It is common for witnesses to give evidence during court proceedings. However certain witnesses present special issues and require the court to employ unique procedures in order to obtain useful evidence in court. Examples of such witnesses would include:

1) Children, whether or not the witness is also a victim of a crime.

2) Witnesses who need protection from potential retribution for giving evidence against criminal gangs, criminal organizations such as the Mafia, or criminals who have not been apprehended.

3) Victims of abuse, especially victims of sexual abuse and domestic violence.

4) Witnesses with mental or emotional issues for whom court proceedings are more stressful than would otherwise be the case.

For our 2018 meeting in Marrakech, the Third Study Commission, which is focused on Criminal Law, decided to study how courts and judges employ special procedures and protections for such witnesses, while at the same time affording other parties, such as the accused, fairness and the ability to confront witnesses who may testify in a case.

Three delegates will first make presentations from the perspective of their own countries. We will then open the floor for discussion and exchange if ideas. To facilitate the discussions, please answer the following questions:

A) Describe how the courts in your country deal with the kinds of witnesses listed above.

In the Swiss Criminal Procedure Code (CrimPC) special rules govern the protection of witnesses. According to the general provision, Art. 149 CrimPC, the court is entitled to take appropriate measures to protect witnesses, those persons who might have information about the case, accused persons, expert witnesses or interpreters if there is serious danger to their life or bodily integrity or if their participation in the proceedings could lay them open to any other form of serious prejudice. In such cases, the court may restrict the procedural rights of the parties, in particular by granting anonymity, conducting examination hearings in their absence or in the absence of the public, establishing personal details in the absence of the parties or the public, modifying the appearance or voice of the person requiring protection or screening the person from the court and limiting rights to access case documents.

In addition, Art. 152 CrimPC provides special measures to protect the victim. The criminal justice authorities are obliged, in principle, to safeguard the personal privacy
of the victim at every stage of the proceedings. The victim may choose to be accompanied to all procedural hearings not just by a lawyer but also by a confidant. Furthermore, the criminal justice authorities are obliged to ensure, if the victim so requests, that he or she will not encounter the accused. In such cases, they are obliged to take measures to ensure that the accused's right to be heard is protected in some other way. In particular, they may question the victim while applying protective measures in accordance with the general measures set out in Art. 149 CrimPC mentioned above. Nevertheless, a confrontation hearing may be ordered if the accused's right to be heard cannot be guaranteed in any other way or if the hearing is essential for the purposes of the prosecution.

Victims of sexual offences have the right to ask to be questioned by a person of the same sex. A confrontation hearing with the accused may be ordered against the wishes of the victim only if the accused's right to be heard cannot be guaranteed in some other way.

There are also detailed rules concerning child victims (i.e. victims who are under 18 at the time of the examination or the confrontation hearing). If it is evident that the examination hearing or the confrontation hearing could represent a serious psychological burden for the child, the following rules apply: (a) A confrontation hearing with the accused may be ordered only if the child expressly requests the confrontation hearing or the accused's right to be heard cannot be guaranteed in any other way. (b) The child may not normally be interviewed more than twice during the entire proceedings. (c) A second interview shall take place only if parties were unable to exercise their rights at the first interview or the examination hearing is essential in the interests of the enquiries or of the child. If possible, the child should be questioned by the same person who conducted the first interview. (d) Examination hearings shall be conducted in the presence of a specialist by an investigating officer specifically trained for this purpose. Unless a confrontation hearing is held, audio and video recordings shall be made of the examination hearing. (e) The parties shall exercise their rights through the person asking the questions. Finally (f) the person asking the questions and the specialist shall record their special observations in a report.

As for persons with mental disorders, the CrimPC states that examination hearings are to be limited to essential matters and any additional examination hearings are to be avoided. The court may arrange for specialist criminal or social services authorities to conduct the examination hearing or request that family members, other confidants or expert witnesses attend the examination hearing.

Furthermore, there are special rules about measures to protect undercover investigators who have been given an assurance that their anonymity will be preserved. These persons have the right to have their true identity withheld throughout the entire proceedings and after their conclusion from everyone other than the judges of the courts hearing the case as well as the right to have no details as to their true identity recorded in the case documents.

Finally, the Federal law on the protection of witnesses outside the proceedings (in force since 2013) should be mentioned as it provide the basis for so-called witness protection programmes. The Federal Office of Police does not publish any statistics but one can say that witness protection programmes are used very rarely in Switzer-
B) **Describe how the courts and judges protect the interests of the accused or other parties when dealing with such special witnesses.**

Art. 149 CrimPC, mentioned above, requires in the event that protective measures are employed, that the right of the parties to be heard is respected and in particular that the accused's right to a proper defence is respected. Victims, victims of sexual offences and child victims should not be confronted with the accused unless this it is essential in order to guarantee the accused's right to be heard.

In each case, the court has to balance the interests of the victim and the accused person. However it is important to note that the right of the accused person to confront a witness can also be ensured by way of so-called indirect confrontation through the use of technical measures such as video or audio transmission. In this way, direct confrontation can be avoided without violating of the accused person's rights.

C) **Clarify whether the court has any obligation to hear from such special witnesses if they have already given a statement during the investigation.**

The CrimPC provides generally that (1) the court can hear new evidence and add to evidence already taken that is incomplete. Furthermore, (2) it is entitled to take evidence again that was not taken in the proper manner in the preliminary proceedings. Finally (3) the court is entitled to hear evidence again that was taken in the proper manner in the preliminary proceedings if direct knowledge of the evidence appears necessary in order to reach a decision.

Under Swiss law a statement given by a witness during the investigation is valid provided that the accused's procedural rights have been respected (right to participate in the hearing and to ask questions, taking into consideration the possible restrictions mentioned above).

However, based on the last rule (3), the Swiss Federal Supreme Court has repeatedly stated that the court shall hear a witness again even if he or she has already given a statement during the investigation if this is necessary in order to allow the court to evaluate the evidence, which will often be the case if the statement of the witness is the only evidence (namely cases in which it is a witness's word against the accused's word). The accused person (or his/her lawyer) is entitled to waive this right.