. On February 1, three protestors were arrested during a march onto an Enbridge easement and two more the following day.⁹³ More than two dozen Water Protectors were arrested in March 2021.⁹⁴ Seven protestors, arrested for locking themselves to machinery and praying inside a traditional Anishinaabe structure, are expected to be charged with gross misdemeanors and obstructing the legal process.⁹⁵

As protests and demonstrations continue, interactions between Indigenous Water Protectors and police have increased, as well as concerns about the violence and force used by the police. A report from *The Intercept* shows that law enforcement prepared for increase protest activity for 18 months and “engaged in a coordinated effort to identify potential anti-pipeline camps and monitor individual protesters, repeatedly turning for guidance to the North Dakota officials responsible for the militarized response at Standing Rock in 2016.”⁹⁶

This response by law enforcement and private security towards peaceful protest is not new. Back in 2017, private security firms had begun monitoring protestors in Wisconsin, leading

⁸⁹ Staff Report, *More Arrests Made at Enbridge Line 3*, AITKIN AGE (Jan. 6, 2021), https://www.messagesmedia.co/aitkin/news/local/more-arrests-made-at-enbridge-line-3/article_904bd044-4f87-11eb-b268-bbd12d0915d2.html (last visited Mar. 28, 2021). See also Dana Drugman, *As Enbridge Races to Build Line 3 Pipeline, Resistance Ramps Up in the Courts and On the Ground*, DESMOG (Jan. 8, 2021), <https://www.desmogblog.com/2021/01/08/enbridge-line-3-pipeline-indigenous-resistance-courts> (last visited Mar. 28, 2021).

⁹⁰ Staff Report, *More Arrests Made at Enbridge Line 3*, AITKIN AGE (Jan. 6, 2021), https://www.messagesmedia.co/aitkin/news/local/more-arrests-made-at-enbridge-line-3/article_904bd044-4f87-11eb-b268-bbd12d0915d2.html (last visited Mar. 28, 2021).

⁹¹ Kirsti Marohn, *Protesters Gather at Line 3 Construction Site in Aitkin County*, MPR NEWS (Jan. 9, 2021), <https://www.mprnews.org/story/2021/01/09/protesters-gather-at-line-3-construction-site-in-aitkin-county>; See also *Joint Press Release Jan. 11 2021: Hundreds of Water Protectors Walk Onto Line 3 Worksite, 8 Arrested*, STOP LINE 3 (Jan. 12, 2021), <https://www.stopline3.org/news/january092021> (last visited Mar. 28, 2021).

⁹² Fiona McCleod, *Pressure Mounts Against Line 3 Pipeline*, EARTH ISLAND J. (Jan. 27, 2021), <https://www.earthisland.org/journal/index.php/articles/entry/pressure-mounts-against-line-3-pipeline-project/> (last visited Mar. 28, 2021).

⁹³ Jessica Corbett, *Over 40 Water Protectors in Minnesota March Onto Line 3 Pipeline Easement to Stop Construction*, COMMON DREAMS (Feb. 2, 2021) <https://www.commondreams.org/news/2021/02/02/over-50-water-protectors-minnesota-march-line-3-pipeline-easement-stop-construction> (last visited Mar. 28, 2021).

⁹⁴ “Water Protectors Arrested as Indigenous Leaders Continue Struggle Against Enbridge Line 3,” DEMOCRACY NOW (Mar. 26, 2021) https://www.democracynow.org/2021/3/26/headlines/water_protectors_arrested_as_indigenous_leaders_continue_struggle_against_enbridge_line_3 (last visited Mar. 28, 2021).

⁹⁵ “7 Protesters Arrested At Line 3 Oil Pipeline Site In Northern Minnesota,” CBS MINNESOTA (Mar. 25, 2021) <https://minnesota.cbslocal.com/2021/03/25/7-protesters-arrested-at-line-3-oil-pipeline-site-in-northern-minnesota/> (last visited Mar. 28, 2021). See also Hannah Olsen, “Protestors block Line 3 construction in Hubbard County,” DULUTH NEWS TRIBUNE (Mar. 25, 2021) <https://www.duluthnewstribune.com/business/energy-and-mining/6953943-Protesters-block-Line-3-construction-in-Hubbard-County> (last visited Mar. 28, 2021).

