Intentional Sexual Crimes, Assaults and Homicides
A Legal Comparison of the Threshold of Intent

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Pro gradu -tutkielmasani tarkastellaan ja vertaillaan rikosoikeudellista tahallisuutta ja sen alarajaa eri valtioiden oikeusjärjestelmissä, erityisesti kahden vakavan rikostyypin, seksuaali- ja henkirikosten kohdalla. Tutkielmani varten olen keskittynyt tarkastelemaan ja vertailemaan Suomen ja Ruotsin, Saksaan ja Alankomaaiden sekä Englannin ja Yhdistyneen kuningaskunnan oikeusjärjestelmissä käytettyä rikosoikeudellista tahallisuutta käsitteleen sekä näissä maissa rangaistavaksi säädettyjä tahallisia seksuaali- ja henkirikoksia niiden tunnusmerkistössä kuvaillessaan teon tekijän tahallisuudelta edellyttämne vaatimuksineen. Tutkielmasani olen vertaillut tahallisuutta muun muassa lapsen kohdistuva seksuaalirikoksissa, HIV-tartuntaharjoituksissa, HIV-tartuntaan liittyvissä rikoksissa sekä niin sanottua vennäläistä rulettia koskevissa henkirikoksissa.


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1 Introduction

1.1 Topic and theme

“Actus non facit reum nisi mens sit rea”, in Latin that is the act is not culpable unless the mind is guilty. Guilt and intention are very essential in criminal law. Having a “guilty mind” refers to the fact that someone has committed a crime with the intention to do so. These crimes are regarded to be more severe than those committed out of negligence. Therefore, it is important for a court to assess if a crime has been committed intentionally and to determine the level of intention. This intention usually is not same the same as motive of the actor. So a person can kill another without a motive to do that. That’s not stopping us from convicting them of murder if they have shown the legally required intention in their act.

But how to find out if a crime has been committed intentionally? The transition from intention to negligence is smooth, so it is not always self-evident. This leads to the fact that the legislation of a country has to define a threshold in the respective criminal code to which the court can stick in its decisions.

Assessing if an offence has been committed intentionally and therefore also deciding about its sentence is of particular importance when it comes to the most severe crimes existing, like sexual crimes, crimes against persons and homicides. Those offences are about violence, about sexual, mental and physical violence. This violence deprives a person of their human rights, risking and attacking their health, life and bodily integrity. In some ways, however, sexual crimes can be considered as one of the most problematic crimes when it comes to proving the intention.

An example of this can be cases of sexual crimes against children. If it is not all clear from the case that the child was under the legally defined age and the acts themselves have been consensual, how can we show that the actor had intent concerning the age? What kind of intent does the actor need to have? Or is the age just a hard fact that the actor should have known or should have found out?

It seems likely that the legislations of different countries come to different conclusions when setting the threshold of intention. This has been the subject of
extended research\textsuperscript{1} as, depending on the threshold, the same offence can be sentenced very differently. However, there are not yet many legal comparisons written about this subject that would include Finland as well. In Finland, the comparison in criminal law has usually been done with Sweden and sometimes with Germany, Matikkala’s doctoral thesis\textsuperscript{2} from 2005 as an excellent exception of wider comparison.

Finally, when studying the legislation and court decisions in a country in the course of time, one can see that there is a constant change. Developments in culture, science and lifestyle often have an impact on legislation and also on court decisions. Both legislation and court decisions also affect each other in turn.

In my thesis, I will look into the concept of criminal intent in Finland, Sweden, Germany, the Netherlands, England and the United States. These countries offer a wide selection with both similarities and differences. This thesis focuses on Finland and Finnish criminal law but additionally provides a comparison with the other mentioned countries.

I will also look into substantive laws of sexual crimes, assaults and homicides. And thirdly I will combine these two, investigating the impact of the respective concepts of intent on the decisions of the highest courts – which emphasis on recent developments in court decisions and legislation.

1.2 Research questions

How are the thresholds of intent in Finland, Sweden, Germany, the Netherlands, England and the United States? What differences are there between the respective models and what impact has this had on recent court decisions regarding sexual offences, assaults and homicides? Have the court decisions in similar cases been convicted in a similar way in different countries? Have there recently been changes in legislation of one or several of these countries regarding intent and / or has the highest court changed its way to decide between intent and negligence?

\textsuperscript{1} See e.g. Blomsma 2012.
\textsuperscript{2} Matikkala 2005.
1.3 Methods

In this thesis, my method is to research substantive laws, court cases, preparatory works, commentaries and writings of legal scholars. I will look for legal definitions of intent, if those exist, and I will look for legal provisions criminalizing intentional sexual crimes, assaults and homicides. I will research what these laws exactly criminalize, what the prohibited acts are and, especially, what the required intent concerning these offences is.

If legal definitions of intent do not exist, I will look even more for court cases and court precedents, especially those given by the highest criminal court of the country, as well as look into the various writings of legal scholars. I will try to give a comprehensive view of the state that exists concerning the intent and these crimes. For carving out recent developments, I will closely examine recent court cases from the selected countries dealing about sexual offences, assaults and homicides.

For my research I have chosen six countries and thus six legal systems to concentrate on. These include the Nordic countries Finland and Sweden, the Central European countries Germany and the Netherlands, as well as the Anglo-American countries England (and Wales)3 and the United States.

I have studied Finnish, Swedish, English, German and Dutch, so this selection of systems is a smart choice for me in this way as well, helping me to better understand the laws and court cases of all these countries. Considering the universal nature of my topic and the many different languages of the material and sources for this research, I have written this thesis in English. I think that this best fits the purpose of this thesis to be an international legal comparison.

1.4 Outline of this research

In the first chapter, I have now given an outline of my research, answering to what I research, why I research this and where this research is exactly looking at, both geographically and inside the legal system of a single country of my research. Next, in Chapter 2, I will take a look at the concepts and forms of intent in all these

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3 "England" is used in this thesis to refer to laws applied in England and Wales. Scotland and Northern Ireland are not included in this thesis.
countries. I will look for the forms of intent from the highest form to the lowest one, especially trying to find the lowest level and lowest limit of intent.

In the third chapter, I will take a close look at sexual crimes and substantial laws concerning these crimes in all the countries of my research. I will give a comprehensive view of the intentional sexual offences, both rape offences and sexual offences committed against children as victims. I will look what kind of acts are criminalized and what is required in this acts, what is especially required from the actor’s mind. In the fourth chapter, I will do the same for homicides and assaults.

In the fifth and sixth chapter I will give a special focus to court cases related to relevant questions of my topic and research questions, seeing how these substantial laws and forms of intent have been applied in practice, showing also differences and similarities in the way that these courts have ruled quite similar acts. I will particularly look into recent court cases and developments in court decisions and legislation. In Chapter 7, I will draw conclusions and give ideas for further research.

2 Forms of intent

2.1 Introduction

In Chapter 2 of my thesis, I will now take a look at the concept of criminal intent in all the countries of my research. I will look for legal definitions of intent, if those exist. If not, I will structure the concept of intent based on other sources. I will start with Finland and for Finland my research is more thorough. In this chapter, I will also briefly compare those other countries’ concepts of intent to that of Finland’s and to those I have already looked into.

2.2 Finland

2.2.1 Finnish criminal law

Finland is a civil law country and the Finnish legal system is largely based on the European-continental civil law tradition. In Finnish criminal law, there is a lot of similarities with criminal laws of other Nordic countries as well as with the criminal law of Germany. Many criminal offences and provisions have been similarly defined
as they are in Swedish criminal law, but today there are more differences than before, like this research will show, too.

In Finnish criminal law, intention and negligence are the forms of culpability. Intent or negligence is a prerequisite for criminal liability. According to Section 5 of the Finnish Criminal Code (Rikoslaki, RL), Chapter 3, unless it is otherwise stated, an act referred in the Criminal Code is punishable only as an intentional act. Thus criminal liability is usually constituted by intent and most acts are punishable only as intentional acts. According to Section 4 of this Chapter 3, the age of criminal responsibility in Finland is 15 years of age, so a younger actor can’t be convicted.

An example of the statutory definition of offence where negligence is enough is Section 8 of the Finnish Criminal Code, Chapter 21. According to this section, the actor who with negligence causes the death of another person shall be sentenced for negligent or involuntary manslaughter (kuolemantuottamus) to a fine or to imprisonment for at most 2 years.

As we can see, for some intentional offences there is also a negligent counterpart, but not for many of them, so the threshold between intent and negligence is very essential when assessing whether a person is punished for his actions or not. As we will later see, the sentences for intentional homicides can be much more severe than for involuntary manslaughter. In addition, an attempt also requires intent in order to be punishable.

2.2.2 Finnish legal definition of intention

After the Finnish Criminal Code overall reforms, there has been a legal definition of criminal intent in the Finnish Criminal Code since 1.1.2004, but this definition applies only to offence elements of consequence, not to other offence elements, and is often called as consequence-intent (seuraustahallisuus) in comparison with intent concerning any other elements than consequences, so called “circumstance-intent” (olosuhdetahallisuus). I will tell more about this circumstance-intent in Chapter 2.2.4, but in general, this kind of cases concerned with circumstances must be ruled merely according to the Supreme Court precedents.
The legal definition of criminal intent for consequences can be found in Section 6 of the Finnish Criminal Code, Chapter 3. It states that an actor has caused the consequence described in the statutory definition intentionally if the causing of the consequence was the actor’s purpose or they had considered the consequence as a certain or quite probable result of his actions. A consequence has also been caused intentionally if the offender has considered it as certainly connected with the consequence that they have aimed for. Next I will take a closer look on these forms.

2.2.3 Forms of intent in Finland

Three forms of intent can be found in the Finnish legal definition of criminal intent. These can be called either in Latin as dolus determinatus, dolus directus and dolus eventualis, or purpose-intent (tarkoitustahallisuus), certainty-intent (varmuustahallisuus) and probability-intent (todennäköisyystahallisuus).

Even though the lowest level of intent is usually enough to convict the actor and can be the easiest to prove, the higher the level of intent, the higher might be the sentence. According to a recent Supreme Court judgment KKO 2014:5, different degrees of intention allow also a separate evaluation in sentencing and the actor certain about the fulfillment of offence elements is more blameworthy than the actor merely assessing that the consequence will quite probably happen.

2.2.3.1 Purpose-intent

An act is intentional when the purpose of the actor was to fulfill the constituent elements of the offence. Finnish legal scholars call this dolus form dolus determinatus, but more often as purpose-intent. According to Section 6 of the Criminal Code, Chapter 3, the actor has acted intentionally if the causing of the consequence described in the statutory definition was their purpose. They want and intend to make this consequence happen.

This is also the case if the actor thinks that there is only a small chance their act will bring about the intended consequence, but not when they think that this consequence is impossible. Practically impossible consequence can’t be the purpose of the act.\(^4\)

\(^4\) KKO 2014:5.
\(^5\) Frände 2012, p. 115.
The consequence can also be under the form of purpose-intent if it’s a necessary intermediate step to some other purpose.\footnote{See KKO 2011:26.}

### 2.2.3.2 Certainty-intent

An act is intentional also when the actor regarded the fulfillment of the constituent elements of the offence as a certain result of their act. In Finland this is often called as dolus directus, but also as certainty-intent. According to the Criminal Code, Chapter 3, Section 6, the actor has acted intentionally if they had considered the consequence described in the statutory definition as a certain.

This form of dolus is not about purpose or wanting the consequence to happen, but about knowing it will happen because of the act. Thus this is the case also if the actor thinks this consequence to be very undesirable for them. Usually in this form of intent, the purpose of the actor is to make some other consequence happen, but there are also these certain less-wanted consequences as a side effect.

Often used example of this form is when the actor wants the insurance money and in order to get that blows up their plane or ship, knowing that people will die as a result, even though it is not the actor’s purpose to kill them. The actor is seen to have certainty-intent in regard to these deaths.

### 2.2.3.3 Probability-intent

The third and lowest form of intent in Finland is called either as dolus eventualis or more commonly as probability-intent. An act is intentional also when the actor regarded the fulfillment of the constituent elements of the offence as a quite probable (varsin todennäköinen) result of their act. The question then is, of course, how probable is “quite probable”? This question has sparked some academic debate.

Quite probable is generally seen to mean that the probability of the consequence occurring needs to be more than 50 %, that is it needs to be more likely to occur than not to occur. If both of these options are equally likely, the actor is seen to have no intent required for conviction of intentional offences. Thus “quite probable” can be seen to generally mean a basic probability.
According to Matikkala the official Swedish language version of the Finnish Criminal Code section concerning the legal definition of intent supports this view too, when it uses the expression “övervägande sannonlik”, which means basic probability.  

In addition to these three forms of intent I have now described, the Proposal of the Criminal Law Project also suggested one additional form of intent, being as the lowest form of criminal intention. In this form of intent an act would have been intentional also if the actor considered it as a serious possibility that their act fulfilled the constituent elements of the offence and in committing the act they had demonstrated an acceptance to fulfill the constituent elements of the offence. Thus this eventualis-intent would have required not only a considerable or serious possibility (varteenotettava mahdollisuus), but also a clear volitional element.

2.2.4 Circumstance-intent

The concept of circumstance-intent covers the intent in all those elements of the statutory definition of the offence that are other than consequences of the offence. It is about awareness, about what kind of awareness is required from the actor of the facts that determine whether non-consequential elements of the offence are fulfilled. These other elements include the age of the victim in crimes that need to be committed against a person under the certain age, or the type of the drugs.

Circumstance-intent was a part of the proposed legal definition of intent in the Government Proposal HE 44/2002, which would have defined it similarly as is now defined the intent concerning consequences, requiring that the actor considered the existence of a statutory offence element to be quite probable.

However, this definition was not included in the legal definition of intent, because the Law Committee of the Finnish Parliament considered it to be harder to define the intent concerning non-consequences than it is with the intent concerning

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7 Matikkala 2014, p. 201.  
9 Ibid.  
10 HE 44/2002 vp, p. 87.
consequences. The Law Committee also feared that such legal definition would have not applied well for the offence elements in economic crimes.\textsuperscript{11}

Thus the offence elements other than consequence have no legal definition of intent, but instead they are evaluated together with the provision concerning a mistake as to the definitional elements of an offence, which is set in Section 1 of the Finnish Criminal Code, Chapter 4. According to this section, if the actor at the time of the act wasn’t aware of the existence of all the elements required by the statutory offence definition, or if the actor has made a mistake concerning one of the elements, the act is not considered to have been intentional, but it can be seen as negligent.

Some Finnish legal scholars have suggested that this section concerning mistake is in the end irrelevant in the evaluation and the intent in offence elements is the same as it was before and that is now not legally defined in any way. This can be seen to be the Supreme Court’s view, too. Other scholars have tried to reconcile the wording of the section concerning mistake and the aim of the Law Committee in a way that “is not aware” (\textit{ei ole selvillä}) would require a probability less than the basic probability of more than 50 percent. This latter group includes Sahavirta and Frände.

Prosecutor Sahavirta has suggested that an actor could have required criminal intent if they have had an approving or indifferent attitude towards the possibility that a property in a money laundering offence had been acquired by a crime.\textsuperscript{12} This kind of economic crimes are, of course, highly specific and the intent assessment could be quite different from, for example, homicides.

This kind of intent would basically mean that it would be enough, if the actor had been aware of the risk and had approving or indifferent attitude towards this risk. According to Matikkala, however, mere awareness of the risk not enough, nor is a theory that this awareness would be replaced with an obligation to be aware.\textsuperscript{13}

According to Matikkala the section concerning mistake applies to intent in offence elements, since it clearly states that the act is not intentional, if the actor has not been aware of all the relevant elements. Matikkala, however, is not convinced that the

\textsuperscript{11} LaVM 28/2002 vp, pp. 9–10.
\textsuperscript{12} Sahavirta 2008, p. 174.
\textsuperscript{13} Matikkala 2014, p. 178.
required awareness of the existence of an offence element could mean in these situations that the probability of this existence could be considered to be enough when it is 50 percent or less than that.\textsuperscript{14}

This, according to Frände, means that Matikkala suggests the same “quite probable” threshold for all the offence elements as what is set in the legal definition for the consequence elements.\textsuperscript{15} Frände himself hasn’t been eager to equate the expression “is not aware” with the requirement of quite probable, but instead he has suggested defining the intent on offence elements as the balance intent (\textit{tasapainotahallisuus}). This model means that a person has intent when they consider the existence of an offence element as equally likely as its non-existence.\textsuperscript{16}

Frände has more recently acknowledged that the Supreme Court has consistently used the intent based on probability on the offence elements other than consequence in all those types of crimes it has dealt with\textsuperscript{17}. However, as Frände points out, there has been yet no Supreme Court judgment about the probability intent on economic crimes. Thus Frände has not yet abandoned his model of balance intent.\textsuperscript{18}

Tapani and Tolvanen have been in favor of a theory in which the element is considered as a serious possibility (\textit{varteenotettava mahdollisuus}).\textsuperscript{19} According to Tapani, actors with an approving or indifferent attitude towards the existence of an offence element are included in the basic possibility intent theory, since their awareness of the existence has not prevented them from carrying out the offence.\textsuperscript{20}

Some problems with proving intent have occurred in situations where the actor has acted with deliberate ignorance in order to not be criminally liable and thus intentionally tried to avoid knowledge about legally essential facts. This kind of situation was in the Supreme Court case KKO 2006:64\textsuperscript{21}, where the drug runners intentionally avoided the knowledge of the nature of the drugs they were smuggling.

