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 Grand Duchy of Luxembourg, the hearing of witnesses by the courts is regulated by article 155 of the criminal proceedings Law which states that witnesses will take at the audience of the court the oath to say the truth and nothing but the truth. If they don’t take the oath as requested by the judge their statement will be void.

The statement done under oath can’t be excluded of the court proceedings unless there is procedure for false testimony which is started and which has succeeded.

A person can be heard as a witness as long as this person isn’t partie to the proceedings. Meaning, that in criminal proceedings the victim who has been damaged by the infringing conduct of the accused can submit to the court a request to get financial compensation from the accused. The victim will then be partie to the
proceedings. Once the victim has submitted such a request to the court, the court won’t be able to hear the victim as witness.

- Article 156 of the criminal proceedings Law states that children under the age of 15 years cannot be heard under oath.

Meaning, that a child under the age of the 15 years can be heard in court but only for information needs without undertaking the oath. The value of the statement won’t be the same as a statement given under oath.

It is rather exceptional that a child under 15 years is heard in court. Usually the judges will rely upon the child’s (victim or not) statement given to the police.

Article 156-2 of the criminal proceedings Law provides however an exception to the rule. The article states that children under the age of 15 years can be heard under oath when the prosecutor, as well as none of the parties, nor the child itself, is opposed to the hearing under oath.

Thus this article permits to hear children in court. However, the use of article 156-2 is very exceptional. The rule is that children under the age of 15 years are not heard in court.

When during the investigating procedure, an audio-visual statement was taken of the child, this audio-visual statement can be broadcasted during the court’s session.

For example, in child abuse cases, cases of violence against minors, or cases where a child has been witness of a murder or violence against others, the investigating judge has the obligation to record the statement of the minor who can be accompanied by an adult of his choice.

- Luxembourghish law doesn’t provide any special protection for witnesses; not for victims of abuse, nor witnesses exposed to a potential retribution or any other witness.

A witness can be assisted by a lawyer as any person appearing before court. However, this assistance has only a limited use considering that witnesses don’t have any specific rights.

Article 190 of the criminal proceedings Law grants to the court the right to order closed proceedings while hearing a witness. The court can order closed proceedings whenever it is judged that the hearing of the witness bears a danger for public order or moral dignity. Closed proceedings mean that there is no public in the courtroom. Only the judges, the prosecutor, the accused and his lawyer as well as the civil partie can be present at the hearing of the witness. This limits the public exposure of the witness.

- Article 156-1 of the criminal proceedings Law requires that a person can be heard under oath only if that person is not under any incapacity to state in court.
For example, in criminal matters when you are sentenced to an imprisonment exceeding 10 years, the judge has to condemn the accused as well to a lifelong prohibition to state as a witness in court.

Likewise, if a person suffers from a mental disease abolishing his judgement abilities, this person cannot be heard as witness.

B) Describe how the courts and judges protect the interests of the accused or other parties when dealing with such special witnesses.

The accused, as well as the civil partie, who has claimed financial compensation, have the right to attend to every witness hearing, without any restriction. The court cannot exclude the accused or the civil partie from the hearing.

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

No, the judge has no obligation to hear again the witnesses in court when that have already given their statement to the police or the investigating judge.

Generally, the “main” witnesses, except those who are under the age of 15 years, are always heard in court under oath considering that the law confers to a statement given under oath a higher probative value.

Article 158-1 of the criminal proceedings Law allows also the possibility to read the written statement given by a witness to the investigating judge or the police when the reasons for the absence of the witness in court are legitimate. Likewise the audio-visual statement or the sound recording of the statement can be broadcasted in court.