⁹⁶ Will Parrish & Alleen Brown, *How Police, Private Security, and Energy Companies are Preparing For a New Pipeline Standoff*, THE INTERCEPT (Jan 30., 2019) <https://theintercept.com/2019/01/30/enbridge-line-3-pipeline-minnesota/> (last visited Mar. 28, 2021).

to coordination between the states.⁹⁷ Now, reports show that Enbridge security often tips the police off about protestor activities and has admitted to monitoring the social media of protestors.⁹⁸ One of the security companies also launched an aerial vehicle service to “inspect energy pipelines.”⁹⁹ However, flight records show that these drones have flown over the homes of water protectors.¹⁰⁰

This relationship between Enbridge and local law enforcement extends beyond communication about the actions of protestors. Enbridge has an escrow account required by the PUC as a pre-condition to construction that permits reimbursement of certain public safety agencies’ purchases like personal protective equipment.¹⁰¹ In Minnesota, a sheriff’s office, “requested that the tar sands pipeline company Enbridge reimburse the department for nearly \$72,000 worth of riot gear and more than \$10,000 in ‘less than lethal’ weapons and ammunition, including tear gas, pepper spray, bean bag and sponge rounds, flash-bang devices, and batons. The sheriff’s office of Beltrami County, which sits at the center of an Indigenous-led fight to stop the construction of Enbridge’s Line 3 pipeline replacement project, labeled the weapons as ‘personal protective equipment.’”¹⁰² The police force – through reimbursement by Enbridge – is accumulating a variety of tactical gear used to suppress protests. This tactical gear, including batons and tear gas and other self-described “less than lethal weapons.”¹⁰³

Globally, there is a very real threat to Indigenous human rights defenders who are subjected to violence and, at worst, murdered, in their attempts to protect their land, water, and resources.¹⁰⁴ In 2020, of the total 331 human rights defenders murdered, a third were Indigenous.¹⁰⁵ In 2019, the United Nations Special Rapporteur on the situation of human rights defenders noted that it is often women human rights defenders who come under attack first.¹⁰⁶ As protests have increased at Line 3, there has been increased arrests and surveillance of the protestors. It is likely these serious human rights violations will continue to escalate as law enforcement becomes increasingly more militarized.

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ Yessenia Funes & Dhruv Mehrotra, *CBP Drones Conducted Flyovers Near Homes of Indigenous Pipeline Activists, Flight Records Show*, GIZMODO (Sep. 18, 2020) <https://earthier.gizmodo.com/cbp-drones-conducted-flyovers-near-homes-of-indigenous-1845104576> (last visited Mar. 28, 2021).

¹⁰¹ Alleen Brown, *Minnesota Police Want a Pipeline Company to Pay For Weapons Claimed as PPE*, THE INTERCEPT (Feb. 10, 2021) <https://theintercept.com/2021/02/10/police-minnesota-enbridge-pipeline-ppe/> (last visited Mar. 28, 2021).

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ “Indigenous rights defenders at risk,” INTERNATIONAL WORK GROUP FOR INDIGENOUS AFFAIRS, <https://www.iwgia.org/en/focus/indigenous-rights-defenders-at-risk> (last visited Mar. 28, 2021).

¹⁰⁵ Kate Hodel, *At Least 331 Human Rights Defenders Were Murdered in 2020, Report Finds*, THE GUARDIAN, (Feb. 11, 2021) <https://www.theguardian.com/global-development/2021/feb/11/human-rights-defenders-murder-2020-report> (last visited Mar. 28, 2021).

¹⁰⁶ *Id.* See also *The Indigenous World 2020*, INTERNATIONAL WORK GROUP FOR INDIGENOUS AFFAIRS, https://iwgia.org/images/yearbook/2020/IWGIA_The_Indigenous_World_2020.pdf.