\textsuperscript{14} Matikkala 2006, p. 86.
\textsuperscript{15} Frände 2010, pp. 161–162.
\textsuperscript{16} Frände 2010, p. 162.
\textsuperscript{17} E.g. KKO 2010:88 and KKO 2012:66.
\textsuperscript{18} Frände 2012, p. 127.
\textsuperscript{19} Tapani and Tolvanen 2008, p. 232–236.
\textsuperscript{20} Tapani 2009, p. 179.
\textsuperscript{21} KKO 2006:64.
The Supreme Court case KKO 2013:17 dealt with an offence and with a course of events, which are highly specific. Thus it might not be the best case to be a precedent about the lower level of intention. The case was about misuse of a business secret and was, only in the question of intention, decided by an eleven-member larger bench of the Supreme Court. The essential question in this case was what is the lowest form of intention in Finland in other elements than consequences, is it probability-intent or acceptance-intent/indifference-intent, like it is in Sweden, as we will see in the Chapter 2.3.2.

This case also shows a clear division inside the Supreme Court on the lowest form of intention. A narrow majority of the judges supported the existing view of the intent requiring quite probable awareness. The majority of the court, six judges, concluded that the actor X had to understand as certain or as quite probable that the object of misuse was a business secret and that it has been obtained or expressed with a criminal act. Thus their view of the lowest form of intention was the probability-intent.

Four judges, however, ended up with a different view that the lowest form of intention is acceptance-intent or indifference-intent. According to their dissenting opinion, X had in this case expressed approval or apparent indifference to the fact that the snowmobile suits had offended B Oy’s business secrets.

Despite the dissenting opinions, all the judges, including Judge Mansikamäki with her own dissenting opinion, ended up with the same outcome that there was a required intent existing in this case. Thus in the end it now made no difference what was the lowest form of intent in this case. Still it’s very good that there is discussion and hopefully this kind of evaluation of intent will continue. So far the probability-intent has been the standard that the Supreme Court uses for consequences and circumstances. Next I will take a look how the forms of intent are in Sweden.

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22 KKO 2003:17.
2.3 Sweden

2.3.1 Swedish criminal law

Sweden is a civil law country. The Swedish legal system shares a lot of similarities with the Finnish one, and in many offences the requirements are quite identical. According to Section 6 of the Swedish Penal Code (*Brottsbalken, BrB*), Chapter 1, the age of criminal responsibility in Sweden is 15. According to Section 2(1) of the Penal Code, Chapter 1, unless otherwise is stated, an act shall be regarded as a crime only if it is committed intentionally. Thus, like in Finland, the general rule in criminal law is that only intentional acts are criminalized. So the requirement of intent is not usually explicitly written out in the statutory offence elements of a certain criminal offence.

Unlike in Finland, there is no legal definition of intent in the Swedish Penal Code. Thus more attention needs to be paid to the Supreme Court decisions. A legal definition has been suggested, but so far it has been rejected. I will now take a closer look in the forms of intent in Sweden and shortly compare them with Finnish ones.

2.3.2 Forms of intent in Sweden

The highest form of intent in Swedish criminal law is direct intention (*direkt uppsåt*). In this form of intent an actor aims to a certain consequence.\(^{23}\) The second highest form of intent is indirect intention (*indirekt uppsåt*), where an actor sees the consequence as necessary when aiming for another consequence with their act. Even though this former consequence is merely a side effect for the actor, they are aware that it will be a consequence of their actions.\(^{24}\)

The lowest form of intent was for a long time considered to be dolus eventualis with a hypothetical test, which was introduced by the Swedish Supreme Court in its judgment *NJA 1959, s. 63*\(^{25}\). However, today the lowest form of intent in Swedish criminal law is intent of indifference (*likgiltighetsuppsåt*). This was established in the

\(^{23}\) Asp and Ulväng 2011, p. 311.
\(^{24}\) Ibid.
\(^{25}\) NJA 1959, s. 63.
Supreme Court decision *NJA 2002 s. 449*\(^{26}\), where the Supreme Court used intent of indifference instead of dolus eventualis with a hypothetical test.

This intent of indifference included assessment of probability to determine whether there was a chance of the consequence and then assessed what was the actor’s attitude towards this. The intent of indifference established intent also to the cases where the actor was indifferent towards this consequence. This kind of form of intent had been suggested already, for example, by the Swedish government commission\(^{27}\).

In its later decision *NJA 2004, s. 176*\(^{28}\) the Supreme Court set out some guidelines (*richtlinker*) on how the intent of indifference should be applied by the courts. This decision also emphasized that these guidelines should be interpreted and applied with certain caution and discernment (*med försiktighet och urskiljning*), because the circumstances proving the actor’s indifference can vary.\(^{29}\)

Today, after *NJA 2004, s. 176*, this form of intent includes two stages, where the actor can be indifferent towards the risk of consequence and indifferent towards the consequence. The first one of these establishes negligence, but only the second one will establish the intent. So the court needs to conclude that the actor has beyond reasonable doubt (*bortom rimligt tvivel*) been indifferent towards the consequence itself in order the act of the actor to be considered as intentional offence.\(^{30}\)

Next I will go to Germany, where there is a long tradition of legal research and theories concerning the concept of intent and especially its lower limit.

### 2.4 Germany

#### 2.4.1 German criminal law

Germany is a federal state and a civil law country. The highest court for criminal cases is the Federal Court of Justice (*Bundesgerichtshof, BGH*). The German Criminal Code (*Strafgesetzbuch, StGB*) doesn’t have legal definitions of intention or

\(^{26}\) *NJA 2002, s. 449.*


\(^{28}\) *NJA 2004, s. 176.*

\(^{29}\) Ibid.

\(^{30}\) Rung 2006, p. 254.
negligence, so these have to be found out elsewhere, from the precedents of the BGH, but also often from the various writings of the German legal scholars.

Section 15 of the German Criminal Code, however, requires intention (Vorsatz, or dolus) as a prerequisite for criminal liability, unless the Code explicitly mentions that negligence is sufficient. Thus, like in Finland and Sweden, unless the law explicitly provides for criminal liability based on negligence, only intentional acts can establish criminal liability. According to Section 19 of the German Criminal Code, the age of criminal responsibility in Germany is 14 years of age.

### 2.4.2 Forms of intent in Germany

As was stated, criminal intention is not legally defined in Germany, so it needs to be established otherwise. In Germany there are three forms of dolus, though sometimes the first two are counted as the same and several different theories have been created and supported in Germany of the lowest form of intention.

The highest form is Absicht or the form of purpose. Sometimes this form is also called as the first degree of dolus directus.\(^{31}\) In this form the criminal consequence was the actor’s purpose, they aimed this consequence to happen.\(^{32}\) This form is about wanting, rather than knowledge. However, there needs to be at least a slight possibility that this consequence can happen.\(^{33}\) So this definition is similar to that of the Finnish and Swedish highest forms of intent. The consequence in question doesn’t need to be the actor’s final goal.\(^{34}\)

The second form of dolus in Germany is dolus directus or knowledge (sicheres Wissen). This can also be called as the second degree of dolus directus.\(^{35}\) This form is about almost certain knowledge.\(^{36}\) Thus in this form the actor knew of or was practically certain of the consequence of their action, but still acted.

The lowest form of dolus in Germany can be called either dolus eventualis or conditional intent (bedingter Vorsatz). This form can be seen to require that the actor

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\(^{31}\) Blomsma 2012, p. 63.
\(^{32}\) Taylor 2004, p. 106.
\(^{33}\) Blomsma 2012, p. 68.
\(^{34}\) Taylor 2004, p. 106.
\(^{35}\) Blomsma 2012, p. 63.
\(^{36}\) Taylor 2004, p. 106.
was aware that the consequence required in the statutory offence was possible and not entirely unlikely and that the actor condoned or accepted this consequence.\textsuperscript{37}

In Germany there are several theories of this lowest form of intention, both cognitive and volitional theories. Cognitive theories largely emphasize the actor’s views and awareness on the probability of materialization of the consequence and on the magnitude of the risks caused by the act.

Volitional theories require that there is some positive statement from the actor about the realization of consequence or of other offence elements. The actor has either accepted the consequence they have been aware of or taken it to carry as part of the deal (\textit{in Kauf nehmen}\textsuperscript{38}). Sometimes the consequences, which the actor doesn’t accept but decides to tolerate at all hazards, are also included in the intention.

A famous German case about intention was the Leather Belt case\textsuperscript{39} in 1957. In this case A and B wanted to steal O’s money. They unsuccessfully tried to drug him and then to strangle him so he wouldn’t resist. A and B were afraid that they would kill O by strangling, so they first tried to make him unconscious by hitting him with a sandbag. Having failed in this, they strangled O with a leather belt until he couldn’t move anymore. They realized that they O could die because of the strangling and this idea was unpleasant to them, but A and B wanted to put O out of action at all costs.

According to the German Supreme Court, A and B had the dolus eventualis form of intent in killing O. According to the court, dolus eventualis requires the offender to foresee the consequences as possible and to approve them. So even though A and B did not desire O’s death, they accepted that O could die and thus approved the death.

Now I will take a brief look at the four German theories on the lower limit of intent. The first theory is the Consent and approval theory (\textit{Einwilligungs- und Billigungstheorie}, later in this thesis just “Approval theory”). In this theory the actor must seriously consider the occurrence of a consequence as well as accept that their act could fulfill the definitional elements of the offence.

\textsuperscript{37} Blomsma 2012, p. 105.
\textsuperscript{38} This term has been used, for example, in the decision BGH 26.4.2001 – 4 StR 439/00.
\textsuperscript{39} BGH 22.4.1955 – 5 StR 35/55.
So in the Approval theory the actor must reconcile themselves to the prohibited consequence. However, if the actor was confident that the consequence won’t occur and they had a reason to believe this way, even when they had foreseen the consequence as a possibility, the actor has lacked intent and they have acted only negligently.\textsuperscript{40}

Thus in this theory both knowledge and willfulness are prerequisites for intent, the knowledge requiring that the actor has foreseen the consequence as possible and the willfulness requiring that the actor has approved the consequence or has reconciled themselves to it.\textsuperscript{41} This required approval of the consequence, however, doesn’t mean that the actor would have needed to desire this consequence\textsuperscript{42}, such as the death of a person, like in the Leather Belt case. However, an actor that has trusted in the non-occurrence of the undesired consequence has still acted only with negligence.

This theory is often used with the inhibition level theory (\textit{Hemmschwellentheorie}) in murder and manslaughter cases. This theory concerns the intent to kill another person and assumes that there is a high threshold for a person to actively kill another human being. Thus it is considered that the actor needs to cross a high inhibition level. So in the homicide cases the court might more easily conclude that the actor had trusted that a death wouldn’t be a consequence of their act, even if it had been a possible consequence. Exceptions to this are, of course, the cases where the death of another person was very likely to occur, like in stabbing another in the heart.\textsuperscript{43}

The Indifference theory (\textit{Gleichgültigkeitstheorie}) is another Germany theory of lower level of intent, first proposed by Karl Engisch. In this theory the actor needs to have foreseen a certain consequence as possible and been indifferent to whether this consequence occurs.\textsuperscript{44} In the Leather Belt case, the actors A and B would have been acquitted with this theory, since they weren’t indifferent to the death of O, but

\begin{flushright}
\textsuperscript{40} Roxin 2006, pp. 457–459.
\textsuperscript{41} Roxin 2006, p. 459.
\textsuperscript{42} Badar 2013, p. 142.
\textsuperscript{43} Ibid.
\textsuperscript{44} Ibid.
\end{flushright}
instead the death of O was undesirable to them. Today this theory doesn’t have a lot of support.\textsuperscript{45} However, as we saw, Swedish criminal law has moved to this direction.

The third German theory is the Possibility theory. According to this theory, the actor must have recognized that there was a considerable or substantial possibility for the consequence to materialize in order to have the intent in regard to this consequence.\textsuperscript{46} So this theory is not about volition, but rather merely about knowledge, and according to this theory the considerable possibility of the consequence should have prevented the actor from carrying out their act.

When the actor didn’t stop themselves from acting when they had this knowledge, they are considered to have acted intentionally. However, this theory might theoretically lead to a conviction of homicide when the actor has merely just realized the possibility of death as a consequence of their act even if they had trusted that the death wouldn’t occur and had greatly undesired this possible consequence.\textsuperscript{47}

The last of the four German theories is the Probability theory. In this theory there is even a higher degree of knowledge required compared to the Possibility theory. According to this theory, the actor must have considered the consequence to be probable. So they have acted intentionally if they had foreseen that the consequence was probable and they had still acted. Like the previous theory, this theory doesn’t have an explicit volitional element either. Only the requirement for knowledge and awareness is higher, higher than possible or considerable possible, but still not any near certain. It could be argued that the Finnish model of probability-intent resembles this theory.

So there are these four theories about the lower level of intent in Germany. Today the first one, the Approval theory, has been used the most by the German courts.\textsuperscript{48} In general, the threshold of intent in Germany could be seen as the actor having been aware of the possible occurrence of a criminal consequence, or circumstance, which was not completely remote, and the actor having endorsed this consequence or at least having made his peace with this possibility by committing their act.\textsuperscript{49} Clearly

\textsuperscript{46} Badar 2013, p. 143.
\textsuperscript{47} Ibid.
\textsuperscript{48} Badar 2013, p. 141.
\textsuperscript{49} Badar 2013, p. 144.
there are some specific circumstances and especially specific offences that need to be considered very thoroughly, especially the homicide offences. I will do that later on in my thesis. Now first I will take a look at the Netherlands and the Dutch system.

2.5 The Netherlands

2.5.1 Dutch criminal law

The Netherlands is a civil law country. The Dutch legal system is partly based on Napoleonic French law tradition and the first codified Dutch criminal law was promulgated under Napoleonic Era\(^\text{50}\), but there are not many signs of that in the current Dutch Penal Code (\textit{Wetboek van Strafrecht, WvSr}) from the year 1886.

Dutch criminal law has some interesting features. There are no specific minimum penalties for particular offences. According to Article 10(2) of the Penal Code, the minimum imprisonment for all offences is one day. Usually there is also a possibility of getting a fine as a sentence instead of imprisonment. It is really noteworthy that this applies to offences of rape and murder too, even though this a very rare. According to Article 23(4) of the Dutch Penal Code, the maximum sum for a fine of the fourth category is 20 250 € and for a fine of the fifth category 81 000 €.

Dutch criminal law has two kinds of criminal offences. Felony is a more serious offence and always needs intent or negligence, while misdemeanor is less serious and might not need that any mens rea element is proved.\(^\text{51}\) Similarly is in Germany. Most importantly with regard to my thesis, there is no legal definition of intent in the Dutch Penal Code.

2.5.2 Forms of intent in the Netherlands

Dolus or criminal intent (\textit{opzet}) in Dutch criminal law is based on the definition “willingly and knowingly” (\textit{willens en wetens}), whereas culpa or negligence is at hand when the actor takes a risk that their actions may have certain consequences.\(^\text{52}\)

There are three forms of intention in the Dutch criminal law. Dolus directus or willful intent is the highest form. It is also often called direct intention and can be

\(^{50}\) Rayar and Wadsworth 1997, p. 3.  
\(^{51}\) Van Dijk and Wolswijk, p. 30.  
\(^{52}\) Taekema, p. 442-443.
described as acting because of a wanted consequence. Thus a person is directing their will towards achieving a prohibited act or consequence, willingly going for a prohibited consequence.\textsuperscript{53}

Dolus indirectus is acting despite a certain prohibited consequence occurring. This indirect intention is the second highest form of intention, requiring a state of mind in relation to a prohibited act or consequence which is not an actor’s main goal, but which is recognized by them as a necessary consequence of the attainment of their main goal or object. An actor here is almost certain that this prohibited consequence will happen. This form can also be called as “awareness of a high degree of probability” (\textit{noodzakelijkheidsbewustzijn})\textsuperscript{54}, which defines it well, since this form is all about awareness. Compared to Finnish certainty-intent, this Dutch version does not seem to have as high requirements of certainty.

Lowest form of intent in Dutch criminal law is dolus eventualis or conditional intent (\textit{voorwaardelijk opzet}). Intent itself is not conditional, but the occurrence of the consequence is conditional on uncertain circumstances.\textsuperscript{55} In a complete offence, the risk that person consciously accepted must occur.\textsuperscript{56}

The Dutch legislator has recognized Dolus eventualis, but left its development to courts and scholars.\textsuperscript{57} It was first truly used by the Supreme Court in its cases Hoorn Pie\textsuperscript{58} and Cicero\textsuperscript{59}. Hoorn Pie was a homicide case and will be discussed later on in this thesis. The Cicero case was concerned about intention in a copyright violation. Supreme Court’s judgment ruled that term “intentionally” could also mean “knowingly and willingly accepting the chance that cannot be ignored as imaginable” ("Willens en wetens aanvaarden van de niet als denkbeeldig te verwaarlozen kans dat").\textsuperscript{60} Thus this case shaped the conditional intent in Dutch criminal law.

