Summary

The title of this study translates as: *An obligation to participate in mass DNA screening in criminal cases?* The principal question it seeks to address is whether the public can be compelled to participate in a mass DNA screening (also known as 'large-scale DNA investigations' or 'DNA-dragnets') in criminal investigations. In order to provide a well-founded answer that covers all aspects of the issue, first of all the existing regulations governing mass DNA screenings are set out, with an explanation of the position of those who refuse to participate in such an investigation in the Netherlands, Belgium, Germany, and England & Wales. A comparison is then given with six statutory duties on citizens to participate in other areas of law enforcement that are imposed in the same four countries. The obligation to participate in mass DNA screening is then assessed in light of the relevant fundamental rights under the European Convention on Human Rights. Finally, a description is given of current practice in the conduct of such an investigation, and the obligation to participate is examined from the standpoint of a number of sociological theories, including those dealing with the relationship between the police and the public. These considerations are intended to answer the constituent questions set down in Chapter 1, which have been formulated in support of the central issue given above:

1. Do the legal systems in the Netherlands, Belgium, Germany, and England & Wales offer any possibility for mass DNA screenings in criminal cases? If so, what then is the citizen's position in law, should he/she refuse to participate? (legal question)
2. Do the legal systems in the Netherlands, Belgium, Germany, and England & Wales impose an obligation to cooperate in the maintenance of law and order that is in any way similar to a possible obligation to participate in a mass DNA screening? Specifically, what are the nature, substance and scope of different types of obligations on the public to cooperate in these countries, under criminal procedural law (including special areas of criminal law and administrative law), fiscal law, and public health law? (legal question)
3. How are mass DNA screenings in criminal investigations conducted in the countries under consideration? What is the position there of anyone who refuses to participate? And what does a possible obligation to participate imply for the relation between the public and the police? (sociological questions)
4. To what degree is any obligation to participate in a mass DNA screening compatible with the content and scope of relevant, fundamental rights established in the European Convention on Human Rights (ECHR)? (legal question)

5. What do the answers to the above questions imply for the possibilities, both legal and social, to compel citizens to participate in a mass DNA screening? (analytical question)

Treatment of Research Question 1

There are significant differences between the rules governing mass DNA screenings in criminal cases in the Netherlands, Belgium, England & Wales, and Germany, which are described in Chapter 2: Germany and the Netherlands both have clear legislation; England & Wales have directives; and Belgium has neither explicit legislation nor directives. Such differences, however, do not alter the fact that these countries all have recourse to mass DNA screenings, and that the practice in these different countries is remarkably similar. For instance, all countries make use of the technique only in cases of serious crime, and this only happens in principle after regular investigation methods have failed to provide a result. Additionally, the group of citizens to be investigated is commonly demarcated according to certain characteristics that are specific to the case, which have been revealed by the investigation methods used at an earlier stage.

In all the countries examined, the individual citizen must him/herself give permission to have the DNA sample taken, so the mass DNA screening is legally conducted on a voluntary basis. Besides this individual permission, investigators in the Netherlands and Germany also require permission from a magistrate before they can conduct a mass DNA screening, principally to safeguard against social pressure, which in reality tends to destroy the voluntary aspect. In all other countries the decision to conduct a DNA-mass screening is the preserve of the police and/or the public prosecutor.

In all countries the DNA sample, once taken, is compared solely with the DNA traces found at the specific crime scene. In addition, the individual citizens' DNA profiles are not stored in a DNA databank, nor are they compared with other DNA traces from different crimes. Moreover, in the Netherlands and England & Wales it is possible to conduct a mass DNA screening that also seeks to establish familial relationships ('family searching'), which involves looking for possible family resemblances between the DNA traces found in the criminal investigation and the DNA samples taken from the people selected to participate. After comparison, the citizens' DNA must be destroyed, unless a match has been found, in which case the DNA profiles are retained.

Those who refuse to participate are not treated the same everywhere. In nearly all countries, a refuser is viewed as someone who needs looking at more closely in light of the still-unsolved crime. In most cases the authorities investigate the refuser using the normal police information channels and by taking a closer look at the reasons given for refusal. In England & Wales they sometimes go a step further, trying to collect DNA from the refuser by covert means. A refuser in Germany can be compelled to give a sample, provided a case against him/her can be constructed. This, of course, is only possible if other, relevant information is available, besides the refusal itself. The system in Belgium is simi-

lar, but the decision to designate someone a suspect in a given case is reserved to the examining magistrate, and the threshold of suspicion is somewhat lower. In England & Wales the police have the authority to arrest someone and compel him/her to provide a sample, but then too, one way or another – commonly in relation to the refusal – they must be able to construct a reason for the arrest. If DNA is to be taken from a refuser in the Netherlands, there must be serious grounds for suspicion. This would seem to raise the bar a little higher than in the surrounding countries, meaning that in the Netherlands there must clearly be more than the mere fact of refusal.

