**Statement of Michelle Harrison, EarthRights International**

Thank you Madam Chair for the opportunity to speak today and thank you to the moderator.

My comments here are necessarily influenced by my experience as a litigator and what I see as the biggest practical barriers to accountability and remedy for the communities we work with that a treaty could meaningfully address.

The treaty process has undeniably prompted important conversations about existing human rights norms and the broad range of impacts corporations have on the lives of citizens around the world. As we move towards elaborating the text of a treaty, however, I would urge the focus not be primarily on normative development, but on the technical, procedural and jurisdictional aspects of holding corporations legally accountable that present the biggest barriers to access to remedy. Such an approach is better suited to filling existing gaps in the law without creating new and unintended ones in the process and is more likely to have a real impact on those the treaty is meant to protect.

I want to use my time to lay out a couple of basic principles that should inform the treaty and then propose some examples of concrete and practical things the treaty could do that would enable individuals and communities to make use of it.

First, corporations must be subject to both private civil liability as well as civil, criminal and/or administrative enforcement by States. That said, prescribing particular criminal, civil and administrative approaches for State enforcement is not necessarily something the treaty needs to do. Different legal systems use different approaches to enforcement and at times civil actions in one system can look a lot like criminal actions in other systems. But what is critical, and what the treaty must do is to affirm that corporate entities are legally accountable for the same offenses as natural persons. There should be no distinction that allows a corporation to escape liability for an offense a natural person would be accountable for.

Second, there are some basic principles of accountability and liability common to virtually all legal systems, which litigators are already using and working to strengthen. In particular:

* Corporations are liable for the acts of their employees and agents
* Corporations are charged with the knowledge and intent of their employees and agents
* Parent corporations are and should be liable for the wrongful conduct of their majority-owned subsidiaries
* Corporations are liable for action taken jointly with both governmental actors and other private actors
* Corporations are liable for knowingly profiting from abuses with in their sphere of influence
* Corporations have a duty not to cause harm within their sphere of influence.

Legal systems put different labels on these general principles of law, but there are substantial similarities. International law is not particularly concerned with labels and the treaty need not adopt the labels that come from one legal system or another. To the extent the treaty deals with this subject, it should provide that corporations should be liable for abuse within their sphere of influence, when they have contributed to it, caused it, profited from it, or failed to prevent it.

There is value in this framing, which is consistent with the basic principles common to different systems, but not specifically tied to the labels of one legal system or another.

Third, victims of abuse by transnational corporations should be able to obtain a substantive resolution of their claims in their choice of either the forum where the wrongs occurred, or where the parent has a substantial presence. The treaty should ensure that rules like personal jurisdiction, forum non conveniens and corporate separateness cannot be used to defeat remedies for affected communities in situations where a corporation should be subject to jurisdiction in multiple legal systems.

With respect to the corporate veil, the basic logic of limited liability – to protect individual investors – simply does not extend to tort liabilities in the corporate ownership context. Though parent companies derive profit from the very activities of their subsidiaries that generate risk to third parties, they use the subsidiary form to insulate themselves from risks to third parties. The tests for piercing the corporate veil in many jurisdictions ignore this economic reality, and create substantial jurisdictional and liability issues in transnational cases.

Requiring companies to internalize the costs of its subsidiaries does not undermine the basic purpose of limited liability, because individual investors’ personal property remains protected. Corporations do not have an inherent right to structure themselves to avoid tort liability and these structures cannot be an end run around the rights of living, breathing people.

The treaty could address this issue by requiring that a subsidiary be answerable for its wrongful conduct in the forum where its parent corporation is located or has a substantial presence, and requiring that the parent be answerable for rights violations in the jurisdiction where its subsidiaries are operating. This does not necessarily require the elimination of corporate separateness – it could simply provide that to the extent a subsidiary is not amenable to jurisdiction or is unwilling (or unable) to pay, the injured party can file claims against the parent. The parent has the option of answering directly, or requiring its subsidiary to answer themselves.

More broadly, the treaty could clarify the circumstances in which jurisdiction is appropriate. This can and should include circumstances where the offense is committed in the State’s territory, as well was where the offense was committed outside the territory, if the offender is a national of the State and/or present in the State’s territory, or the offense is committed against a national of the State or against the State itself. These bases are already recognized in international law.

A related issue is the use of the doctrine of forum non conveniens to get cases dismissed – usually from a corporation’s home country – on the grounds that it would be more “convenient” to litigate the case elsewhere, usually where the alleged harm occurred. The tests that countries like the US and Canada have developed weigh heavily in favor of a corporation’s choice of forum. There is no real reason why it should be less convenient for a corporation to litigate in its home country, and those you familiar with cases like the Chevron Ecuador litigation know that even where litigation is reinstated in the alternative forum, corporations can continue to evade enforcement of a judgement.

The treaty could address this problem by eliminating FNC as a bar to human rights cases brought in a corporation’s home country. To this end, I recommend the working group give consideration to the approach taken by Europe in the Brussels Regulation, which may provide a useful model.

Finally, I would like to emphasize the importance of ensuring that the drafting process is guided by consideration of the practical effects a treaty will have on the efforts of communities to seek remedies. Some additional examples of things the treaty could do that would address some of the major barriers:

* Eliminate or significantly extend any applicable statute of limitations for claims involving human rights violations, in both the civil and criminal context. Human rights cases, and especially cases involving transnational corporations, are complicated. Victims and survivors often have limited resources and need to have time to heal, to find lawyers or advocates, and obtain necessary information to hold the offender accountable. Filing deadlines favor abusers, and especially powerful corporations, over victims by allowing perpetrators to avoid accountability simply because time has passed.
* Liberalize discovery rules in cases of corporate rights abuse, and/or allow for pre-filing discovery to make it easier for claimants to get necessary information that they are often denied access to and which may only be in the hands of the perpetrator.
* Ease the burden of proof or shift the burden in cases involving corporate abuse
* Enhance international cooperation and coordination in cross-border proceedings and mandate mutual legal assistance. There are a wide range of technical and procedural issues the treaty may be well suited to address. I would encourage the Working Group to look to the UN Anti-Corruption Convention, which can prove a useful model on this topic, as well as a range of other corporate accountability and cross-border issues. For example, the Convention has provisions requiring states provide specific types of legal assistance in gathering and transferring information and various types of evidence for use in investigations and in court; provisions concerning notification of potential offenses; provisions on burden-shifting in corruption cases; provisions requiring states to take measures to support the tracing, freezing, seizure and forfeiture and confiscation of corrupt assets; and provisions promoting the sharing of technical expertise and best practices. Similar things could be done in this treaty to mandate the sharing of information and gathering and transfer of evidence between home and host countries, among other things. It is also worth looking at agreements that have come out of the Hague Conferences and similar instruments in the EU.

These are just a few examples. But addressing these technical, jurisdictional and procedural barriers can meaningful and practically enhance prevention, enforcement and access to remedy at the national level and give meaningful and usable tools to communities affected by corporate misconduct.

Thank you.