Today in Dutch criminal law the conditional intent can be defined as consciously accepting a substantial chance of causing the consequence. The Supreme Court has

\textsuperscript{53} De Hullu 2012, p. 225.
\textsuperscript{54} Van Dijk and Wolswijk 2015, p. 40.
\textsuperscript{55} Blomsma 2012, p. 100.
\textsuperscript{56} Ibid.
\textsuperscript{57} Blomsma 2012, p. 63.
\textsuperscript{58} HR 19 June 1911, W 9203.
\textsuperscript{59} HR 9 November 1954, NJ 1955, 55.
\textsuperscript{60} HR 19 June 1911, W 9203.
stated this, for example, in case *NJ 2007, 313*\(^61\). So there needs to be a considerable chance that a consequence occurs and a conscious acceptance of this. The chance must be considerable based on general experience and it depends on the circumstances of the case.\(^62\) In non-lethal offences the required conditional intent is often inferred from the knowledge of an objectively high risk.\(^63\)

The actor can sometimes be considered to have taken a prohibited consequence “into the bargain” (*op de koop toenemen*) showing that they had accepted the possible consequence, a bit similarly than in German criminal law with “in Kauf nehmen”. An example of a case where this wasn’t the case and the court concluded that the actor wasn’t consciously taking consequences into the bargain, when they could have also died as a result, was the *Porsche case*\(^64\), which will be discussed more later on. In HIV cases Dutch courts have often used statistical calculations where experts have assessed the risks.\(^65\)

### 2.6 England

#### 2.6.1 English criminal law

Unlike the previous legal systems, Finland, Sweden, Germany and the Netherlands, the English legal system is a common law system. However, there are also various codified written laws in English criminal law, so it’s not only based on legal precedents given by the highest court, now the Supreme Court of the United Kingdom, and prior the year 2005 the House of Lords. The written laws, when applicable, are usually explicitly separated by their field of offences, so in this thesis I will look closer into the Sexual Offences Act 2003 and the Offences against the Person Act 1861.

#### 2.6.2 Forms of intent in England

Mens rea elements are constructed somewhat differently in English criminal law compared to civil law countries. There is also dolus and culpa in English criminal law, but there is also an additional form of recklessness between these two.

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\(^{62}\) Blomsma 2012, p. 110.

\(^{63}\) Blomsma 2012, p. 121.

\(^{64}\) HR 15 October 1996, *NJ 1997, 199*.

Dolus can be divided into direct intention and oblique intention. Direct intention includes cases where the actor intends to kill the victim, when it is their purpose, aim and objective. An example of this is when the actor pulls the trigger of their gun intentionally to kill another person. Direct intent is acting in order to bring about a certain wanted consequence.\(^{66}\)

Oblique intention is acting with foresight of certainty that certain consequence will result. In these cases the actor can be said to have intended a result if they realized that this result was certain to follow from the behavior in question. So it is not the actor’s aim, but it is known to them to be certain.\(^{67}\)

In English criminal law the dimension of “intent” ends here. But what if the actor foresaw a prohibited consequence as a probable result of their act, should this be classified as intention? The answer to this in English criminal law is recklessness, which can be considered to cover the same questions as dolus eventualis in the countries yet investigated. According to Blomsma, normative concepts of these forms are very similar.\(^{68}\) However, recklessness has a broader range than dolus eventualis, requiring no volitional element. Still it can also be narrower, since takes into account the nature of legal interests in a particular case and the harm that is caused to these.\(^{69}\)

Recklessness can be defined as the conscious taking of an unjustified risk.\(^{70}\) So the actor needs to be aware of the risk. The risk can be of any degree, as long as it materializes. So it doesn’t need to be a considerable or serious risk. In addition to this, the actor also needs to believe that this risk is unjustified or unreasonable.\(^{71}\) The actor’s awareness is important here; even so that distinction between recklessness and negligence is usually based on the actor’s awareness or unawareness of the risk.

Recklessness used to be assessed in some cases subjectively and in others objectively. The latter assessment was mostly used in criminal damages\(^{72}\) and was

\(^{66}\) Ashworth and Horder 2013, p. 169.
\(^{67}\) Ashworth and Horder 2013, p. 170.
\(^{68}\) Blomsma 2012, p. 112.
\(^{69}\) Blomsma 2012, p. 143.
\(^{70}\) Blomsma 2013, p. 134.
\(^{71}\) Ashworth and Horder 2013, p. 176.
\(^{72}\) Ashworth and Horder 2013, pp. 179–180.
based on the theory of Caldwell-recklessness, named after the case *R v Caldwell*\(^{73}\). In this case, the actor Caldwell was a hotel worker, who started a fire in the hotel after drinking a lot of alcohol. Caldwell’s defence was that due to intoxication he hadn’t given any thought to the possible endangerment of the people in the hotel. The House of Lords, however, ruled that the actor has been reckless if their act has created an obvious risk, even if they haven’t given any thought to it.

The decision in case *R v G and R*\(^{74}\) changed the recklessness back to subjective assessment, when the House of Lords in this case ruled that the unreasonableness of the risk needed to be based on the circumstances known to the actor. In this case the 12-years and 11-years old actors had gone camping near a shop, where they had found some newspapers and lit some of them on fire. They had thrown the lit newspapers under a plastic wheelie-bin and left. The fire had spread eventually to the shop and caused a million pounds worth of damage. The House of Lords ruled that in this case the actors due their infancy hadn’t known the risk of this damage occurring.

### 2.7 United States

#### 2.7.1 American criminal law

The American legal system is a common law system, as well. The Model Penal Code (*MPC*) is a model of codified American criminal code. It is a statutory text, but no state of the United States is bound to follow it. So it is a model for criminal law standardization and harmonization, since all the states have their own criminal codes.

The Model Penal Code was drafted by prominent American lawyers, judges and law teachers of the American Law Institute. The Institute approved it in 1962 after ten years of drafting.\(^{75}\) Since 1962, the Model Penal Code has been partly adopted into various state’s own criminal codes, for example, the states of Illinois, New York and Delaware.\(^{76}\) The Model Penal Code has provisions regarding both general and substantive part of the criminal law. Next, I will take a closer look in its quite qualified provisions concerning mens rea.

\(^{73}\) [1982] AC 341.

\(^{74}\) [2003] UKHL 50.

\(^{75}\) Wechsler 1968, pp. 1425–1426.

\(^{76}\) American Law Institute 1985, p. xi.
2.7.2 Forms of intent in the United States

Section 2.02 of the Model Penal Code defines the forms of culpability and the levels of mens rea mental state. According to this section, an actor can act purposely, knowingly, recklessly or negligently. I will mostly now use the first three of these forms in my thesis.

The highest form is acting “purposely”. According to Section 2.02(2)(a), a person can act purposely, with respect to a material element of an offence, in regard to the nature of their conduct or a result thereof as well as in regard to the element that involves the attendant circumstances. In the former case, a person acts purposely, when it is their conscious object to engage in conduct of that nature or to cause such a result. In the latter case, a person acts purposely, when they are aware of the existence of such circumstances or they believe or hope that the circumstances exist.

The second highest form is acting “knowingly”, defined in Section 2.02(2)(b). The structure of the form is similar as in acting purposely, so a person can act knowingly in regard to the nature of their conduct or a result thereof and in regard to the element that involves attendant circumstances. In the former case, a person acts knowingly, with respect to a material element of an offence, when they are aware that their conduct is of that nature or that such circumstances exist. In the latter case the actor acts knowingly, if the element involves a result of his conduct, they are aware that it is practically certain that their conduct will cause such a result. So if the actor is aware of this certain probability, their knowledge is established and they are culpable. This is a subjective form, not what a reasonable man would have known.77

The third form of culpability is acting “recklessly”. According to Section 2.02(2)(c), a person acts recklessly with respect to a material element of an offence when they consciously disregard a substantial and unjustifiable risk that the material element exists or will result from their conduct. This risk must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation. Thus recklessness includes both accepting the result and accepting the concrete danger that the result

may occur. It is also noteworthy that the risk needs to be both substantial as well as unjustifiable. This difference to negligence is that negligence doesn’t need awareness, only that the actor has created a substantial and unjustifiable risk, which they should have been aware of.\(^7\) This is not very different from other countries.

I have now finished with my initial look into concepts and forms of intent in all the countries of my thesis research. Next, I will take quite a different direction and head to substantive laws and sexual crimes.

### 3 Sexual crimes

#### 3.1 Introduction

In Chapter 3 of my thesis I will now take a closer look into the substantive laws of all the countries of my research and examine the substantive laws concerning sexual crimes. I will aim to give a comprehensive view of these laws, since their content is highly essential in my research. What is exactly criminalized, what are the specific definitions, what is the actus reus or the guilty act, and what are the required and expressed mens rea elements in these offences? I will start this investigation by covering the Finnish sexual crimes legislation first.

#### 3.2 Finland

##### 3.2.1 Rape offences

In Finland the sexual offences are criminalized in the Finnish Criminal Code. This legislation has been amended recently and the most recent amendments of the Criminal code concerning these sexual crimes entered into force on 1.9.2014. So what is the statutory definition of rape in Finland today?

According to Section 1(1) of the Criminal Code, Chapter 20, the actor who forces another into sexual intercourse by the use or threat of violence, shall be convicted of rape to imprisonment for at least 1 year and at most 6 years. Thus the rape offence can be based on force, violence or threats of it. It can be a situation where the victim is not physically able to prevent the intercourse, because the actor is holding their

\(^7\) American Law Institute 1985, p. 240.
hands and legs\textsuperscript{79}, but it can also be a situation where the victim is mentally forced to the intercourse by threats of violence, e.g. the actor threatens to kill the victim.

According to subsection 2, the rape offence shall apply also to the sexual intercourse where the actor takes advantage of the victim being unable to defend themselves or to form or express their will because of unconsciousness, illness, disability, state of fear or other helpless state. Thus the rape offence can be based not only on force, violence and threats, but also on taking advantage of a vulnerable victim. The victim needs to be unable to defend themselves or to form or to express their will, so it is not enough that the victim’s ability to do this is only diminished, e.g. being more uninhibited towards the sexual intercourse because of alcohol.\textsuperscript{80}

A good example of this subsection is an unconscious victim, who clearly is unable to meet any of the requirements, to defend themselves or form or express their will.\textsuperscript{81} More problematic, however, could be the cases where the victim can’t express their will, because, for example, of being in a state of fear, which the actor necessarily can’t perceive as well as the victim does.

According to subsection 3, if the rape, in view of the slight degree of the threat or the other circumstances of the offence, is assessed as a whole to be less serious than acts referred in subsections 1 and 2, the actor shall be sentenced to imprisonment for at least 4 months and at most 4 years. Likewise is sentenced the actor, who coerces another into sexual intercourse by a threat other than that referred to in subsection 1, i.e. with a non-violent threat. This kind of threat could be in question when the actor threatens to expose that the victim is having an affair.\textsuperscript{82} The provisions of the subsection 3 do not apply if violence has been used in the rape.

An attempt is also punishable in all these previous offences. According to Section 10(1) of the Finnish Criminal Code, Chapter 20, “sexual intercourse” refers to the sexual penetration, by a sex organ or directed at a sex organ or anus, of the body of another person, or taking the other person's sexual organ into your body.

\textsuperscript{79} Matikka\l a 2014, p. 126.
\textsuperscript{80} Matikka\l a 2014, p. 130.
\textsuperscript{81} Ibid.
\textsuperscript{82} Matikka\l a 2014, p. 127.
The Government Proposal *HE 216/2013* added “anus” in to the definition, so now the definition includes also the cases where there is a sexual penetration directed at anus of another person by a finger or an object, when the previous wording applied only to the cases where a sex organ penetrated the anus of another person.\(^{84}\)

Taking another person’s sexual organ into your body, however, was not a part of the Government Proposal, but the Law Committee of Finnish Parliament added it\(^{85}\), so that the definition would include also the situations where a man’s sex organ is taken into the actor’s mouth.\(^{86}\)

Thus today e.g. taking the penis of an unconscious man into your mouth clearly meets the statutory offence elements of rape. With this addition the definition of the sexual intercourse is today gender-neutral and includes vaginal, anal and oral forms of intercourse between a man and a woman, a man and a man as well as a woman and a woman.

The amended version of aggravated form of rape offence also entered into force on 1.9.2014. Section 2 of the Finnish Criminal Code, Chapter 20, now includes five separate aggravating circumstances. An attempt of aggravated rape is also punishable. The actor convicted of aggravated rape is sentenced to imprisonment for at least 2 years and at most 10 years.

Firstly, an aggravated circumstance is present if a grievous bodily injury, serious illness or a state of mortal danger has been inflicted on the victim. This circumstance as its previous form included the word “intentionally”, but this was removed from the current law. This, however, doesn’t mean that the meaning would have changed, but merely that this term is not required in Finnish criminal law to tell that offences are criminalized only as intentionally committed, since this is the general rule.\(^{87}\)

Secondly, rape is aggravated if the offence has been committed by several people, or if especially considerable mental or physical suffering has been caused to the victim.

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\(^{83}\) HE 216/2013 vp.
\(^{84}\) Matikkala 2014, p. 118.
\(^{85}\) Cf. Matikkala 2014, p. 131 about this kind of situations. Matikkala suggests that these situations were already covered. This book was written before these situations were explicitly added into the law.
\(^{86}\) LaVM 4/2014 vp.
\(^{87}\) See Chapter 2.2.1.
Thirdly, the rape is aggravated if the victim was a child younger than 18 years of age. This aggravating factor was just added to the latest amendment of this offence to protect the children under 18 years of age. Compared to most of other factors, it is rather mechanical to apply, but requires intent in regard to the age of the victim.\textsuperscript{88}

Fourthly, the offence is committed in a particularly brutal, cruel or humiliating manner. Fifthly, a firearm, edged weapon or other lethal instrument is used or a threat of other serious violence is made. Lastly, in all these cases the rape needs to be assessed as aggravated also as a whole. So in some cases it might not be enough that the victim had been under 18 years of age, if there are no other reasons for the rape offence to be considered as aggravated.

If the rape as a whole is not assessed as aggravated, it could be possible that a case where the victim was under 18 years of age would be convicted under subsection 1, 2 or even under subsection 3 of the standard rape offence of Section 1.\textsuperscript{89} The Supreme Court has recently given decision KKO 2013:57\textsuperscript{90} where it ruled that the court always needs to explicitly state whether it has assessed the offence as aggravated as a whole when this kind of overall aggravated assessment is a part of the statutory definition of the offence.\textsuperscript{91}

If the victim of rape offence is under 16 years of age, this act fulfills both rape and (aggravated) sexual abuse of a child, if the actor was aware of the age of the victim.

\section*{3.2.2 Sexual offences against children}

Finnish criminal law has a standard offence of sexual abuse of a child as well as an aggravated form of this offence. According to Section 6(1) of the Finnish Criminal Code, Chapter 20, a person who by touching or otherwise performs a sexual act on a child younger than 16 years of age, this act being conducive to cause harm to the child’s development, or induces the child to perform such an act, shall be convicted of sexual abuse of a child to imprisonment for at least 4 months and at most 4 years.

\textsuperscript{88} HE 216/2013, p. 58.
\textsuperscript{89} HE 206/2013, p. 59.
\textsuperscript{90} KKO 2013:57.
\textsuperscript{91} KKO 2013:57, 8.
According to subsection 2, a person who has sexual intercourse with a child younger than 16 years shall also be sentenced for sexual abuse of a child, if the offence is not aggravated as a whole as stated in the Section 7(1). Similarly shall be sentenced a person who commits an act referred to in subsection 1 or act referred previously in this subsection with a child over 16 but younger than 18 years of age, if the person is a parent of the child or the person is in a position comparable to that of a parent and is living in the same household with the child. An attempt is also punishable.

I have already earlier in this thesis written about the definition of the sexual intercourse.\textsuperscript{92} Sexual act is also defined in Section 10 of the Finnish Criminal Code, Chapter 20. According to its subsection 2, “sexual act” means an act that is sexually relevant considering the actor, the victim and the circumstances of the act.

As we can see in subsections 1 and 2, the victim of this offence needs to be under 16 years of age, or under 18 years of age, if the actor is their parent or comparable to this position and living in the same household with the child. Besides these age requirements, there are no additional requirements that would be have to shown as an evidence of the taking advantage of a child. So the age of the victim generally needs to be under 16 years of age, but naturally the act is deemed more harmful to the child the younger the child is. So, for example, the children of the age of 12 are not considered to be able to give any kind of consent to sexual acts.\textsuperscript{93}

Prior to the amendment that entered into force on 1.6.2011, Section 6 included subsection 3 stating that an act referred to in subsection 1 was not deemed as sexual abuse of a child if there was no great difference in the ages or the mental and physical maturity of the persons involved. Today this exception to the rule is in Section 7a. According to this section, an act is not deemed as sexual abuse of a child under Section 6 or the sexual intercourse form of aggravated sexual abuse of a child under Section 7(1)(1), if it doesn’t violate the sexual sovereignty of the person objected to this act and if there is no great difference in the ages and the mental and physical maturity of the persons involved.