Treatment of Research Question 2

To further clarify the obligation to participate in a mass DNA screening, this obligation is compared with obligations to cooperate in other areas of law enforcement: mandatory proof of identity, 'stop and search' operations for weapons or contraband, (road-side) breath tests, searching the homes of third parties, mandatory measures taken to combat infectious disease, and obligations under fiscal legislation. These obligations to cooperate are differentiated according to the material and procedural grounds on which they rest. Our conclusions are set out below.

Insofar as is relevant for comparison with an obligation to participate in mass DNA screenings, the principle underlying the mandatory identification detailed in Chapter 3 for the Netherlands, Belgium, Germany and England & Wales involves obtaining personal information on someone who is already suspected of a disturbance of the peace or a felony. (Note that this is not the same as the obligation of witnesses or victims to identify themselves to the police.) The material justifications for this mandatory identification inhere in the material legal interest in maintaining public order, in substantive penal law insofar as such behaviour is punishable, and in the material interests owed to the public's protectors. These goals are also relevant from a procedural viewpoint, since mandatory identification is instrumental to the government's implementation thereof.

The authority to conduct random stops and searches described in Chapter 4 is also described *in extenso* for all four countries. The material justification for this authority is the preventive maintenance of public order. In procedural terms, the authority to stop and search is an instrument whereby contraband or hazardous goods can be removed from the public space or a certain area within it, to eliminate their further use. In an extension of the public order interest, stop-and-search can be indirectly important in securing the chain of evidence in criminal cases. The use of stop-and-search can also exert a general preventive effect. In principal, stop-and-search is a means of control: its use does not depend on whether or not a crime has been committed.

This also holds for the breath testing described in Chapter 5. The material legal interest to be protected by the duty to participate in a breath test is the preservation of safety on the roads. Given that material interest, the authorities need an instrument with which they can uphold the prohibition against driving under the

influence (procedural interest). There are, however, preventive and repressive aspects to this procedural interest. The breathalyzer, incidentally, is not indispensable: a blood test can also be undertaken. This in contrast to the various duties to cooperate under fiscal legislation.

Neither do the grounds for the third-party search given in Chapter 6 rest on any suspicion of the third party, nor as a potential perpetrator, but in the assumption that the dwelling contains contraband items or a person whom the authorities wish to arrest. The material justification for this action inheres in the interest of the community and potential victims in seeing the criminal law upheld (detection of crime). The procedural reasoning underlying a third-party search is first of all concerned with the collection of contraband items prior to their seizure, followed by the arrest of suspects and the preservation of evidence. This makes the search accessory (it is a secondary means of coercion) to the powers of seizure, arrest and evidence collection.

The legal grounds for the government measures described in Chapter 7, relating to the control of infectious diseases, lie primarily in the prevention of serious threats or harm to public health and the prevention of serious harm to other public interests (such as pollution of the drinking water supply, sick leave, and economic harm). Moreover, a material ground can be found in the prevention or calming of public unease in case of an outbreak of infectious disease. Finally, government action to combat infectious disease also has a preventive purpose. The procedural reasoning regulating the duty to cooperate in combating infectious disease is that it provides the authorities with an instrument to achieve their material aims. Opposed to the grant of authority under the regulation, there is a restriction on the power granted: compulsion may only be resorted to when other measures are ineffective (the principle of *ultimum remedium*).

Finally, the duty to participate in a tax audit described in Chapter 8 is in principal unrelated to the need to detect a specific crime. The material ground for the citizens' duty to cooperate under fiscal law lies in the budgetary function of the taxation system and the redistribution of capital (or possibly even distributive justice). More directly, material tax law also provides us with the most important position from which we can look at the issue of whether, and if so when, the government may take action against the citizenry. From the procedural point of view, an adequate system to ensure compliance is indispensable, so that every taxpayer is taxed in conformity with material tax legislation. Primarily this proceeds from a preventive viewpoint, but fiscal procedural law also offers the authorities an instrument whereby they can compel compliance with material fiscal law in concrete cases. This is also the procedural reasoning underlying the obligation to file a tax statement: without the information thus supplied, no tax can be levied, or at least, it would be impossible in practice to gather taxes properly from the whole of society.