In a letter to the city and county officials in Minnesota, the director of the Center for Protest Law and Litigation stated:

“Your offices have attempted to deprive [Winona] LaDuke, [Shanai] Matteson and others of their lawful rights to assemble on public land,” the letter said. “Basic First Amendment rights are being deprived at the whim and direction of entities and officials, armed with the power of the state, serving essentially as private security of a private corporation whose profit interests lie in suppressing and demonizing opposition to their activities – including suppressing educational events that can impact the public’s understanding of their dangerous pipeline.”¹⁰⁷

The Anishinaabe have the right to peacefully assemble to oppose Line 3. This includes the right to do so by organizing and engaging in peaceful acts of protest without active and hostile opposition from the State police.¹⁰⁸ Rather than ensuring that police and private security forces do not harm or violate the rights of the people gathered to pray and protest peacefully, the U.S. Government and State of Minnesota has left the protesters unprotected. Worse, there is growing evidence that abuse and violations of freedom of speech, association, and assembly are escalating. These efforts to suppress the Indigenous Water Protectors as well as the U.S. Government’s failure to protect these rights constitutes violations of ICERD Articles 5(b) and 5(d)(ix).

V. UNDRIP informs ICERD violations relating to Indigenous Peoples

The CERD’s 2008 Concluding Observations regarding the United States included a recommendation that the U.S. Government adopt UNDRIP as a guide for fulfilling its obligations as a State party to ICERD.¹⁰⁹ When the U.S. Government adopted UNDRIP in 2010, it did so with reservations, including that its domestic frameworks were sufficient to protect these rights. Since then, the U.S. has done little to nothing through its legislative and regulatory mechanisms to implement UNDRIP and has failed to follow these recommendations regarding the effect of extractive industries on Indigenous Peoples. While UNDRIP is not a binding treaty, CERD has recommended that the “declaration be used as a guide to interpret the State party’s obligations under [ICERD] relating to indigenous peoples.”¹¹⁰ Further, UNDRIP does not have its own treaty body to enforce its guidelines. Therefore, it is appropriate for the Committee to address violations of these principles as they relate to issues covered by ICERD.¹¹¹

The Line 3 project would violate UNDRIP Articles including the Right to Free, Prior and Informed Consent: Arts. 3,5,8(2)(b), 11(2), 18, 19, 27, 28(1), 29(1), the Right to Subsistence: Arts. 20, 24, 26, 29, 30, the Right to Health, Nutrition, and Mental Health: Arts. 21(1), 23, 24(2),

¹⁰⁷ Mary Annette Pember, ‘Pipe Dream’: *Enbridge Escalates Local Tension*, INDIAN COUNTRY TODAY (Mar. 1, 2021) <https://indiancountrytoday.com/news/enbridge-escalates-local-tensions> (last visited Mar. 28, 2021).

¹⁰⁸ InterAmerican Commission on Human Rights, Report of the Office of the Special Rapporteur for Freedom of Expression, OEA/Ser.L/V/II.124, Doc. 7 (Feb. 27, 2006), Chapter V, para. 93, <http://www.oas.org/en/iachr/expression/showarticle.asp?artID=662&IID=1> (last visited Mar. 28, 2021)(citing numerous decisions of the United States Supreme Court).

¹⁰⁹ Committee on the Elimination of Racial Discrimination, Concluding Observations of the Committee on the Elimination of Racial Discrimination: United States of America, 72nd Sess., UN Doc. CERD/C/USA/CO/6 (2008), at ¶ 29.

¹¹⁰ *Id.*

¹¹¹ *Id.* at ¶ 29

the Right to Culture and Religion: UNDRIP Arts. 5, 8(1), (2)(a), & (2)(b), 12, and the Right to Self-Determination in Resource and Land Development: Arts. 1, 3, 8(2)(b), 20, 23, 25, 26, 28, 29. All of these violations are a furtherance of the discriminatory framework within the U.S. that fails to protect the rights of Indigenous Peoples.