It is noteworthy that in addition to a child’s inviolable sexual sovereignty, all three other requirements need to be met. So we can see that the new definition is clearly

\textsuperscript{92} See Chapter 3.2.1.
\textsuperscript{93} Ojala 2012, p. 120.
more specific and narrower in scope, e.g. it can’t be applied to situations where there is a considerable difference in the ages, but not in the maturity of the persons involved. An age difference over five years has been considered to be a great age difference where this restriction wouldn’t apply. Even with this age difference, the court can still look closer into circumstances of the case and on the act and the relationship the child under 16 years of age had with the actor.

Two different forms can be distinguished of aggravated sexual abuse of a child. First one is sexual intercourse. According to subsection 1(1) of the Finnish Criminal Code, Chapter 20, Section 7, aggravated sexual abuse of a child occurs if a person has sexual intercourse with a child younger than 16, or with a child who is 16 but not yet 18 and the person is the child's parent or in a similar relationship with the child and lives in the same household. In addition to such sexual intercourse, the offence also needs to be assessed as a whole as aggravated. If it is not, the standard offence of sexual abuse of a child in Section 6(2) is applied.

The second form includes three qualified cases of sexual abuse of a child, when a) the victim is a child to whose development the crime is conducive of causing severe harm because of the child's age or level of development; b) the crime is committed in a way that is particularly humiliating; or c) the crime is conducive to causing severe harm to the child because of the particular trust the child has for the person or because of the child's particular dependency of this person. In all these situations, the offence also needs to be assessed as a whole as aggravated.

The first case (a) case is based on the assessment of dangerousness and generally there is more harm the younger the child is. The nature of the act and other circumstances, such as the age of the actor, can be relevant in this assessment, as well. An attempt is also punishable. The person convicted of aggravated sexual abuse of a child shall be sentenced to imprisonment for at least one year and at most 10 years.

96 Ibid.
3.3 Sweden

3.3.1 Rape offences

The definition of rape was recently changed in Sweden, as well. Current Section 1 of the Swedish Penal Code, Chapter 6, entered into force on July 1, 2013. The offence of rape was extended to include also the cases where the victim reacts with passivity, thus it makes no difference whether the victim has resisted or not. The requirement of victim being "in a helpless state" was also replaced with "in a particularly vulnerable situation" (särskilt utsatt situation).

According to Section 1(1), a person who by assault or otherwise by violence or by threat of a criminal act forces another person to have sexual intercourse or to undertake or endure another sexual act that, having regard to the nature of the violation and circumstances in general, is comparable to sexual intercourse, is convicted of rape to imprisonment for at least two and at most six years. So this first subsection concerns cases where the actor has used violence or threats.

According to subsection 2, this shall also apply if a person engages with another person in sexual intercourse or in a sexual act which under the first paragraph is comparable to sexual intercourse by improperly exploiting that the person, due to unconsciousness, sleep, serious fear, intoxication or other drug influence, illness, physical injury or mental disturbance, or otherwise in view of the circumstances in general, is in a particularly vulnerable situation.

Subsection 2 is meant to protect the sexual integrity and the right to decide over one’s own body. So it criminalizes the circumstances where the actor has taken advantage of the victim’s vulnerability. This vulnerability is seen as the reason why the sexual intercourse or a sexual act occurred. So this law is quite similar to the Finnish one.

Section 1 includes also less and more aggravated forms of the offence. According to subsection 3, if in view of the circumstances associated with the offence, an offence provided for in subsection 1 or 2 is considered less aggravated, the actor is convicted of rape to imprisonment for at most 4 years. These kind of less aggravated circumstances can occur, for example, when there is sexual intercourse with a
sleeping person, but no penetration and this sexual intercourse is immediately stopped when the victim has woken up and protested.

According to subsection 4, if a crime provided for in the first or second subsection is considered gross, the actor is convicted of aggravated rape to imprisonment for at least 4 and at most 10 years. In assessing whether the offence was gross, special consideration is given to whether the violence or threat was of a particularly serious nature or whether more than one person assaulted the victim or in any other way took part in the assault or whether the actor exhibited particular ruthlessness or brutality with regard to the method used in the offence or otherwise.

As we can see, the Swedish offence definition of rape is not based on lack of consent. However, questions regarding consent were widely considered in the Swedish government report SOU 2010:71\(^7\). This analysis came into conclusion that the European Human Rights Court (ECHR) judgment on the case of M.C. v. Bulgaria\(^8\) doesn’t mean that member states of the Council of Europe should explicitly include consent in the statutory definitions of rape, when the standards set by the ECHR judgment can be met and non-consensual sexual acts be covered in other ways.\(^9\)

### 3.3.2 Sexual offences against children

According to Section 4(1) of the Swedish Penal Code, Chapter 6, the actor that has sexual intercourse with a child under 15 years of age or with such a child carries out a sexual act which, considering the seriousness of the violation is comparable to sexual intercourse, is convicted of child rape to imprisonment for not less than 2 and not more than 6 years.

According to subsection 2, the same applies to the actor who commits an act referred to in the first subsection of a child from the age of 15 but not 18 and is a descendant of the actor or under the instruction of the actor, or has a similar relationship to the actor, or for whose care or supervision the actor to was responsible because of an authority's decision.

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\(^7\) SOU 2010:71.
\(^8\) M.C. v. Bulgaria, Appl. No. 39272/98, Council of Europe: European Court of Human Rights, 3 December 2003.
\(^9\) SOU 2010:71, p. 203–204.
If the offences referred to in the first or second subsection is considered aggravated, sentenced for aggravated rape of a child to imprisonment for not less than four and not more than ten years. In assessing whether the offence is aggravated the court needs to pay particular attention to whether the actor used violence or the threat of a criminal offence or if more than one abused child or otherwise participated in the assault or if the actor exhibited particular ruthlessness or brutality with respect to the approach or the child's young age or otherwise.

The Swedish Penal Code has a less serious form of this offence, as well. If an offence referred to in Section 4(1) or 4(2) with regard to the circumstances of the crime is considered to be less serious, the actor shall be sentenced for sexual exploitation of children to imprisonment for at most 4 years.

Section 13 of the Swedish Penal Code, Chapter 6, deals with the awareness of the victim’s age. According to this section, there is criminal responsibility for the sexual offences committed against anyone below a certain age, so the responsibility exists also for the actors who had not realized (inte insåg) the victim’s age but had had reasonable grounds to believe (skälig anledning att anta) that their sex partner had not reached that legally required age. This provision will be discussed more later on.

Section 14 states that a person who has committed an offence under Section 5 (sexual exploitation of children) and Section 6 (sexual abuse of children under 15), first paragraph against a child under fifteen years or according to Section 8 (exploitation of children for sexual posing) first subsection or Section 10 (sexual offence against child under 15), first subsection, should not be penalized if it is clear that the offence did not involve any abuse of the child with respect to the slight difference in age and development between the person who committed the offence and the child as well as other circumstances.

So similarly to Finnish criminal law, the Swedish criminal law has a possibility to determine that the conduct otherwise fulfilling the statutory offence elements is not prosecuted in these specific sexual crimes. Next I will take a look at the German law.
3.4 Germany

3.4.1 Rape offences

Section 177 of the German Criminal Code includes the offence of sexual assault by use of force or threats. This offence includes, but is not limited to rape. According to subsection 1, whosoever coerces another person by force, by threat of imminent danger to life or limb, or by exploiting a situation in which the victim is unprotected and at the mercy of the offender, to suffer sexual acts by the offender or a third person on their own person or to engage actively in sexual activity with the offender or a third person, shall be liable to imprisonment of not less than one year. According to Section 38(2), the maximum sentence is 15 years of imprisonment.

Conditional intent is sufficient for this offence. So the actor must have held possible that the victim didn’t consent to the sexual contact. The actor also needs to accept that they can have stopped the victim’s previously started or expected resistance by their behavior, for example by violence, and realize that the victim sees their behavior as a threat. The actor needs to take seriously any form of resistance by the victim. If the actor sees the reluctance of the victim, the actor trusting in good outcome can only have a pipe dream of the consent by the victim. In cases where the actor takes advantage of the vulnerable situation of the victim, they need to be aware of the victim’s vulnerability.

Subsection 2 states that in especially serious cases the penalty shall be imprisonment of not less than two years. This kind of especially serious case typically occurs if the actor performs sexual intercourse with the victim or performs similar sexual acts with the victim, or allows them to be performed on themselves by the victim, especially if these degrade the victim or if they entail penetration of the body (rape). A likewise especially serious case is when more than one person jointly commits the offence.

Subsections 3 and 4 cover even more aggravated forms of the offence with higher sentences. According to subsection 3, penalty shall be imprisonment of not less than

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100 Renzikowski §177, 58 in Joecks and Miebach 2012, p. 1374.
101 Renzikowski § 177, 60 in Joecks and Miebach 2012, p. 1375.
three years if the offender carries a weapon or another dangerous instrument; otherwise carries an instrument or other means for the purpose of preventing or overcoming the resistance of another person through force or threat of force; or by the offence places the victim in danger of serious injury.

Subsection 4 involves the cases where the actor uses the weapon or another dangerous instrument during the commission of the offence, or if the actor seriously physically abuses the victim during the offence, or by the offence places the victim in danger of death. The penalty those these cases shall be imprisonment of not less than 5 years. So the most aggravated form of sexual offence, not leading to the death of the victim, carries a sentence of at least 5 years’ imprisonment.

There is also subsection 5 in Section 177 for the less serious cases. According to this subsection, less serious cases under subsection 1 shall carry imprisonment from six months to five years and less serious cases under subsections 3 and 4 imprisonment from 1 to 10 years.

3.4.2 Sexual offences against children

The standard form of sexual abuse of a child is defined in Section 176(1) of the German Criminal Code. According to this section, the actor that engages in sexual activity with a person under 14 years of age (child) or allows the child to engage in sexual activity with the actor shall be liable to imprisonment from six months to ten years. So the victim needs to be under 14 years of age. The actor needs to be at least 14 years of age, since this is the age of criminal responsibility in Germany.

According to Section 176(2), whosoever induces a child to engage in sexual activity with a third person or to allow third persons to engage in sexual activity with the child shall incur the same penalty. Subsection 3 then includes a more severe penalty, imprisonment of not less than one year for the especially serious cases.

“Sexual activity” in these offences can be seen to include various sexual acts. It can include penetration, but penetration is not required. If the act is not considered obviously sexual, it depends on the objective conditions whether it is considered as sexual activity. This kind of acts can be sitting on the victim and telling that of wanting to ejaculate or uncovering the upper body of a child when talking about
sexual matters. In addition to acts in subsections 1 and 2, which require sexual activity between the actor and the victim, Section 176 also includes forms of offences of sexual abuse of a child where this kind of direct sexual activity is not needed.

According to subsection 4, the actor that (1) engages in sexual activity in the presence of a child; (2) induces the child to engage in sexual activity, unless the act is punishable under subsection 1 or subsection 2; (3) presents a child with written materials (per Section 11(3)) to induce them to engage in sexual activity with or in the presence of the actor or a third person or allow the actor or a third person to engage in sexual activity with them; or (4) presents a child with pornographic illustrations or images, audio recording media with pornographic content or pornographic speech. The sentence for all these offences is imprisonment from 3 months to 5 years.

Lastly, subsection 5 also criminalizes acts where a person supplies or promises to supply a child for an offence under subsections 1-4 or who agrees with another to commit such an offence. These acts shall carry imprisonment from three months to five years. According to subsection 6, an attempt is also punishable, except in offences of subsection 4(3), 4(4) and 5.

Aggravated forms of sexual abuse of a child are set out in Section 176a of the German Criminal Code. There are various aggravating factors in this section. First subsection concerns sexual abuse of a child offences under Section 176(1) and 176(2) and applies when the actor has already been convicted of such offence within the previous five years. Conviction here means the final judgment. If these conditions are at hand, the actor is sentenced to imprisonment of at least one year. So this aggravating circumstance is recidivism and meant to protect children from sexual offenders.

According to subsection 6, any period during which the offender was detained in an institution pursuant to an order of a public authority is not credited to this 5 years term of subsection 1. An offence resulting in a conviction abroad shall be equal to an

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103 Hörlle §184g, 3, in Joecks and Miebach 2012, p. 1615.
offence resulting in a domestic conviction if it under German criminal law would have been an offence under Section 176(1) or (2).

Subsection 2 includes more specific situations. It also concerns sexual abuse of a child offences under Sections 176(1) and 176(2), but the actor needs to be over 18 years of age. If this actor performs sexual intercourse or similar sexual acts with the child, which include a penetration of the body, or allows them to be performed on the actor by the child, the actor shall be sentenced to imprisonment of not less than two years. Similarly are sentenced the actors when the offence is committed jointly by more than one person, or if the actor by their offence places the child in danger of serious injury or substantial impairment of the child’s physical or emotional development.

Subsection 3 includes specific cases where the actor under Section 176(1) to (3) engages or induces the child into sexual activity with the actor or a third person, under 176(4)(1) engages in sexual activity in the presence of the child, under 176(4)(2) presents the child pornographic material or under 176(6) attempts the offences. If the actor in these offences acts as a principal or secondary participant with the intent of making the act the object of a pornographic medium (per Section 11(3)) which is to be disseminated pursuant to Section 184b(1) to (3), the actor is sentenced to imprisonment for at least 2 years.

It is noteworthy that aggravated sexual abuse of a child also has a less serious form possible. According to subsection 4, in less serious cases under subsection 1 concerning the recidivists the penalty shall be imprisonment from three months to five years, and in less serious cases under subsection 2 from one to ten years.

The gravest form of aggravated sexual abuse of a child is set out in subsection 5. According to this subsection, a person who under Sections 176(1) to 176(3) seriously physically abuses the child or places this child in danger of death shall be liable to imprisonment of not less than five years. The sentence is thus the same as in the gravest form of the rape offence in Section 177.

As we have now seen, German criminal law gives the most protection for the children under 14 years of age. However, there is also a separate offence in Section 182 concerning abuse of juveniles. According to Section 182(1), the actor who
abuses a victim under 18 years of age shall be sentenced to imprisonment for at most 5 years.

This abuse can be committed by taking advantage of an exploitative situation by engaging in sexual activity with this victim or suffering this victim to engage actively in sexual activity with the actor, or by inducing the victim to engage in sexual activity with a third person or to suffer sexual acts committed on their own body by a third person. The same penalty shall, according to subsection 2, apply to the actor over 18 years of age who abuses a victim under 18 years of age by engaging in sexual activity with them, or by inducing the victim to suffer sexual acts committed by the actor on their own body for a financial reward.

There are again quite different age requirements in the offence of subsection 3. According to this subsection, the actor over 21 years of age who abuses a victim under 16 years of age shall be sentenced to imprisonment for at most 3 years, or is given a fine. This abuse is committed by engaging in sexual activity with the victim or by causing the victim to engage actively in sexual activity with the actor or by inducing the victim to engage in sexual activity with a third person or to suffer sexual acts committed on their own body by a third person. To be convicted the actor also needs to, by either of these acts, exploit the victim’s lack of capacity for sexual self-determination.

According to subsection 4, attempts of Section 182 offences shall also be punishable. Subsection 5 states that in cases under subsection 3 above the offence may only be prosecuted upon request unless the prosecuting authority considers proprio motu (of their own initiative) that prosecution is required out of special public interest.

There is also a possibility of discharge of Section 182 provisions set out in this section’s subsection 6. In cases under subsections 1 to 3, the court may order a discharge under these provisions, if in consideration of the conduct of the person against whom the offence was committed, the harm of the offence is of a minor nature.
3.5 The Netherlands

3.5.1 Rape offences

Dutch criminal law includes a wide range of sexual offences. The Dutch Penal Code has been detailed with sexual offences since its drafting.\textsuperscript{104} I will now take a brief look on three of these sexual offences, rape, sexual assault and indecent assault.

The offence of rape is defined in Article 242 of the Dutch Penal Code. According to this section, it is an offence of rape to force another person into allowing an act consisting of or including sexual penetration of the body, by an act of violence, threat of violence or threat of another act. The actor of this offence is sentenced to imprisonment of up to 12 years or given a fine of the fifth category.

Both men and women can be actors and victims in this offence. In Dutch criminal law the term “sexual penetration” doesn’t only mean sexual intercourse. The Supreme Court has had an important role defining the limits of this term. Oral sex\textsuperscript{105} can also fulfill the offence of rape, and even active French kissing has been seen in the Supreme Court case \textit{NJ 1998, 781}\textsuperscript{106} as sexual penetration and considered as rape. However, in recent case \textit{NJ 2013, 437}\textsuperscript{107} the Supreme Court ruled that this was no longer the case.