What all these obligations to cooperate and coercive measures have in common, by the way, is that the regulations in which they are presented are not merely instrumental to the task of maintaining compliance. Because the obliga-

tions and the measures are conditional and subject to bounds, for instance, they also serve to manage and limit the power of the state (the reasoning being that they restrict power).

A possible obligation to participate in a mass DNA screening in criminal investigations is very different from these other types of obligations. After all, the nature of an obligation to participate in a mass DNA screening is to advance the investigation of a criminal case, i.e. it is an investigative instrument deployed within the wider criminal investigation of the case. Moreover, it is imposed with the direct intention of clearing up a concrete criminal case and it is imposed on people against whom a formal hypothesis can be constructed, viz., that they may potentially be connected to the crime. After all, the reason for their selection to participate in a mass DNA screening is that they have certain characteristics in common with the unknown perpetrator.

Treatment of Research Question 3

One of the assumptions underlying the present study is that imposing an obligation to participate in mass DNA screening may influence the relationship between the police and the public. This is why the obligation to participate is examined in Chapter 10 from the viewpoint of the sociology of law. It turns out that this sort of obligation to participate seems to imply a command-and-control approach. This approach is often used in criminal law to trace criminal suspects. However, a mass DNA screening is targeted precisely at members of the public who have not committed a crime. For that reason alone, it would seem that enforcement by requesting 'spontaneous compliance' is a more obvious option than the command-and-control approach. Another thing in its favour is that the police, having an eye to procedural justice and good relations with the public, as well as competence in the performance of their duties, would probably want to build trust with the public – certainly over the long term – in order to count on their cooperation in the future.

There is a further interest at stake when looking at the approach to be adopted – voluntary versus mandatory – and that has to do with the culture in the police and the way they deal with the public's ideas and opinions. The cultures discussed in this research are fatalist, hierarchic, egalitarian, and individualist. In the Netherlands, the police culture lies more towards a hierarchical model, combined with egalitarianism, which certainly attaches value to the public's ideas and opinions, but which nevertheless wants to manage its own house and fix its own priorities in police work. This means that when the police are involved with a mass DNA screening, they have to invest a great deal in the public's sense of trust. It is also very important that the citizens are approached and informed as transparently as possible about the investigation (including the consequence of a refusal to participate). This requires optimum use of the existing relationships between the police and the public, such as the close involvement of neighbourhood police officers. If a long-term relationship of trust with the public is to be maintained, then it would not seem to be a good idea to compel them to participate.

However, if there is an actual case of serious crime (or a series of them), which represents a very serious breach of the peace and which requires immediate action from the police to prevent further danger, then an obligation to participate may be more acceptable, having regard to the relations between the police and the public. Even then, though, it is highly probable that the need for such an obligation would decline, since voluntary cooperation would most likely increase. Of course, that relationship can come under pressure when the police appear incapable of dealing effectively with serious crime, so the use of unorthodox investigation methods might further strain police relations with the public, but on balance that might be preferable in terms of preserving the relationship. Whether or not that is the case will depend in part on the real or potential effectiveness of such a method, and the added value gained by its application. In the present case, this means an obligation to participate as an alternative to voluntary cooperation. What is important, after all, is that imposing an obligation on the public may have an adverse effect on relations between the public and the police, and the advantage of a general obligation to participate must be weighed against this. So if it is intended to impose an obligation to participate, another question that needs to be answered is whether it should be a general obligation (with the associated, relatively severe negative effects), or whether it should be made easier to compel refusers to supply a DNA sample (for instance by requiring mere suspicion or even just a tip-off).

Treatment of Research Question 4

An important question is how tenable an obligation for citizens to participate in a mass DNA screening in criminal investigations would be in the face of the content and scope of relevant fundamental rights as established under the European Convention on Human Rights (ECHR). In Chapter 9 this is tested against the right to silence (the *nemo tenetur* principle), the presumption of innocence, the right to privacy, the principle of non-discrimination, and the right to freedom from detention, all of which are protected under the Convention. Assessing a possible obligation to participate in light of these rights and principles conferred under the Convention shows that one cannot determine unambiguously whether such an obligation would be in conformity with the ECHR, the primary reason being that such an obligation has never been examined in light of the ECHR. Another consideration is that the nature, grounds and scope of such an obligation are so different from other statutory obligations to cooperate that it is difficult to determine exactly what the significance of the Strasburg case law (and precedent) related to other obligations to participate may be for an obligation to participate in mass DNA screenings.

