Code of Criminal Procedure (as amended in 1994)

(relevant provisions + excerpts from a decision of the ECHR with regard to these provsions)

I.

(excerpts from the decision of the European Court of Human Rights on the case Doorson v. the Netherlands, application 20524/92, 26 March 1996, under "relevant domestic law") -

"38. The public prosecutor has the power to call witnesses and experts to the hearing (Article 260 CCP). In his summons to the accused he gives a list of the witnesses and experts to be brought forward by the prosecution. If the accused wishes to call witnesses, he can - according to Article 263 - submit a request to the public prosecutor no later than three days before the court hearing to summon a witness before the court. As a rule, the public prosecutor should summon the witness, but - according to Article 263 para. 4 - he may refuse to do so if it is to be reasonably assumed that no prejudice to the rights of the defence will be caused if the witness is not heard in open court ("Indien redelijkerwijs moet worden aangenomen, dat de verdachte niet in zijn verdediging kan worden geschaad wanneer een door hem opgegeven getuige ... niet ter terechtzitting wordt gehoord"). He has to give a reasoned decision in writing and must at the same time inform the defence of its right under Article 280 para. 3 (see paragraph 40 below) to renew the request to the trial court at the hearing.

39. At the opening of the trial hearing the prosecutor hands to the court a list of all the witnesses called, which is then read out by the registrar (griffier) (Article 280 para. 2).

40. If the public prosecutor has failed to summon a witness at the request of the accused, or declined to do so, the defence may ask the court to have that witness summoned (Article 280 para. 3). The court so orders, unless it finds that the non-appearance of this witness cannot reasonably be considered prejudicial to the rights of the defence ("De rechtbank beveelt dat de ... getuige ... zal worden gedagvaard of schriftelijk opgeroepen, tenzij zij ... van oordeel is dat door het achterwege blijven daarvan de verdachte redelijkerwijs niet in zijn verdediging kan worden geschaad" - Article 280 para. 4).

41. A request by the defence to hear a witness who has not been placed on the list of witnesses, who has not been convened to attend the trial and whose summons the defence has not sought in accordance with Article 280 falls under Article 315 CCP (see paragraph 42 below). (...)

42. Under Article 315 CCP the trial court has the power to order of its own accord the production of evidence, including the summoning of witnesses whom it has not yet heard.

43. If it finds that there is occasion to do so, the trial court may order that a witness be brought to its hearing by the police (Articles 282 para. 1 and 315 CCP).

44. If at the trial the trial court finds it necessary to have any factual question examined by the investigating judge, it must suspend the hearing and refer the question to the investigating judge along with the case file. The investigation carried out by the investigating judge in these cases is deemed to be a preliminary judicial investigation and is subject to the same rules (Article 316 CCP).

45. Appeal proceedings against the conviction or sentence at first instance involve a complete rehearing of the case. Both the prosecution and the defence may ask for witnesses already heard at first instance to be heard again; they may also produce new evidence and request the hearing of witnesses not heard at first instance (Article 414 CCP). The defence enjoys the same rights as it does at first instance (Article 415 CCP).

II. The Act of 11 November 1993, Staatsblad (Official Gazette) 1993, no. 603, has added to the CCP a number of detailed provisions relating to the "protection of witnesses". It entered into force on 1 February 1994. The additions include the following provisions:

(...)

Article 136c

The term ‘threatened witness’ shall mean a witness whose identity will be kept secret during the examination pursuant to a judicial order.

(...)

Article 219a

A witness who is involved by virtue of his office of profession in the examination of a threatened witness of a previous examination of that witness during the preliminary investigation may refuse to answer any question put to him if this is necessary in order to conceal the identity of the threatened witness.

(...)

Part Four A

Threatened witnesses

Article 226a

1. *Ex Proprio motu*, or on the application of the public prosecutor, or at the request of the suspect of his counsel, or at the request of a witness, the examining magistrate shall order that the identity of the said witness remain secret during the examination if:

a. with a view to the statement to be made by the witness, the said witness of another person feels so threatened that it may reasonably be assumed that his life, or health, or the safety or stability of his family life or socio-economic circumstances or those of the said other person are at risk; and

b. the witness has stated that because of the afore-mentioned threat does not wish to make a statement.

Otherwise, the examining magistrate shall refuse the application or request.

2. The public prosecutor, the suspect and his counsel, and the witness shall be given the opportunity to express their views on this subject.

3. The examining magistrate shall not proceed with the examination of the witness as long as his order is open to appeal and, where an appeal has been lodged, until it has been withdrawn or has been decided, unless it would not be in the interests of the investigation to postpone the examination. Under such circumstances the examining magistrate shall not release the official report of the examination of the witness until there has been a judgement in the appeal proceedings.

Article 226b

1. An order made by the examining magistrate pursuant to article 226a, paragraph 1 should state the grounds on which it is based and be dated and signed. It must be communicated immediately in writing to the public prosecutor and served immediately on the suspect and the witness, stating the time limit within which, and manner in which the legal remedy available against the order must be instituted.