Sexual assault including penetration is defined in Article 243 of the Dutch Penal Code. This section makes it a criminal offence to commit sexual acts that include penetration of the body where the victim is in a state of unconsciousness, impaired consciousness or physical incapability, or where the victim’s impaired mental development leaves them unable to give consent or indicate their resistance to these sexual acts. The actor of this offence is sentenced to imprisonment of up to 8 years or given a fine of the fifth category.

Lastly, Article 246 of the Dutch Penal Code states that the actor is guilty of indecent assault (\textit{aanranding van de eerbaarheid}) if they by violence or threat of violence or by other act force another person to commit or tolerate indecent acts (\textit{ontuchtige}
handelingen). The actor of this offence is sentenced to imprisonment of at most 8 years or given a fine of fifth category.

3.5.2 Sexual offences against children

In Dutch criminal law there is a specific offence criminalizing sexual acts with a child under 12 years of age, as well as an offence criminalizing indecent or sexually abusive acts with a child older than 12 but younger than 16 years of age. I will now take a look at these.

Sexual assault on a child is criminalized in Article 244 of the Dutch Penal Code. According to this article, it is a criminal offence to perform sexual acts comprising or including penetration of the body of the victim under the age of 12. So this offence includes penetration, as well. The only other requirement is that the victim is under 12 years of age, so no violence or taking advantage is needed besides the young age. The consent of this victim can’t negate the intent. The actor of this offence is sentenced to imprisonment for up to 12 years or given a fine of the fifth category.

There is definite list of indecent or sexually abusive acts (ontuchtige handelingen). When the law was changed, it was stated in the explanatory memorandum that this term covers all acts that have a sexual nature and which are in conflict with the social and ethical standards, but are still not extraordinarily horrific. It depends largely on the circumstances and context as well as on the intent of the actor whether the act is seen as indecent. Under Article 246, for example, a victim having to tolerate the actor touching briefly a breast of the victim and saying “nice tits” has been seen as an indecent act.

Article 245 of the Dutch Penal Code deals with cases of extramarital penetration, when the victim is older than 12 but younger than 18 years of age. An actor that performs indecent acts comprising or including sexual penetration of the body of this kind of child, and is not married to this child, shall be sentenced to imprisonment for at most 8 years or given a fine of the fifth category.

109 HR 13 December 2005, LJN AU4825.
Indecent act can also be charged under Article 247 of the Dutch Penal Code in cases
where the actor performs indecent acts with a victim whom the actor knows to be
unconscious or physically unable to resist or to be suffering from such a degree of
mental defect or mental disease that the victim is incapable or not sufficiently
capable of exercising or expressing will in the matter or of offering resistance,
performs indecent acts.

This offence of indecent act is also at hand when the actor performs indecent acts
with a person under 16 years of age or induces this person to perform or submit to
these acts with a third party. Like in Article 245, offences of indecent acts with a
person under 16 year-old apply only if the actor and this child are not married. The
actor liable for the offence of indecent act under Article 247 is sentenced to
imprisonment of up to 6 years or is given a fine of the fourth category. Next I will
take a look at the English sexual offences.

3.6 England

3.6.1 Rape offences

The current English sexual crimes legislation is also relatively new. According to the
old law, Sexual Offences Act 1956 and its Section 1(2), a man had committed rape if
he had had sexual intercourse with another person (whether vaginal or anal) who at
the time of the intercourse had not consented to it (actus reus); and at the time he had
known that the person had not consented to the intercourse or had been reckless as to
whether that person had consented to it (mens rea). Thus recklessness used to be the
threshold of mens rea.

According to the new law, Sexual Offences Act 2003 and its Section 1(1), an act
constitutes a rape offence, if person (A) has intentionally penetrated with his penis
the vagina, anus or mouth of another person (B) without B’s consent if A did not
reasonably believe that B consented. The requirement of penis penetration means
that the offence has to be committed by a man. The victim, however, can be either a
man or a woman. After oral penetration with a penis was also added into the rape
definition of the new law, it now includes vaginal, anal and oral penetration. Only
man can commit rape as a principal offender\textsuperscript{110}, but both man and woman can be accomplices to rape. Rape can be committed against a male or female.\textsuperscript{111}

Thus the threshold of mens rea has changed in the new law, which has left recklessness out of the offence definition and mens rea is now a question of reasonable belief. So what is this “reasonable belief”?

According to subsection 2, whether a belief in consent is reasonable is to be determined having regard to all the circumstances, including any steps A has taken to ascertain whether B consents. According to subsection 3, sections 75 and 76 of the Sexual Offences Act apply to rape offence. These sections deal with evidential (Section 75) and conclusive (Section 76) presumptions about consent. These presumptions can be used either as a presumptions of the lack of consent or as presumptions of the lack of reasonable belief of the victim’s consent.

There is a reversed burden of proof in the question of consent and mens rea in certain circumstances, which are included under Section 75. So under these circumstances the actor can rebut the presumption that this act was a rape without consent and without reasonable belief that the consent existed. However, under the circumstances under Section 76, the actor can’t rebut the presumption that the victim didn’t consent, so in these cases the actor has had the required mens rea for rape offence.\textsuperscript{112}

In this new definition of rape, unreasonable, but honest mistake about consent does not negate mens rea anymore, like it did in the case \textit{DPP v. Morgan}\textsuperscript{113}, because person A can only lack mens rea, if their mistake about consent has been reasonable. In Morgan case Mr. Morgan had brought three other men to his house, told these men that his wife would act like she didn’t consent but would still consent to sexual intercourse with them. The men had then had sexual intercourse with Mrs. Morgan without her consent and with her clearly protesting to the intercourse. The House of Lords concluded that the men had made an unreasonable, but honest mistake about whether Mrs. Morgan had consented to the sexual intercourse with them.

\textsuperscript{110} Ashworth and Horder 2013, p. 340.
\textsuperscript{111} Ibid.
\textsuperscript{112} Ashworth and Horder 2013, p. 347.
\textsuperscript{113} [1976] AC 182.
Besides the offence of rape, there is another serious sexual offence in the Sexual Offences Act, assault by penetration. Section 2 of the Sexual Offences Act covers the situation where a person (A) intentionally penetrates the vagina or anus of another person (B). This penetration can be done by a part of A’s body, e.g. a finger\textsuperscript{114} but also with anything else, e.g. a bottle\textsuperscript{115}. However, this penetration needs to be sexual.

According to Section 78 of the Sexual Offences Act, penetration, touching or any other activity is sexual if “a reasonable person would consider that whatever its circumstances or any person’s purpose in relation to it, it is because of its nature sexual, or because of its nature it may be sexual and because of its circumstances or the purpose of any person in relation to it (or both) it is sexual.” This excludes, for example, intimate searches and medical procedures\textsuperscript{116}, although even proper medical examination of penis or vagina could be seen as sexual, if there is no necessity or consent\textsuperscript{117}.

In addition to this, the offence of assault by penetration also has the same mens rea elements as in the offence or rape, so it requires that B does not consent to the penetration and A does not reasonably believe that B consents. According to subsection 3, Sections 75 and 76 apply also to this offence. Unlike in rape, a male or a female can commit this offence and it can be committed against a male or a female.

Section 3 criminalizes the offence of sexual assault. According to Section 3(1), a person (A) commits this offence if they intentionally touch another person (B), the touching is sexual, B did not consent and A did not reasonably believe that B consented to this act. So Section 78 applies here, as well, when determining whether the touching could be considered as sexual. The mens rea elements regarding consent, reasonable belief, any steps A has taken to find out whether B consented, and Sections 75 and 75 about the presumptions all apply in this offence too.

According subsection 2, the actor guilty of sexual assault is liable, on summary conviction to imprisonment for at most 6 months or a fine not exceeding the statutory

\textsuperscript{114} Ashworth and Horder 2013, p. 343.
\textsuperscript{115} Ibid.
\textsuperscript{116} Herring 2004, p. 415.
\textsuperscript{117} Ashworth and Horder 2013, p. 344.
maximum or both; or on conviction on indictment, to imprisonment for at most 10 years.

There are also another sexual offences in the Sexual Offences Act, for example, the offence of causing a person to engage in sexual activity without consent under Section 4. I will not look closer to this, but only state that this offence requires intentionally causing, sexual activity, lack of consent and lack of reasonable belief of consent. There are same provisions concerning consent as are in offences of Sections 1–3. I will now move to sexual offences specifically targeted against children.

### 3.6.2 Sexual offences against children

In English criminal law there is a specific offence of rape of a child under 13. According to Section 5 of the Sexual Offences Act, a person commits this offence if he intentionally penetrates the vagina, anus or mouth of another person with their penis, and this other person is under 13. According to subsection 2, a person guilty of the offence of rape of a child under 13 is liable, on conviction on indictment, to imprisonment for life. So we are speaking of a really severe sentence.

As we can see, actus reus of this offence is the same as is in the rape offence under Section 1. So the penetration with a penis can be vaginal, anal or oral. However, there are no similar mens rea elements in this rape of a child under 13 years of age. Only the penetration itself needs to be intentional.

Similarly is constructed the offence of assault of a child under 13 by penetration. According to Section 6(1) of the Sexual Offences Act, a person commits this offence by intentionally penetrating the vagina or anus of another person with a part of his body or anything else if this penetration is sexual and the other person is under 13. So the actus reus here is similar to the offence of assault by penetration under Section 2 of the Sexual Offences Act, but Section 6 doesn’t have elements of consent.

According subsection 2, the person guilty of an offence assault of a child under 13 is liable, on conviction on indictment, to imprisonment for life. So the sentence is the same as is for the offence of rape of a child under 13.

Section 7 criminalizes the offence of sexual assault of a child under 13. According to Section 7(1), a person commits this offence if they intentionally touch another
person, the touching is sexual, and the other person is under 13. So the touching needs to be intentional as well as of sexual nature. Like in Section 3, this is determined with having regard to Section 78 of the Sexual Offences Act.

According subsection 2, the actor guilty of this offence is liable, either on summary conviction to imprisonment for at most 6 months or a fine not exceeding the statutory maximum or these both; or they can be liable on more serious cases, conviction on indictment, to imprisonment for at most 14 years. Thus there is a very wide sentencing range in this offence.

In addition to these sexual offences with a child as a victim, in the Sexual Offences Act there is also, for example, an offence of causing or inciting a child under 13 to engage in sexual activity under Section 8. This requires intentionally causing or inciting, sexual activity and that the victim is under 13 years of age. Next I will cross the Atlantic to the United States.

3.7 United States

3.7.1 Rape offences

As was stated earlier, the Model Penal Code has also various substantive criminal law provisions. Article 213 of the Model Penal Code deals with sexual offences. However, it is good to remember that the Model Penal Code was accepted in 1962 and last time it was updated in 1981, so these provisions aren’t very modern. I will however take a look at these, since it’s very good to see the similarities and differences to the laws of the countries that I have now already covered in this thesis. Firstly, there are in Section 213.0 some definitions, which apply to sexual offences under Article 213, unless a different meaning plainly is required in the offence.

According to 213.0(2), the term "sexual intercourse" can be mean oral (per os) or anal (per anum) intercourse, with some penetration however slight it is; emission, however, is not required. According to subsection 3, the term "deviate sexual intercourse" means oral or anal intercourse between human beings who are not husband and wife. It also applies to as any form of sexual intercourse with an animal.
The offence of rape is criminalized in Section 213.1. According to 213.1(1), a male who has sexual intercourse with a female, other than his wife, is guilty of rape, if he compels her to submit by force or by threat of imminent death, serious bodily injury, extreme pain or kidnapping, to be inflicted on anyone. So firstly, the rape offence can be committed by force or by serious threats.

Rape also occurs if the male actor has substantially impaired her power to appraise or control her conduct by administering or employing without her knowledge drugs, intoxicants or other means for the purpose of preventing resistance; or if the female victim is unconscious or less than 10 years old. All these conditions are about the vulnerability of the victim. We can also see from these definitions that only a man can commit rape and it can only be committed against a woman.

Rape is a felony of the second degree, but as an exception it is a felony of the first degree, if the actor inflicted a serious bodily injury upon anyone, or the victim was not a voluntary social companion of the actor upon the occasion of the crime and had not previously permitted him sexual liberties.

There is also the offence of gross sexual imposition in Section 213.1(2). This offence requires that a male has sexual intercourse with a female, other than his wife, by compelling her to submit by any threat that would prevent resistance by a woman of ordinary resolution; or knowing that she suffers from a mental disease or defect which renders her incapable of appraising the nature of her conduct; or knowing that she is unaware that a sexual act is being committed upon her or that she submits because she mistakenly supposes that he is her husband.

Section 213.2 criminalizes the offence of deviate sexual intercourse by force or imposition. Offence by force or its equivalent applies when a person engages in deviate sexual intercourse with another person, or causes another to engage in deviate sexual intercourse. In addition to this, the offence requires that one of the four acts or conditions set already in the offence rape applies, so compelling another, impaired victim, victim’s unconsciousness or victim’s age being under 10 years.
The offence of deviate sexual intercourse can also be committed by other imposition. According to subsection 2, a person who engages in deviate sexual intercourse with another person, or who causes another to engage in deviate sexual intercourse, commits a felony of the third degree, if the actor compels the other person to participate by any threat that would prevent resistance by a person of ordinary resolution; or the actor knows that the other person suffers from a mental disease or defect which renders the victim incapable of appraising the nature of the actor’s conduct; or the actor knows that the other person submits because the victim is unaware that a sexual act is being committed upon them.

Lastly, there is also the offence of sexual assault, set out in Section 213.4. This offence criminalizes the sexual contact with another person, not their spouse, and causing this other to have sexual contact with the actor. According to subsection 2, this required “sexual contact” refers to any touching of the sexual or other intimate parts of the person for the purpose of arousing or gratifying sexual desire.

One of the eight circumstances had to apply to this sexual contact in order the offence to be fulfilled. Firstly, the actor knew that this sexual contact was offensive to the other person. Secondly, the actor knew that the victim suffered from a mental disease or defect, which rendered the victim incapable of appraising the nature of their conduct. Thirdly, the actor knew that the victim was unaware that a sexual act was being committed. Fourthly, the person was less than 10 years old.

Fifthly, the actor had substantially impaired the other person's power to appraise or control their conduct, by administering or employing without the other's knowledge drugs, intoxicants or other means for the purpose of preventing resistance.

Sixthly, the other person was less than 16 years old and the actor was at least 4 years older than this person. Seventhly, the other person was less than 21 years old and the actor was their guardian or otherwise responsible for general supervision of their welfare. Lastly, the other person was in custody of law or detained in a hospital or other institution and the actor had supervisory or disciplinary authority over him.
3.7.2 Sexual offences against children

As we just saw in the previous chapter, the age of the victim is important already in many general sexual offences, especially when the victim was under 10 years of age. Section 213(6)(1) includes two provisions concerning the mistake as to age of the victim in sexual offences. If the offence requires that the victim is under 10 years of age, the actor has no defence of mistake when they didn’t know the child’s age or reasonably believed the child to be older than 10. These offences are rape, deviate sexual intercourse by force or imposition and sexual assault. Thus there is a strict liability in regard to the age in these offences when the victim is under 10 years.

Second provision concerns the offences where the victim needs to be older than 10 years of age. In these cases the actor has a defence of mistake as to the child’s age, if they can prove by a preponderance of the evidence that they reasonably believed the child to be above the critical age. This provision applies to offences of corruption of minors and seduction and sexual assault, if the victim is under 16 years of age and the actor is at least four years older. This provision applies also to sexual assault, if the victim is under 21 years of age and the actor is victim’s guardian or otherwise responsible for general supervision of their welfare. Thus the actor needs to rebut the presumption of culpability in these cases.

In addition, there is also the offence of corruption of minors and seduction in Section 213.3 of the Model Penal Code. According to Section 213.3(1), this offence can apply when a male has sexual intercourse with a female other than his wife, or when any person engages in deviate sexual intercourse or causes another to engage in deviate sexual intercourse.

In addition to sexual intercourse or deviate sexual intercourse, one of the four circumstances has to apply. The offence is fulfilled if the victim is less than 16 years of age and the actor is at least 4 years older; or if the victim is less than 21 years of age and the actor is their guardian or otherwise responsible for general supervision of their welfare; or if the victim is in custody of law or detained in a hospital or other institution and the actor has supervisory or disciplinary authority over him; or if the victim is a female who is induced to participate by a promise of marriage which the actor does not mean to perform.
I have now finished with this chapter and with the substantive laws concerning sexual offences. In the next chapter I will change to somewhat different kind of violence, even more clearly physical and even life-threatening type of offences.

4 Intentional homicides and assaults

4.1 Introduction

In Chapter 4 of my thesis I will continue my research with the substantive laws and take a closer look into the substantive laws concerning homicides and assaults. Especially the latter might bring differences in forms and requirements among the different countries. Even more interesting is what is needed for the intentional forms of homicides. I will again start with Finland and the Finnish Criminal Code, where the applicable criminal offences and their statutory offence elements can be found.