Clearest and least problematic in this regard is the right to freedom from arbitrary detention under Article 5 ECHR. If a person were to be briefly detained for the purpose of compelling him/her to provide a DNA sample, it is virtually certain that it would be permissible under this provision, provided the obligation to provide DNA itself were deemed to be lawful. Less evidently, but still with quite

a reasonable degree of certainty, one can state that the right to freedom from discrimination under Article 14 ECHR and Article 1 P12 ECHR does not as such oppose the introduction and application of an obligation to participate in a mass DNA screening. Matters may be different if insufficient action were to be taken against the stigmatization of certain groups, for instance if the investigation were to look at certain groups in the absence of any objective justification.

It is less easy to draw firm conclusions in respect of the other fundamental rights against which an obligation to participate in mass DNA screening may be tested. The first of these is the right to silence (*nemo tenetur* principle). The main difficulty in settling the jurisprudence in this regard is the fact that the obligation to participate is directed at people who are not suspects, but within a criminal-law context, in order to discover a perpetrator (by inclusion or exclusion). In addition, it is a fact that the obligation to participate certainly does conflict materially with the principle. Nevertheless, albeit incomplete, the jurisprudence at present does seem to indicate that, formally, the obligation to participate would not come into conflict with the right to silence under Article 6 para. 1 ECHR. With regard to the presumption of innocence, however, matters seem to be quite the opposite: the Strasburg case law is far clearer here than it is on the right to silence, offering grounds for the conclusion that application of an obligation to participate in mass DNA screening in criminal investigations does come into conflict with the presumption of innocence under Article 6 para. 2 ECHR. Finally, assessment against the right to privacy under Article 8 ECHR quite clearly shows that any obligation to participate in mass DNA screening is a considerable (read: relatively serious) breach of this right in respect of citizens who are not suspects.

All in all, there seems to be a reasonable to appreciable risk that the use of an obligation to participate in mass DNA screening would be declared in violation of the ECHR. When looking at the question of whether this risk should be accepted, one should remember that the provisions of the ECHR present merely minimum standards for rights and freedoms.

Treatment of Research Question 5

Finally, in Chapter 11 the following conclusions are drawn, all of which merit attention should the legislature consider the introduction of an obligation to participate in mass DNA screenings:

1. The first thing the study shows is that the need for and the usefulness of an obligation to participate in mass DNA screenings is contentious. A relevant aspect in this regard is that very many people commonly participate in mass DNA screenings in the Netherlands, despite the country having no compulsory duty to participate. The added value of an obligation, even if it were effective, would thus be marginal. There is even a risk, however, that the introduction of an obligation to participate would reduce rather than enhance the effectiveness of such an investigation.
2. Another matter when considering the need for and usefulness of an obligation to participate is that the imposition of such an obligation collides with the im-

portance of a satisfactory relationship of trust between the police and the public. An obligation to participate may in fact have an adverse effect on general police work. (Cf. the results of the sociological study of the conduct of mass DNA screenings in practice and the consideration of police-public relations based on sociological models).

3. Furthermore, viewed from a legal and principled standpoint, any compulsion to participate in mass DNA screenings is problematic: it conflicts with a variety of fundamental rights under the ECHR and may actually contravene some of them. In this regard too, when examining this accumulation of tensions and possible breaches, it should be recollected that the provisions of the ECHR merely record the minimum requirements for the protection of human rights.
4. That an obligation to participate is not generally accepted can also be seen from the countries examined, where there is no explicit legislative provision to compel participation in mass DNA screenings. Indeed, as far as we are aware, this holds throughout the world.
5. Moreover, an obligation to participate in mass DNA screening is also exceptional when compared to other statutory obligations to cooperate in law enforcement as already exist under criminal law, special criminal law, administrative law, fiscal law and public health law in the Netherlands and the other countries examined: none of the existing obligations to cooperate involves a combination of essential characteristics similar to those involved in an obligation to participate in mass DNA screenings. Indeed, most such obligations have no such characteristics.
6. Finally, an obligation to participate in mass DNA screenings does not sit well with the foundations of the Penal Code and may well encounter difficulty in relation to the normal, legally regulated DNA procedure.

Should the introduction of an obligation to participate in mass DNA screenings be contemplated, then a precise balance must be struck between the need for and use of such an obligation, and its viability, considered in legal, principled and systematic legislative terms. Such considerations should also examine the precise form in which such an obligation should be drafted. But even with an obligation to participate that would be applied only under certain, very specific circumstances, it is highly questionable, given the variety of legal and social issues discussed above, whether such legislation would ultimately be indicated.