2. The public prosecutor may appeal against the order within fourteen days of the date of the order; the suspect and the witness may appeal within fourteen days of the service of the order. Appeal proceedings may be instituted before the court hearing the facts of the case.

3. The court hearing the facts of the case shall decide as soon as possible. If an appeal against an order made in accordance with article 226a, paragraph 1 is deemed to be well-founded, and the examining magistrate has already examined the witness taking articles 226c to 226f into consideration, the examining magistrate shall ensure that the official report of the examination is destroyed and that an official report of this is drawn up. Article 226f shall apply *mutatis mutandis*.

4. Appeal in cassation against the judgement of the court hearing the facts of the case shall not be permitted.

5. If the appeal proceedings result in an irrevocable judgement that the witness is indeed threatened, the members of the court hearing the facts shall not take part in the examination during trial, otherwise the judgement in the main proceedings shall be quashed. Article 21, paragraph 3 shall remain inapplicable.

Article 226c

1. Prior to the examination of a threatened witness, the examining magistrate shall establish his identity and shall state in the official report that this has been done.

2. The witness shall swear an oath of be otherwise admonished to tell the truth in accordance with the provisions of article 216.

3. The examining magistrate shall examine the threatened witness in such a way as to ensure that his identity is not revealed.

Article 226d

1. If necessary in the interests of concealing the identity of the witness, the examining magistrate may refuse to allow the suspect or his counsel or both to attend the examination of the threatened witness. Under such circumstances, the public prosecutor shall also be refused permission to attend.

2. The examining magistrate shall inform the public prosecutor, the suspect or his counsel, in the event they were not present at the examination of the witness, of the substance of the witness statement, and give them the opportunity to submit questions to be put to the witness, either by telecommunication, or, if this would be contrary to keeping the witness's identity secret, in writing. Unless delay would be contrary to the interests of the examination, questions may be submitted before the examination begins.

3. If the examining magistrate decides that the public prosecutor, the suspect or his counsel shall not be notified of an answer given by the threatened witness, he shall have entered in the official report the statement that the threatened witness answered the question.

Article 226e

During the examination the examining magistrate shall investigate the reliability of the threatened witness and make a statement to that effect in the official report.

Article 226f

1. Where possible in consultation with the public prosecutor, the examining magistrate shall take the measures necessary to conceal the identity of a threatened witness and any witness in respect of whom a request or an application as referred to in article 226a, paragraph 1 has been submitted, until an irrevocable judgement in the matter has been given.

2. To that end, the examining magistrate shall be competent to omit information regarding the identity of the witness from the documents in the proceedings or to remove all names from such documents.

3. Where names have been removed from documents, the examining magistrate or the registrar shall sign or stamp them.

The following paragraphs shall be added to article 342:

2. A statement made by a witness whose identity is not revealed may serve as evidence that the accused committed the offence with which he is charged only if the following conditions have been met:

a. the witness is a threatened witness and has been examined as such by the examining magistrate in the manner laid down in articles 226c-226f, and

b. the offence with which the accused has been charged, insofar as found proven, is an indictable offence as defined in article 67, paragraph 1, and in view of its nature, the organised framework within which it was committed of its connection with other indictable offences committed by the accused, constitutes a serious violation of the legal order.

The following paragraphs shall be added to article 344:

3. A. written document containing the statement of a person whose identity is not revealed may serve as evidence that the accused committed the offence with which he has been charged only if the following conditions have been met:

a. the decision on the evidence is supported to a significant degree by other kinds of evidence, and

b. the accused has never in the course of the proceedings expressed the wish, either in person or through another party, to put questions to the person referred to in the chapeau of to have questions put to him.

III. The provisions added to the CCP by the Act of 11 November 1993, Staatsblad (Official Gazette) 1993, no. 603, habe been commented by the European Court of Human Rights in the case of Doorson v. the Netherlands (*see part I above)* as follows:

"Article 226a now provides that the identity of a witness may remain secret if there is reason to believe that the disclosure of his identity may threaten his life, health, safety, family life or socio-economic existence and if the witness has made it clear that

he does not wish to make any statement because of this. The decision is made by the investigating judge, who must first hear the prosecution, the defence and the witness himself.

An appeal against the decision of the investigating judge lies to the trial court (**Article 226b**).

The investigating judge may order that a threatened witness be heard in the absence of the accused, or of counsel, or of both, so as not to disclose the identity of the threatened witness; in that event, the prosecution authorities may not attend the questioning of the witness either. The investigating judge must then allow the defence to put questions of its own to the witness, either through the use of telecommunication or in writing (**Article 226d**).

Article 264 now lays down that the prosecution may refuse to summon a threatened witness.

If the trial court has ordered that a witness be heard and that witness turns out to be under threat, he must be heard in camera by the investigating judge (**Article 280 para. 5**).

The statement of an anonymous witness taken in accordance with the above-mentioned provisions may only be used in evidence against a person accused of crimes in respect of which his detention on remand is permitted (**Article 342 para. 2 (b))**.

A new paragraph has been added to **Article 344** to the effect that a statement of a person whose identity is not apparent may only be used in evidence if the conviction is based to a significant degree on other evidence and if the defence has not at any time during the trial sought to question that person or have him questioned.