4.2 Finland

4.2.1 Intentional homicides

Chapter 21 of the Finnish Criminal Code deals with homicides, assaults and other bodily injuries. Finnish criminal law has a clear tripartite model of intentional homicide, with a standard homicide offence, an aggravated homicide offence and a less serious homicide offence. There is also a homicide committed negligently.

The standard homicide offence in Finland is voluntary manslaughter (tappo), briefly defined in Chapter 21, Section 1. According to this section, a person who kills another shall be sentenced for voluntary manslaughter to imprisonment for a fixed period of at least eight years. An attempt is also punishable. So there are not many statutory elements here, only the killing of another person. The death of this person needs to be a causal and objectively foreseeable consequence of the actor’s act.121

This killing needs to be intentional. It can be the actor’s aim to kill, but intent also applies when it was certain to the actor they would cause the death of another. However, the death rarely is certain to occur. So more important and easier to prove is the lowest level of intent, probability-intent, where the death of another person

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121 Matikkala 2014, pp. 195–196. See also KKO 1998:2, where the death by cardiac arrest was not seen as a foreseeable consequence of short-term strangling.
needs to have been a quite probable consequence of the actor’s act. ¹²² It is also noteworthy, that if the actor thought they were killing a deer but killed another person, they are acquitted of voluntary manslaughter, but can be convicted of involuntary manslaughter. ¹²³ However, if the actor wants to kill person A, but kills person B, the actor is still convicted of voluntary manslaughter, since both A and B have the same value. ¹²⁴

Murder (murha) is a voluntary manslaughter under aggravating circumstances and generally needs to be premeditated and/or brutal. According to Chapter 21, Section 2, a manslaughter can be a more aggravated offence, murder, if it is premeditated, committed in a particularly brutal or cruel manner, committed by causing serious danger to the public, or committed by killing a public official on duty maintaining public order or public security, or because of an official action. The offence also needs to be aggravated when assessed as a whole. The actor of murder offence shall be sentenced to life imprisonment. An attempt is also punishable.

Murder requires the same intent as voluntary manslaughter, but the aggravating factor of killing another person because of an official action requires purpose-intent in regard to the motive of killing this person. ¹²⁵ The aggravating factor of premeditation should not be, however, seen to mean that only purpose-intent would apply. ¹²⁶ The aggravating factor of particularly brutal or cruel manner requires that the actor knows what facts make the manner to be assessed as brutal or cruel. ¹²⁷

Killing (surma) is a voluntary manslaughter under mitigating circumstances. According to Section 3 of the Criminal Code, Chapter 21, if the manslaughter, in view of the exceptional circumstances of the offence, the motives of the offender or other related circumstances, when assessed as a whole, is to be deemed committed under mitigating circumstances, the actor is convicted of killing to imprisonment for at least 4 and at most 10 years. An attempt is also punishable.

¹²² E.g. KKO 1984 II 142 and KKO 2004:120. Of cases that the death wasn’t quite probable, e.g. KKO 1988:21 and KKO 1998:2.
¹²⁴ Ibid.
¹²⁶ Matikkala 2014, p. 211.
If the actor has killed the victim, because the victim has with his firm will asked the actor to do it, so a case of active euthanasia, this situation could be considered as the offence of killing instead of voluntary manslaughter.\textsuperscript{128} The exceptional circumstances can be, for example, when the actor has been strongly provoked to act or when the killing has felt for the actor to be the only way out of the situation.\textsuperscript{129}

There is also the intentional offence of infanticide in Section 4 of the Criminal Code, Chapter 21. I won’t, however, now go into that offence in my thesis, but continue with non-lethal offences, assaults, which can also sometimes lead to death, but with the actor being convicted only of aggravated assault and negligent manslaughter.

\subsection*{4.2.2 Intentional assaults}

Section 5 of the Criminal Code, Chapter 21, criminalizes assault (\textit{pahoinpitely}). A person shall be convicted of assault, if they employ physical violence on the victim, or, without such violence, injures the health of the victim, causes pain to the victim or renders the victim unconscious or into a comparable condition. The sentence for assault can be a fine or imprisonment for at most 2 years. According to subsection 2, an attempt is also punishable.

The violence needs to be physical, but it doesn’t need to wound or injure the victim.\textsuperscript{130} The other possibility is to injure the health, cause pain or render the victim unconscious. According to the Government Proposal \textit{HE 94/1993}, infecting another person with a disease by “caressing” (\textit{hyväilyin}) can be assault, if there is no consent to do this.\textsuperscript{131} This fact can be used HIV-infection exposure cases, which I will discuss more later on in this thesis.

The offence of assault needs to be intentional, so either the violence or injuring needs to be intentional. The probability-intent is enough. If the actor had injured the victim, but hadn’t considered the injury as a quite probable consequence of their act, they can only be convicted of the offence of causing an injury under Section 10.\textsuperscript{132}

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\textsuperscript{128} HE 94/1993, p. 94.
\textsuperscript{129} Lappi-Seppälä in Lappi-Seppälä et al. 2009, p. 499.
\textsuperscript{130} Matikkala 2014, p. 231.
\textsuperscript{131} HE 94/1993, p. 95–96.
\end{flushright}
Section 6 deals with an aggravated form of assault (törkeä pahoinpitely). This is at hand, when grievous bodily injury or serious illness is caused to the victim or the victim is placed in mortal danger, or the offence is committed in a particularly brutal or cruel manner, or a firearm, edged weapon or other comparable lethal instrument is used in the assault. The offence also needs to be aggravated when assessed as a whole. The actor is convicted of aggravated assault to imprisonment for at least 1 year and at most 10 years. According to subsection 2, an attempt is also punishable.

The lowest level of intent is enough in the aggravated form of assault, too. The actor needs to have intent also with regard to the aggravating factors. It is generally seen that the victim can’t give effectively their consent to aggravated assault, as opposed to standard assault. So the victim might not be able to give their consent to the exposure, or rather to the transmission, of HIV either, if HIV-infection is considered as a serious illness.

If the actor has placed the victim in mortal danger, but not considered their death as quite probable, the offence of aggravated assault applies, but if the actor has considered the death as a quite probable consequence of their act, this is a question of attempted voluntary manslaughter. This threshold is also important in my thesis. In the cases of stabbing another person the assessment depends where the victim was hit, but more problematic assessment might arise, for example, if the actor has driven with a vehicle towards the victim. But first we will go now to Sweden.

4.3 Sweden

4.3.1 Intentional homicides

Chapter 3 of the Swedish Penal Code deals with crimes against life and health. According to Chapter 3, Section 1, the actor that takes the life of another shall be convicted of murder (Mord) to imprisonment for at least 10 years or for life. Thus in Sweden the offence of murder is the standard offence for killing another person. Unlike in Finland, it doesn’t have a mandatory sentence of life imprisonment.

134 For the chances of transmitting HIV and how HIV-cases are dealt in criminal law, see Chapter 6.6.
136 Ibid.
According to the Supreme Court decision NJA 2007, s. 194, the life imprisonment is used for the most serious and brutal cases.

Murder needs to be intentional. It doesn’t require that it was the actor’s purpose to kill another. The offence is also intentional when the actor was certain that it would occur as a consequence of their act, but also when they foresaw it as a possible consequence and was indifferent to this consequence.

According to Section 2, if in view of the circumstances that led to the act or for other reasons, the offence referred to in Section 1 is considered to be less serious, the actor shall be convicted of manslaughter (Dråp) to imprisonment for at least 6 and at most 10 years. Similarly to murder, manslaughter needs to be intentional. The lowest level of intent is enough. The higher levels of intent might usually lead to conviction of murder instead of manslaughter.

The cases where the victim was related to the actor and/or was defenseless against the actor, are rarely considered to be less serious. Rather those are aggravating factors that might lead to life imprisonment for murder. There are also some mitigating factors in Section 3 of the Swedish Penal Code, Chapter 29, that might lead to less severe sentence. In the Supreme Court case NJA 2013, s. 376, the actor would have been otherwise convicted to life imprisonment, but their sentence was reduced due to mental disorder at the time of the offence of murder.

There is also the intentional offence of infanticide in Section 3. However, unlike in Finland, there is no third intentional homicide in Sweden. The offence of manslaughter already is an intentional homicide offence under mitigating factors.

According to Rung, the actor that has acted having foreseen the risk of death of another person as a consequence of their act is considered to have been indifferent not just to this risk but also to this consequence. This would lead to the conviction of murder in all serious assaults cases that have led to death of another person.

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137 NJA 2007, s. 194.
138 Cf. see NJA 1985, s. 10 and NJA 2002, s. 116.
139 NJA 2013, s. 376.
In the case *NJA 2004, s. 479*

In the case *NJA 2004, s. 479*, the Supreme Court considered whether the intent of indifference should be applied to the case. In this case a 15-year old actor P had stabbed the victim G with a knife in the face, neck and back. The first stab was severe, but the third one was life threatening and would have led to G’s death if the medical care wouldn’t have arrived on time.

According to the Supreme Court, it was not clear how likely P had considered G’s death and that there was no evidence that P had yet reached such development and experience that he could know that at least the third stab had a substantial risk of G’s death. The Supreme Court convicted P of aggravated assault and not of attempted murder.

### 4.3.2 Intentional assaults

The offence of assault (*misshandel*) is defined in Section 5 of the Swedish Penal Code, Chapter 3. According to this section, a person commits assault if they inflict bodily injury, illness or pain upon another person or renders the victim powerless or in a similar helpless state. The actor convicted of this offence shall be sentenced to imprisonment for at most 2 years or, if the crime is petty, to a fine or imprisonment for at most 6 months. Thus the statutory definition doesn’t include, unlike the Finnish offence of assault, the cases of pure physical violence without injury, illness or pain.

If the offence referred to in Section 5 is considered aggravated, the sentence for aggravated assault (*grov misshandel*) shall, according to Section 6, be imprisonment for at least 1 year and at most 10 years. According to Section 6(2), in assessing if the offence is aggravated, special consideration shall be given to whether the act constituted a mortal danger or whether the offender inflicted grievous bodily harm or severe illness or otherwise displayed particular ruthlessness or brutality.

Unlike in Finland, in Swedish criminal law there is an explicit provision concerning consent under Section 7 of the Swedish Penal Code, Chapter 24. According to this section, an act committed with the consent of the person towards whom the act was directed, constitutes a crime only if the act, having regard to the injury, violation or danger which it involved, its purpose, and other circumstances, is indefensible (*oförsvarlig*). Pain and mild injury has been considered to be under this provision.

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141 *NJA 2004, s. 479.*
but more severe injuries not. For example, consensual cutting another person’s forearm with a piece of glass has not been considered to fit under this section.142

4.4 Germany

4.4.1 Intentional homicides

Chapter 16 of the German Criminal Code deals with offences against life, including murder and manslaughter. Like Finnish criminal law, German criminal law has a tripartite model of intentional homicide, with a standard homicide offence, an aggravated homicide offence and a less serious homicide offence.

Most serious homicide in Germany is a murder (Mord), where killing needs to be committed under specific aggravating circumstances. According to Section 211, whosoever commits murder under the conditions of this provision shall be liable to imprisonment for life. A murderer under this provision is any person who kills a person for pleasure, for sexual gratification, out of greed or otherwise despicable motives, by stealth or cruelly or by means that pose a danger to the public or in order to facilitate or to cover up another offence.

Dolus eventualis is generally enough for the offence of murder, but killing another for pleasure requires direct intent, because an actor’s purpose needs to be killing the victim for killing’s sake.143 The intent to kill under “in order to facilitate or to cover up another offence” can be dolus eventualis, but the intent to facilitate or to cover up another offence needs to be direct intent.144

A standard homicide offence in Germany is a voluntary manslaughter (Totschlag) in Section 212. According to this section, whosoever kills a person without being a murderer under Section 211 is convicted of manslaughter and is sentenced to imprisonment of not less than 5 years. In especially serious cases the penalty shall be imprisonment for life.

A less serious homicide offence is voluntary manslaughter under mitigating circumstances (Minder schwerer Fall des Totschlags). According to Section 213, if

142 RH 2009:47.
143 Bohlander 2009, p. 190.
144 Bohlander 2009, p. 191.
the killer under Section 212 was provoked to rage by maltreatment inflicted on them or a relative, or was seriously insulted by the victim and immediately lost self-control and committed the offence, or in the event of an otherwise less serious case, the penalty shall be imprisonment from 1 to 10 years.

A lesser homicide offence is also mercy killing or killing at the request of the victim (Tötung auf Verlangen). According to Section 216, if a person is induced to kill by the express and earnest request of the victim the penalty shall be imprisonment from six months to five years. Thus this concerns the cases of active euthanasia. An attempt is also punishable.

### 4.4.2 Intentional assaults

Chapter 17 of the German Criminal Code deals with offences against the person, including causing bodily harm (Körperverletzung). This is criminalized in Section 223 of the German Criminal Code and requires physically assaulting or damaging the health of another person. The actor of this offence is sentenced to imprisonment for at most 5 years or given a fine.

Section 224 of the German Criminal Code defines the offence causing bodily harm by dangerous means (gefährliche Körperverletzung). According to this section, bodily harm is caused by dangerous means if its caused by administering poison or other noxious substances, using weapons or other dangerous instrument, acting by stealth, acting jointly with another, or by methods that pose a danger to life. The sentence can be imprisonment from 6 months to 10 years. If the case is less serious, the range is from 3 months to 5 years.

An even more serious offence is causing grievous bodily harm (schwere Körperverletzung) under Section 226. This requires that the injury has resulted in the victim losing their sight in either or both eyes, hearing, speech or ability to procreate; losing or permanently losing the ability to use an important member; or being permanently and seriously disfigured or contracting a lingering illness, becoming paralyzed, mentally ill or disabled. The actor in these cases shall be sentenced to imprisonment from 1 to 10 years. According to subsection 3, in less serious cases the range shall be from 6 months to 5 years.
The offence requires intent and conditional intent is enough for conviction. However, the level of intent is an aggravating according to subsection 2, which states that if it was the actor’s purpose (absichtlich) to cause the result or if they caused it knowingly (wissentlich), the minimum sentence is 3 years of imprisonment. Unless this kind of situation is still considered as a less serious case, when the sentence shall be, according to subsection 3, from 1 to 10 years. So here we can see a case of statutory definition where the higher levels of intent lead to mandatory higher minimum sentences.

The offence of female genital mutilation (Verstümmelung weiblicher Genitalien) under Section 226a is quite a new offence in German Criminal Code, added in July 2013. Such specific offence doesn’t exist in Finnish or Swedish laws. This offence applies only to women, so male circumcision is excluded.

Lastly, the offence of infliction of bodily harm causing death (Körperverletzung mit Todesfolge) is criminalized in Section 227. This concerns inflictions of bodily harm under Sections 233 to 226a. The actor causing the death through such harm is convicted to imprisonment for a minimum of 3 years, or in less serious cases to imprisonment from 1 to 10 years.

Noteworthy is the provision under Section 228 concerning consent, which kind of explicit consent exception can’t be found in the Finnish Criminal Code. According to this section, the actor that has caused bodily harm with the consent of the victim shall be deemed to act lawfully. The exception to this are the cases where this act has violated public policy (guten Sitten verstößt), in these cases the consent is irrelevant. So the defence by consent can be seen as broader than the Swedish one.

What is this public policy restriction? Most probably included are at least the cases where the harm has led to the victim’s death or has created concrete endangerment to their life, like in a German case, where the victim was consensually tied to bed, poured with three liters of gasoline and where the victim then asked the actor to play

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145 BGH 22.4.2005 – 2 StR 310/04. In this case the actor, with consent, killed and ate the victim. This act clearly doesn’t fit under the German consent provision.
with a lighter. The gasoline caught fire and the victim died. This is an interesting
case concerning the conditional intent, too.

4.5 The Netherlands

4.5.1 Intentional homicides

According to Article 287 of the Dutch Penal Code, a person that intentionally
deprives another of life is guilty of voluntary manslaughter (doodslag), which is
punishable by imprisonment not exceeding 15 years or a fine of the fifth category.
Thus this article prohibits general killing.

Article 289 of the Penal Code prohibits murder (moord), which is killing with
intention and premeditation (opzettelijk en met voorbedachten rade). A sentence for
murder can be imprisonment for life or up to 30 years, or a fine of the fifth category.
So premeditation is the aggravating factor in the Netherlands and the sentence for
murder is much more severe than what it is under Article 287. According to
Blomsma, this is based on the idea that the actor shows a higher degree of free
decision, control and danger when the actor can have planned and weighed their
motives and directed how the events will go. There is a clear contrast to situations
where the act has been done impulsively. According to NJ 2000, 605 the
requirement of premeditation means that it is sufficient that the actor had time to
reflect on the taking the decision, the opportunity has existed and the actor has made
the decision realizing the significance and consequences of their intended act.

Article 293 of the Penal Code criminalizes killing another person at this person’s
request. According to this article, the actor that intentionally terminates the life of
another person, at this person’s explicit and earnest request, shall be sentenced to
imprisonment for at most 12 years or given a fine of the fifth category. There are
specific requirements that have to be fulfilled so that physicians are not culpable
under this active euthanasia offence.