VI. The Anishinaabe have never provided their free, prior and informed Consent.

UNDRIP establishes the duty of States to consult in good faith with Indigenous Peoples to obtain their free, prior and informed consent prior to approving projects that may affect their lands, territories, or other resources.¹¹² It also reaffirms that Indigenous Peoples have the right to participate in decision-making processes through representatives chosen in accordance with their own procedures.¹¹³ As early as 1997, this Committee recognized Indigenous Peoples' right to be consulted and the key role that consent plays in the elimination of discrimination.¹¹⁴

Through Executive Order 13175, the U.S. Government sought to strengthen its consultation with Indigenous Peoples. The order requires “an accountable process to ensure meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications.”¹¹⁵ Before granting the many permits required for the construction of Line 3 to begin, federal law requires that the Corps, in consultation with potentially affected Indigenous Peoples, assess potential environmental and social impacts of the project. However, as noted by the Special Rapporteur in her 2017 Report, the Executive Order has “has failed to ensure effective consultations with tribal governments. The breakdown in communication and lack of timely and good faith involvement in the review of federal and non-federal projects has left tribal governments unable to participate in meaningful dialogue on projects affecting their lands, territories and resources. . .”¹¹⁶ Similarly, the Governor of Minnesota issued Executive Order 19-24 in 2019, required executive-level state agencies to consult, coordinate, and cooperate with Minnesota Tribal Nations.¹¹⁷

The U.S. Government and State of Minnesota have failed to consult the affected Indigenous Peoples and to adequately consider the impacts of Line 3. The Minnesota PUC denied requests for public hearing on reservations.¹¹⁸ Throughout the FEIS process, engagement and consultation with the Anishinaabe was an afterthought, added on instead of “integrated into a substantive review of the project and its impacts.”¹¹⁹ According to the Anishinabe Cumulative Impact Assessment (ACIA) a culturally guided impact assessment prepared by the Minnesota Chippewa Tribe with White Earth Band of Ojibwe and Honor the Earth, “the permitting process... has also seen a dramatic disenfranchisement for non-native people, including state

¹¹² UNDRIP Articles 27 and 32.

¹¹³ *Id.* Art. 18.

¹¹⁴ See Committee on the Elimination of Racial Discrimination General Recommendation No. 23 Rights of Indigenous Peoples, U.N. Doc A/52/18, Annex V at 122 (1997).

¹¹⁵ S. Rep., 115th Congress, 1st Session, Vol. 163, No. 207 at H1201 (2017) (Conf. Rep.).

¹¹⁶ Rep. of the Special Rapporteur on the rights of indigenous peoples, ¶ 14, U.N. Doc. A/HRC/36/46/Add.1 (2017).

¹¹⁷ Exec. Order No. 13-10.

¹¹⁸ Treaty Rights and Oil Pipelines: What You Need to Know,” HONOR THE EARTH, <https://static1.squarespace.com/static/58a3c10abebafb5c4b3293ac/t/5bea2acc89858370442dec08/1542073038236/factsheet+TREATY+RIGHTS.pdf>.

¹¹⁹ *Supra* note 5.

employees.”¹²⁰ Additionally, although Minnesota Commerce hired a tribal liaison, there was consistent failure to engage and consult with affected Tribes. Hired in March 2017, the liaison resigned in July, noting that “Commerce has not shown a willingness to address [these concerns about Commerce’s lack of consultation].”¹²¹ She had also stated that she was consistently undermined and “instructed to refrain from publicly answering questions about pipeline impacts, and instead told to direct meeting attendees to the coffee and cookies.”¹²² The U.S. Government and State of Minnesota failed to include the participation of the Anishinaabe, despite the consistent and continuing objection to construction of Line 3. That both the U.S. and Minnesota Governments consider that the consultation that occurred here was meaningful indicates the flawed domestic system that continually violates the rights of Indigenous Peoples. Without obtaining the free, prior, and informed consent through any of the permitting processes, the U.S. Government and its states have violated the most central tenet of Indigenous rights, that of their self-determination. Not only does this violate several articles of UNDRIP, but it also implicates the Anishinaabe’s right to equality before the law (ICERD Article 5(c)) as arguable the U.S. Government is not applying its own domestic laws meaningfully to their consultation with the Anishinaabe. This falls far short of the international standard requiring free, prior, and informed consent from Indigenous Peoples affected by extractive industries.

VII. The U.S. Government has the responsibility to protect Anishinaabe Peoples from human rights abuses by private businesses under the UN General Principles of Business and Human Rights.