According to subsection 2, an act of killing is not punishable, when it was committed
by a physician acting with the requirements of due care, which are in Article 2 of the

146 BGH 20.6.2000 – 4 StR 162/00.
147 Blomsma 2012, p. 45.
Termination of Life on Request and Assisted Suicide Act. According to that article, these requirements include, for example, being convinced that person’s request to die is voluntary and carefully considered, as well as that the suffering is unbearable and there are no prospects of improving.

The physician also needs to report the cause of death to the municipal coroner in accordance with Article 7, second subsection, of the Burial and Cremation Act. The provisions concerning physician-assisted suicide entered into force on April 1, 2002.\textsuperscript{149} It was tested already in December 2002, when the Supreme Court upheld the conviction of a physician, who had given lethal pills to an 86-year old patient tired of living. However, he didn’t get any sentence.\textsuperscript{150}

Article 294 also concerns euthanasia and criminalizes intentionally inciting another person to commit suicide or intentionally assisting in the suicide of another as well as procuring for that person the means to commit suicide. The sentence for this offence is imprisonment for at most 3 years or a fine of the fourth category. So the help needs to be intentional. The second subsection of Article 293 applies here as well.

4.5.2 Intentional assaults

The Dutch Penal Code includes several forms of the offence of assault. A distinction is also made between assault and aggravated assault. Article 300 of the Penal Code defines the standard form of assault (mishandeling). According to subsection 1, physical abuse is punishable by imprisonment for at most 2 years or a fine of the fourth category.

According to subsection 2, where serious bodily harm ensues as a result of the act, the offender is liable to a term of imprisonment of not more than 4 years or a fine of the fourth category.

If the actor’s act was intended to bring about a serious bodily injury to another person, the offence of assault is considered aggravated. According to \textit{NJ 2001, 329}\textsuperscript{151}, the injury is considered serious when the common language use (gewoon

\textsuperscript{149} The progress towards allowing physician-assisted suicide had started with \textit{Schoonheim} case, HR 27 November 1984, NJ 1985, 108. In this case the physician was acquitted on a defence of necessity.\textsuperscript{150} HR 24 December 2002, NJ 2003, 167.\textsuperscript{151} HR 13 March 2001, NJ 2001, 329.
*spraakgebruik*) for this injury labels it serious enough. The Supreme Court has ruled that this injury can be e.g. a broken nose, but only if it the nose is permanently disfigured.\textsuperscript{152} A serious injury can also be tattooing another person’s stomach, when the removal was painful and the victim couldn’t perform as ballet dancer.\textsuperscript{153} Also HIV-infection has been considered as a serious injury.\textsuperscript{154}

The maximum penalty for an assault offence is also dependent on the severity of its impact. An assault that leads to death is distinguished from homicide and manslaughter. According to subsection 6, where death ensues as a result of the act, the offender is liable to a term of imprisonment of not more than six years or a fine of the fourth category.

According to subsection 4, intentionally injuring a person's health is equivalent to physical abuse. However, according to subsection 5, an attempt to commit the serious offence of physical abuse is not punishable.

Article 301 of the Penal Code includes the same provisions but in regard to premeditated physical abuse (*mishandeling gepleegd met voorbedachten rade*), which is considered to be a more aggravated form of assault. According to subsection 1, this kind of premeditated physical abuse is punishable by imprisonment for at most 3 years or a fine of the fourth category.

According to subsection 2, if a serious bodily harm ensues as a result of the act, the offender is sentenced to imprisonment for at most 6 years or a given a fine of the fourth category. According to subsection 3, if death ensues as a result of the act, the actor is sentenced to imprisonment for at most 9 years or given a fine of the fifth category.

According to Article 302 of the Penal Code, a person that intentionally inflicts a serious bodily harm on another person is convicted of aggravated physical abuse (*zware mishandeling*) and sentenced to imprisonment for at most 8 years or given a fine of the fifth category. If death ensues as a result of the act, the actor is sentenced to imprisonment for at most 10 years or given a fine of the fifth category.

\textsuperscript{152} HR 20 January 2004, LJN AN9372.
\textsuperscript{153} HR May 22, 1990, NJ 1991, 93.
\textsuperscript{154} HR 24 June 2003, NJ 2003, 555.
According to Article 303 of the Penal Code, premeditated aggravated physical abuse (zware mishandeling gepleegd met voorbedachten rade) is punishable by an imprisonment for at most 12 years or a fine of the fifth category. If death ensues as a result of the act, the actor is sentenced to imprisonment for at most 15 years or given a fine of the fifth category.

According to Article 304, the imprisonment sentences in offences of Articles 300-303 may be increased by one third, if the actor committed the serious offence against their mother, their legal father, their spouse, their companion, their child, a child under their authority, or a child they take care of and educate; or if the serious offence was committed against a public servant during or in connection with the lawful execution of their duties; or if the serious offence was committed by administering substances injurious to life or health.

Article 304a increases also the sentences, by one half if the offence under Article 302 or 303 has been committed with a terrorist intent, and if it has been imprisonment for at most 15 years, the actor is sentenced to life imprisonment or for at most 30 years.

4.6 England

4.6.1 Intentional homicides

There are no codified legal definitions of homicides in English criminal law. However, there are formally two homicide offences in English criminal law, murder and manslaughter. Manslaughter can be either voluntary or involuntary. In addition, there are also infanticide and specific offences relating to death caused while driving.

In English criminal law homicide offences are not just limited to intentional killings. According to Sir Edward Coke, the definition of murder in 17th century was: “Murder is when a man of sound memory, and of the age of discretion, unlawfully killeth within any country of the realm any reasonable creature in rerum natura under the king's peace with malice fore-thought, either expressed by the party or implied by law.”

155 Coke 1797, p. 47.
Today the actus reus element of the offence of murder is defined as “the unlawful killing of another person in the Queen’s peace”\textsuperscript{156} Thus it requires causing the death of another person. Defence of self-defense can make the act to be not unlawful.\textsuperscript{157} The term “Queen’s peace” refers to those killings that have not occurred during war.\textsuperscript{158}

The offence of murder used to have a rule that restricted the liability of the actor to those cases where the death of the victim had occurred within a year from the act. However, this rule was abolished by the Law Reform (Year and a Day Rule) Act 1996.\textsuperscript{159} However, Section 2 of the Act still sets some restrictions. According to this section, if the actor has already been convicted of a non-fatal offence and the victim then dies after more than three years from the occurrence of this offence, the actor can only be put on trial with the consent of the Attorney General.

The mens rea element of the offence of murder is defined as intention to cause death or grievous bodily harm to the victim.\textsuperscript{160} Thus it is not limited only to intent to kill, but instead the offence of murder is at hand also when the actor has had intention to cause grievous bodily harm and the victim has died as a result. This definition is based on the case \textit{R v Cunningham}\textsuperscript{161}.

Unlike in the Netherlands, the offence of murder doesn’t need to be premeditated, but this has been used as a reason for more severe sentencing in recent English guidelines.\textsuperscript{162} The question of the mandatory sentences for murder has been lately quite controversial and today the sentence depends not only of the act, but also of the actor.\textsuperscript{163} The attempted murder needs intent to kill and it is not enough that the actor had intent to cause grievous bodily harm. The actor also needed to commit an act that was more than merely preparatory.\textsuperscript{164}

Murder is considered to be the standard homicide offence in England. The offence of manslaughter is a less serious and mitigated homicide offence. Manslaughter can be

\textsuperscript{156} Herring 2004, p. 235.  
\textsuperscript{157} Herring 2004, p. 236.  
\textsuperscript{158} Ibid.  
\textsuperscript{159} Ibid.  
\textsuperscript{160} Ashworth and Horder 2013, p. 239.  
\textsuperscript{161} Herring 2012, p. 113.  
\textsuperscript{162} [1982] AC 566.  
\textsuperscript{163} Criminal Justice Act, Schedule 21, Section 4(2)(a)(i).  
\textsuperscript{164} Ashworth and Horder 2013, p. 310.
either voluntary or involuntary. I will now focus on the offence of voluntary manslaughter, since it’s mens rea requirement is higher than in involuntary.

Voluntary manslaughter occurs when the actor kills another person and has the intent to kill the victim or cause grievous bodily harm to the victim. What separates this offence from murder offence is that manslaughter needs to have some mitigating circumstance that reduces the blameworthiness of the actor’s lethal act. So this far this looks like the Swedish model of homicides. However, these mitigating circumstances are very exact in English criminal law.

The first mitigating circumstance is the loss of self-control. Before 2009, only provocation was accepted as a circumstance reducing the culpability.\(^{165}\) In some English provocation cases even suspended manslaughter sentences have been given.\(^{166}\) After the Coroners and Justice Act 2009, also the fear of serious violence is a mitigating factor reducing the blameworthiness from murder to manslaughter. This Act abolished the old common law defence of provocation and replaced it with the loss of self-control, which includes both provocation and the fear of serious violence.

The loss of self-control is defined in Section 54 of the Coroners and Justice Act. According to Section 54(1), the actor is not to be convicted of murder if his acts or omissions doing (or being a party to) the killing resulted from loss of self-control, this loss had a qualifying trigger and a person of their sex and age, with a normal degree of tolerance and self-restraint and in the same circumstances, might have reacted the same way. According to subsection 2, it doesn’t matter whether the loss was sudden or not. So there is no requirement of an immediate response to the qualifying trigger.

The second mitigating circumstance is diminished responsibility. Today this is defined also in the Coroners and Justice Act, under Section 52. According to this section, the actor is not to be convicted of murder if they were suffering from an abnormality of mental functioning, which had arisen from a recognized medical condition, had substantially impaired their ability to understand the nature of their conduct, to form a rational judgment or to exercise self-control. This abnormality

\(^{165}\) Ashworth and Horder 2013, p. 251.
\(^{166}\) Ashworth and Horder 2013, pp. 251–252.
also needs to explain the actor’s acts and omissions in doing (or being a party to) the killing of another.

Compared to defence of insanity that acquits the actor of charges\(^{167}\), diminished responsibility only mitigates the culpability to manslaughter. In diminished responsibility, the actor has a burden to show that this mitigating circumstance existed.\(^{168}\) The conditions include, for example, dementia and schizophrenia, but also the effects of alcohol dependency.\(^{169}\) Related to this is the *Dowds case*\(^{170}\), where the actor was heavily intoxicated and stabbed his wife with 60 stab wounds. He tried to plead diminished responsibility. The Court of Appeal ruled that voluntary acute intoxication can be a recognized medical condition, but in this case it was not enough for diminished responsibility. The Court dismissed the appeal for manslaughter conviction instead of murder conviction.

There is also the offence of doing an act capable of assisting or encouraging suicide or attempted suicide under Section 2(1) of the Suicide Act 1961. This act can lead to imprisonment for at most 14 years. Factors against prosecution under this section are, for example, that the act was wholly motivated by compassion and the assistance was only minor.\(^{171}\) The Criminal Law Revision Committee (CLRC) has also proposed a new mercy killing offence, with lesser sentences of maxim 2 years imprisonment. CLRC concluded that the concepts of mercy killing should be reviewed first.\(^{172}\)

Involuntary manslaughter can be committed by an unlawful and dangerous act or by gross negligence. There is also a quite new offence of corporate manslaughter concerning manslaughters committed by companies.\(^{173}\) The mens rea is lower in these and the actor hasn’t intended to kill and not even intended grievous bodily harm.\(^{174}\) However, I won’t now look closer than this at these offences.

In addition to these, English criminal law has several offences concerning causing death by driving. The offence of causing death by dangerous driving under Section 1

\(^{167}\) It might still require the court to make hospital order. See Ashworth and Horder 2013, p. 267 and footnote 118.
\(^{168}\) Ashworth and Horder 2013, p. 267.
\(^{169}\) Ashworth and Horder 2013, p. 270.
\(^{171}\) Ashworth and Horder 2013, p. 280.
\(^{172}\) Ashworth and Horder 2013, pp. 281–282.
\(^{173}\) See the Corporate Manslaughter and Corporate Homicide Act 2007.
\(^{174}\) Ashworth and Horder 2013, p. 285.
of the Road Traffic Act 1988 requires a high degree of negligence as to the damage or injury, and can lead to imprisonment of 14 years. If the actor driving a vehicle and causing the death of another person had been grossly negligent, they can be convicted of manslaughter\textsuperscript{175}, and if they had had intent they can be convicted of murder.\textsuperscript{176}

### 4.6.2 Intentional assaults

The Offences against the Person Act 1861 includes two offences that could be considered as assaults, even though the offence of common assault is a separate offence. These offences are the offence of wounding or causing grievous bodily harm (GBH) with intent\textsuperscript{177} under Section 18 and the offence inflicting a wound or grievous bodily harm\textsuperscript{178} under Section 20. I will now take a look at these.

According to Section 18, the offence of wounding or causing grievous bodily harm with intent is at hand, when the actor unlawfully and maliciously wounds any person by any means or causes any grievous bodily harm to any person, and had intent to do some grievous bodily harm to the victim, or had intent to resist or prevent the lawful apprehension or detention of any person.

So the actus reus of this act is wounding or causing grievous bodily harm. The actor of this offence is guilty of a felony. The maximum sentence for this offence is life imprisonment. It is noteworthy that this offence can be committed on any person, which would include the actors themselves, as well.\textsuperscript{179} In regard to the mens rea element, this offence requires intent, either intent to cause GBH or intent to resist or prevent the lawful apprehension or detention of any person.

According to Section 20, the offence of inflicting a wound or grievous bodily harm is at hand, when the actor unlawfully and maliciously wounds or inflicts any grievous bodily harm upon the victim, either with or without any weapon or instrument. The actus reus is in this offence is unlawfully wounding or inflicting GBH on another

\textsuperscript{175}See Adomako case, [1995] I AC 171.
\textsuperscript{176}Ashworth and Horder 2013, p. 301.
\textsuperscript{177}This offence is officially titled as "Shooting or attempting to shoot, or wounding with intent to do grievous bodily harm" in the Act. However, I will now use the title I have used in the body text.
\textsuperscript{178}This offence is officially titled as "Inflicting bodily injury, with or without weapon".
\textsuperscript{179}Herring, p. 332. Herring states that there hasn’t yet been any such prosecutions.
person. *R v Burstow*[^180] established that under Section 20 “inflicting” means the same as “causing” and that the term “bodily harm” also includes a serious psychiatric injury.

The actor of this offence is guilty only of a misdemeanor, so this offence is less serious than the offence under Section 18. We can see that also in the maximum sentence, which is 5 years imprisonment. The requirement for the mens rea element is also lower, requiring only recklessness and requiring only that some harm was foreseen and accepted by the actor. This was established in the cases *R v Savage v Parmenter*[^181]. These cases were decided at the same time. Savage and Parmenter were initially convicted under Section 20, but substituted to be convicted under Section 47 by the Court of Appeal in Savage’s case and by the House of Lords in Parmenter’s case.

This Section 47 of the Offences against the Person Act states that, whosoever shall be convicted upon an indictment of any assault occasioning actual bodily harm (ABH) shall be liable to be kept in penal servitude. According to case *R v Donovan*[^182], an ABH can be “any hurt or injury that is calculated to interfere with the health or comfort of the victim”[^183]. According to case *DPP v Smith*[^184] cutting another person’s ponytail can also be an ABH. When it comes to intent, according to case *R v Meachen*[^185] the actor must have intent or recklessness in regard to the ABH.

In English criminal law, there are also the offences of common assault and battery, both charged with under Section 39 of the Criminal Justice Act. Any touching of another person or applying unlawful force on them can cause the offence of battery[^186], while the assault is causing apprehension of this touching or unlawful force[^187].

[^180]: [1997] UKHL 34.
[^182]: [1934] 2 KB 498.
[^183]: Swift J. in [1934] 2 KB 498.
[^184]: [2006] EWHC 94.
[^186]: Ashworth and Horder 2013, p. 316.
[^187]: Ashworth and Horder 2013, p. 318.
Battery can be direct as in touching another person’s hair or indirect as in digging a hole for another person to fall into. In case *DPP v Santana-Bermudez*, the actor was seen to have created a danger by omission when he had given the police officer searching him a dishonest assurance that he didn’t have a needle on him.

So the force needs to be unlawful, not for example self-defense, but an even more interesting point is the consent of the other person. In cases of ABH the consent has been seen irrelevant, but in cases of assault and battery instead it is considered as more relevant. In the case *R v Brown*, the consent of the person harmed in consensual S&M sexual acts was not a defence to Section 20 (wounding) and 47 (ABH) of the Offences Against the Person Act. Similarly was ruled case *R v Emmett*. In *Brown* case, Lord Templeman, who was against the consent as a defence, stated that “pleasure derived from the infliction of pain is an evil thing.”

So a person can consent to a kiss, which could constitute battery, but generally not to an actual bodily harm. There can still be some cases where consent is relevant, as in case *R v Wilson*, where the actor had used a hot knife and branded his initials with it on his wife. The wife’s consent was seen to be relevant in this case. The view of the court was very different from *Brown* case, when Russell LJ in this case stated that consensual activity between husband and wife is not even a matter of criminal investigation.