The UN Guiding Principles on Business and Human Rights (“UNGPs”) apply to States and corporations alike. States must protect against human rights abuses by third parties. States have a duty to prevent, investigate, punish, and redress human rights abuses through State legal systems.¹²³ Further, a State has an additional duty to protect against abuses by businesses when they receive substantial support and services from State agencies.¹²⁴ Where such connection to the State exists, acts of human rights abuses by businesses might “entail a violation of the State’s own international obligations.”¹²⁵ In that case, the UNGPs encourage States to require agencies and businesses to practice due diligence to ensure human rights are not violated. States also have a duty to ensure that remedies to abuses occurring in their territories exist and are available when those abuses occur.

The U.S. Government’s pipeline permitting process at the state and federal levels do not provide opportunities to address abuses resulting from Line 3. The same industry – indeed, the

¹²⁰ *Supra* note 65 at Chapter 6, page 3.

¹²¹ *Oxendine Molliver Resignation Letter*, THE INTERCEPT (Aug. 12, 2017), <https://theintercept.com/document/2017/08/11/oxendine-molliver-resignation-letter/> (last visited Mar. 28, 2021).

¹²² “Minnesota Tribal Liaison for Line 3 Resigns to Protest Corruption,” HONOR THE EARTH (Sep. 22, 2017), <https://www.stopline3.org/news/tribal-liason-resigns> (last visited Mar. 28, 2021); *See also* Alleen Brown, *Tribal Liaison in Minnesota Pipeline Review is Sidelined After Oil Company Complains to Governor*, THE INTERCEPT (Aug. 12, 2017) <https://theintercept.com/2017/08/12/tribal-liason-in-minnesota-pipeline-review-is-sidelined-after-oil-company-complains-to-governor/> (last visited Mar. 28, 2021).

¹²³ United Nations Human Rights Office of the High Commissioner, “Guiding Principles on Business and Human Rights,” at 3 (2011) https://www.ohchr.org/documents/publications/guidingprinciplesbusinesshr_en.pdf.

¹²⁴ *Id.* at 6.

¹²⁵ *Id.* at 7.

same company – that contributed heavily to human rights abuses at Standing Rock in 2014, has been given permits by the State of Minnesota and the U.S. Government that will have significant impacts on the human rights of the affected tribes. Instead of preventing discrimination against the Anishinaabe by holding Enbridge accountable, state and federal agencies have given Enbridge their permission to proceed with a project that disparately impacts Indigenous communities and deprives them of their health, land, and culture.

VIII. Conclusions and Requests.

In light of the ongoing discrimination against the Anishinaabe and the threat of irreparable harm to their lands, waters, and cultural practices, the submitting organizations request that CERD considers the expansion of Line 3 under its early warning and urgent action procedures in order to avoid further irreparable harm to the Anishinaabe. The submitting organization requests that the Committee adopt a decision:

- 1) Stating concerns regarding the discriminatory treatment of the Anishinaabe and requesting that the U.S. Government submit information to CERD under the urgent action and early warning procedures about the Line 3 proposed expansion plan;
- 2) Recommending that the U.S. Government, consistent with the commitments that it has made under ICERD and UNDRIP, recognize the denial of rights to the Anishinaabe as a human rights issue and begin to take action to rectify the above-described human rights violations;
- 3) Recommending the U.S. Government work to bring a halt to any future activities that infringe on the rights of the Anishinaabe through:
 - a) Halting the ongoing construction of the Line 3 expansion;
 - b) Honoring the government's trust responsibility to Indigenous Peoples within the United States;
 - c) Passing legislation to provide permanent protection for the human rights of the Anishinaabe pursuant to the UNDRIP; and
 - d) Engaging in meaningful consultation and obtaining the free, prior, and informed consent of the Anishinaabe under the principles of UNDRIP and related international norms before commencing projects on or near the lands of the Anishinaabe;
- 4) Requesting that other States and international organizations, including financial institutions, withdraw their support and funding for this project;
- 5) Recommending that CERD communicate with the U.S. Government regarding the situation and consider sending a committee member to visit Minnesota to create a report on the situation based on their findings;
- 6) Addressing these ICERD violations facing the Anishinaabe at the 103rd CERD Session.

APPENDIX