So in England, there is a clear difference when the act has happened between a man and a wife, compared to the group of homosexuals in *Brown* case. Is this some kind of social utility? German and Sweden are clearly more permissive when it comes to consent negating the intent in assaults. I will discuss about HIV-cases and consent on these cases a little later. First I will conclude my research in substantive laws by investigating them in the United States.
### 4.7 United States

#### 4.7.1 Intentional homicides

Section 210 of the Model Penal Code includes homicide offences. According to Section 210.1(1), a person is guilty of criminal homicide if they purposely, knowingly, recklessly or negligently cause the death of another human being. Homicides are thus divided into different forms of culpability.

According to Section 210.2(1)(a) a criminal homicide constitutes a murder, when it is committed purposely or knowingly. So as a general rule: an actor that has caused another person’s death purposely or knowingly is guilty of murder.

Exceptions to this rule are the cases in 210.3(1)(b), when a homicide is committed under the influence of extreme mental or emotional disturbance for which there is reasonable explanation or excuse. This constitutes only manslaughter. The reasonableness of such explanation or excuse shall be determined from the viewpoint of a person in the actor's situation under the circumstances as they believe them to be.

So the actor must have been under the influence of disturbance and the disturbance must have been reasonable. In the more objective common law doctrine of provocation this kind of killing usually needs to be a result of temporary excitement and immediate response, in comparison to premeditated wickedness of heart.\(^\text{194}\)

Compared to this doctrine, the Model Penal Code doesn’t exclude the cases where some time has already passed from the event that provoked the actor to kill the victim.\(^\text{195}\)

Murder needs to be intentional, meaning that causing the death of another person needs to have been the actor’s conscious object (purposely) or that the actor needed to be practically certain (knowingly) that his act would cause the other person’s death. The actor also needs to have had aware that they were killing another human.\(^\text{196}\)

\(^{194}\) Robinson 1997, p. 709.


\(^{196}\) Robinson 1997, p. 708.
According to Section 210.3(1)(a), a criminal homicide constitutes manslaughter if it is committed recklessly. This is the general rule for reckless mens rea. However, as an exception in Section 210.2(1)(b), a homicide constitutes murder when it is committed recklessly under circumstances manifesting extreme indifference to the value of human life. This kind of recklessness and indifference is presumed if the actor has engaged or has been an accomplice in the commission of, or an attempt to commit, or flight after committing or attempting to commit robbery, rape or deviate sexual intercourse by force or threat of force, arson, burglary, kidnapping or felonious escape. This is “felony murder” and generally the actor needs to be the one to cause the death of the victim, but complicity principles can also lead to a situation where an accomplice to a crime, like robbery, shall be convicted of murder.\footnote{American Law Institute 1980, p. 30.}

4.7.2 Intentional assaults

Section 211.1 of the Model Penal Code includes assault offences. According to Section 211.1(1), a person is guilty of the simple form of assault if they attempt to cause or purposely, knowingly or recklessly causes bodily injury to another; or if they negligently cause bodily injury to another with a deadly weapon; or if they attempt by physical menace to put another in fear of imminent serious bodily injury.

According to Section 211.1(2), a person is guilty of aggravated assault if they attempt to cause serious bodily injury to another, or causes such injury purposely, knowingly or recklessly under circumstances manifesting extreme indifference to the value of human life; or if they attempt to cause or purposely or knowingly cause bodily injury to another with a deadly weapon.

5 Further analysis of intent in sexual crimes

5.1 Introduction

In Chapter 5 of my thesis I will now look closer to intent in sexual crimes and I will compare and analyze these. I will first look at intent in rape offences in Finland and Sweden. I will go through a few important and new court cases concerning these offences and intent. I will then take a broader look at the intent in sexual offences.
against children. In the last subchapter I will take a brief look at how buying sex from an adult is criminalized, if it is, and what is the required intent in these cases.

### 5.2 Intent in rape offences in Finland and Sweden

In Finland the offence of rape requires intention, as it is not stated in the law otherwise. As we have seen earlier, the Finnish rape offence is not clearly based on consent and lack of it\(^{198}\). Similar situation is in Swedish criminal law. So the focus of the intention assessment is then elsewhere, in the act of forcing in Section 1(1) of the Finnish Criminal Code, Chapter 20, and in Section 1(1) of the Swedish Penal Code, Chapter 6, and in the act of taking advantage in subsections 2 of those sections.

How can we show that the victim is forced into sexual intercourse? In Finland this Section 1(1) doesn’t require that the victims need to physically resist the sexual intercourse or put themselves in danger to prevent the act. It is enough that the victim clearly demonstrates their opposition to sexual intercourse and that the violence or its threat has forced the victim to submit to this intercourse.\(^{199}\) So what is the required degree of intention?

In cases where violence or its threat has been used, the requirement of intention has been seen to mean that in these situations the actor needs to have understood that the victim has submitted themselves to the actor’s will because of this violence or threats of its use.\(^{200}\) According to Rautio, there have been problems with proving this kind of intent mostly in cases where the actor has used a relatively slight degree of violence or threats of violence.\(^{201}\) Previously, this kind of cases could be convicted more likely as coercion into sexual intercourse rather than rape, but this offence has now been repealed. The recent law amendment concerning rape offence has not changed the view that the actor needs to have understood that the victim has submitted themselves to the actor’s will because of the violence or threats of its use. The probability-intent is enough for the conviction.

In cases that concern situations referred in subsection 2, where the victim has been unable to defend themselves or to form or express their will, the actor needs to have

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\(^{198}\) For further discussion about consent, see Hahto 2004, pp. 239–251.


\(^{201}\) Ibid.
understood that the victim was unable to defend themselves or to form or express their will because of their helpless state, and that the victim had submitted themselves to sexual intercourse with the actor because of this.202 This means that the actor needs to have understood that the reason they got to have the sexual intercourse with the victim was the victim’s such vulnerability that had resulted in the victim being unable to defend themselves or to form or express their will.203 Probability-intent is enough in these cases, as well.

This subsection 2 doesn’t require that the actor themselves has aroused this helpless state in the victim, only that the actor has taken advantage of it. Prior the law amendment concerning this Section of the Finnish Criminal Code that entered into force on 1.6.2011, the actor needed to be the one arousing this helpless state in the victim. However, even then rape wasn’t seen to require that the actor’s purpose from the beginning had been to rape the victim, but enough was that the actor had later taken advantage of the victim’s helpless state they had first aroused in them.204 Today these factors matter only when the Court is determining the length of the sentence for the offence.205

Section 3 concerning coercion into sexual intercourse has been repealed since 1.9.2014 and section 1 subsection 3 now includes the less serious rape cases, where lesser or non-violent threats have been used, or the offence is assessed otherwise to be less serious as a whole. In regard to intention, it is sufficient that the actor had understood that the victim had submitted to the sexual intercourse because of these threats. Probability-intent is thus enough.

Subsection 3 does not apply if the actor has used violence, not even a violence of slight degree, unlike the old Section 3, which was applied also in the Finnish Supreme Court case KKO 2013:96206. In this case the actor X had grabbed for the victim A’s intimate areas and pushed A into the bedroom, despite A’s verbal and physical resistance, and later in the bedroom sat on top of A. According to the Court these acts met the requirement of violence in forcing a person into having sexual

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202 HE 216/2013 vp.
203 Matikkala 2014, p. 130.
205 Matikkala 2014, p. 130.
206 KKO 2013:96.
intercourse, when as a result of this violence A was helpless and in a state of fear. X was convicted of coercion into sexual intercourse, because the violence used was of slight degree, but today X would be convicted of rape under Section 1, subsection 1.

In this decision *KKO 2013:96* the actor X claimed he hadn’t understood that he was forcing the victim A into sexual intercourse, especially not after A had given him a condom. According to the Supreme Court, if a victim has physically or verbally ceased to resist other person’s intimate advances or sexual intercourse after first resisting these, this doesn’t alone mean that the victim has consented to these further advances or intercourse.\(^{207}\) So intention is not negated merely by the fact that the actor assumes the victim has changed their mind without any verbal or otherwise clear statement of this change of mind. According to the Court, giving a condom can’t be regarded as this kind of statement in the circumstances of this case.\(^{208}\)

In a Finnish Court of Appeal case *RHO 2013:4*\(^{209}\), the actor A had had sexual intercourse with B. A was charged with rape, committed by taking advantage of sleeping B who had not been able to express their will. A denied this, stating that their sex had been consensual. The District Court concluded that B had been asleep and drunk, and in this kind of state might have by their unconscious moving affected responsively to A’s conduct. The Court also viewed that mitigating factors in this case were that B had invited A to come to their house to drink alcohol and that A had immediately stopped their act after B had woken up and protested to the intercourse. The District Court convicted A of coercion into sexual intercourse rather than rape.

According to the Court of Appeal, A had not made sure if B was awake even when A had to perceive that B had still been sleeping despite their possible movements. The facts that A had not planned to take advantage of B and that A had stopped their act were only mitigating factors when determining the sentence and not reasons to view the act as coercion into sexual intercourse instead of rape. The Court of Appeal convicted A of rape. So in this case A was viewed to have considered quite probable that B was still sleeping when A engaged in sexual intercourse. A had a reasonable grounds to suspect that B was still sleeping and A still didn’t make sure they were.

How is this kind of situation handled in Sweden with the intent of indifference?

\(^{207}\) *KKO 2013:96*, 48.  
\(^{208}\) Ibid.  
\(^{209}\) *RHO 2013:4*. 
In a Swedish Court of Appeal decision RH 2010:37\textsuperscript{210} the actor E had been partying with the victim M. They had gone to E’s place, drank some more wine, kissed and fell asleep on the couch with some clothes on. E had woken up a few hours later and had wanted to have sex with M. He had then pushed first one and then two fingers into M’s vagina, while M was still sleeping. E claimed that M had reacted nicely to this despite still sleeping. E had then woken M up and immediately suspended his act when she had protested. According to E, she had later woken up to M having sexual intercourse with her. M admitted inserting fingers, but not the sexual intercourse.

The District Court in this case ruled that inserting two fingers in the drunk and sleeping M’s vagina was a sexual act comparable to sexual intercourse, E had had taken advantage of victim’s helpless state and that the actor E was culpable of rape. However, M’s story of the sexual intercourse wasn’t considered credible. The Court of Appeal upheld the conviction. Both the District Court and the Court of Appeal viewed this as a less serious rape, sentencing E respectively to imprisonments of 8 months and 1 year. The decision doesn’t really assess E’s intent, since E has admitted his act and the other act hasn’t been proven to have occurred. Clearly in this case E has been at least indifferent to whether E was still sleeping, but a Finnish court would have ruled similarly, since E can be even known that M was sleeping.

In another recent Swedish decision NJA 2013 s. 548\textsuperscript{211} the Swedish Supreme Court ruled that the actor was culpable of rape, when he had pushed two fingers to his female partner’s genital area. The motive of the actor had been to find out whether she had been unfaithful to him. Even though there was no clear sexual motive for the act and no intent to get sexual gratification for the actor, the Supreme Court ruled that this act was an act referred in the statutory offence definition of rape. Thus the actor was convicted of rape. So we can see that it’s not only the actor’s intention that matters, but also acts that are considered to have sexual character.

Even more recent Swedish rape case was RH 2014:32\textsuperscript{212}. In this case the actor M was charged with rape. M had been in victim A’s house and stayed for the night. Nothing sexual had happened before they went to sleep in the same bed, both having their own blankets. During the night M had penetrated A’s vagina with his penis and

\textsuperscript{210} RHO 2010:37.
\textsuperscript{211} NJA 2013, s. 548.
\textsuperscript{212} RH 2014:32.
finger, while A had been asleep. With A’s statement and forensic evidence the act was proven to have occurred. M was seen to have taken advantage of the A’s vulnerable state of being asleep and M was charged with the offence of rape.

M’s defence from the beginning was based on lack of intent, since he had been asleep and didn’t remember that sexual acts would have happened. An expert opinion in this case admitted that such behavior is possible but very rare. In the District Court M’s ex-girlfriend told that one such incident had occurred before. However, M himself didn’t remember this incident in the investigations.

A told in the District Court that some time after the act, M had got up from the bed and visited the balcony while A was there and had asked A to come back to bed. M had no memory of this. According to the court, this balcony episode could be seen to be contrary to the sexsomnia theory, when M had been able to reason in such way. The District Court convicted M of rape and sentenced him to imprisonment for 2 years, the minimum sentence for this offence.

The Court of Appeal heard several witnesses. M’s mother and aunt testified about M’s sleepwalking habits and that it ran in the family. The police officer who had come to A’s apartment in the morning testified how M had acted when he had woken up when the police came for him. A second expert opinion was also given, stating that this condition possibly was hereditary, and that in this kind of condition there could be short periods of wakefulness up to 3 minutes without memories of them.

The Court of Appeal concluded that it was possible that the balcony sequence had happened during 3 minutes in which M had been in lingering unconsciousness. The court also stated that A’s testimony couldn’t clarify whether M had been asleep during the act and aware of his actions or not. The court also concluded that both expert opinions had stated that the condition of sexsomnia was possible and that it could be hereditary, which was supported by M’s mother and aunt.

The Court of Appeal found that the prosecutor hadn’t in this case rebutted M’s defence based on him being asleep. The court acquitted M. It concluded that M had been asleep and had not been aware of the sexual acts. Thus M had not the intent that the offence of rape would have required.
In 2012 there had been a similar case B 564-12\textsuperscript{213}, where the Court of Appeal had acquitted the actor A. In this case, A had had a history of sleepwalking behavior, as well as risk factors, when A was under the influence of alcohol and had slept only a little. A was acquitted since the theory of him being asleep couldn’t be refuted.

5.3 Intent in sexual offences against children

5.3.1 Finland

In Finland the offence of sexual abuse of a child requires intention, as it is not stated in the law otherwise. The actor needs to have intent for all statutory offence elements of the act, such as the age of the victim in the offence of sexual abuse of a child, where a certain threshold of age requirement has been set. As I have earlier written, this age is generally 16 years of age and in specific situations 18 years of age.

These age restrictions are essential in defining what kind of conduct is specifically criminalized, that is sexual interaction with a person not mature enough to participate in this kind of conduct. In regard to intention, it is noteworthy that a child under 16 years of age can’t consent to sexual intercourse or sexual acts in such a way that would negate the actor’s intent.

So when can we say that the actor has had the required intent? Intent in regard to the age of the victim in the offence of sexual abuse of a child requires that the actor has been aware he is having sexual intercourse or a sexual act with a person under the age of 16.\textsuperscript{214} So what if the actor thinks that their partner might be old enough or might not yet be old enough?

It is quite natural that a person can be seen to have some responsibility of the fact that their partner is legally old enough, since the sexual crimes against children and the age thresholds that those sexual offence definitions set, for example 15 years of age, are meant to protect the children from the sexual interaction harmful to them. So should this person and when should this person clarify their partner’s exact age?

Matikkala has written that the partner’s age is not necessarily on the actor’s mind and working memory as well as is the sexual intercourse itself with this partner, but the

\textsuperscript{213} Hovrätten för Övre Norrlands 26.10.2012, B 564-12.

\textsuperscript{214} HE 6/1997 vp, p. 182.
knowledge that the sexual intercourse with a child is a crime might be able to make
the actor to consider the age, as well.\footnote{Matikkala 2005, p. 78.} Similarly might work the actor’s previous
experiences and criminal charges of similar acts.\footnote{Matikkala 2005, p. 79.}

The actor can have the required intent also in cases where he has tried to clarify
whether the victim was old enough, since the intent is not negated by the mere fact
that the victim has lied about their age if the actor has been able to come to the
conclusion that the victim has not yet reached the legally required age of 16.\footnote{HE 6/1997 vp, p. 182.} So it
is important to consider the circumstances, such as the place where the actor has met
the victim and the victim’s appearance. This kind of circumstances can make the
actor aware he is dealing with a person under the legally required age.

In the Finnish Supreme Court case \textit{KKO 2004:71}\footnote{KKO 2004:71.} the actor A was charged with
attempted sexual abuse of a child. A hadn’t met the 11-year-old victim B, so he had
not been able to make any conclusions about the victim’s age based on her
appearance or bodily development. However, according to the Court, her age being
under 16 years of age must have been clear to A from B’s pen-pal ad, where she had
told her age, and from subsequent emails.\footnote{KKO 2004:71, 7.} The Court still concluded that there had
been no real danger of the offence occurring, when A had stopped sending messages
to B without knowing B’s real identity or asking her contact information.\footnote{KKO 2004:71, 10.}

In the recent Court of Appeal of Turku case\footnote{THO 28.10.2014 R 13/1778.} 39-year old actor H had had sexual
intercourse with a 13-year old victim A. A had been in the company of other girls
and met H, whom she had asked to come to her home, where they had had sexual
intercourse by A’s initiative. H denied having known at the time that A had been
under 16 years of age. A had been taller and dressed differently than the other girls in
her company. According to the District Court, this could have given H the
impression that A was older than her age. However, A had been in the company of
girls of the same age than her and H had considered these girls to be under 16. So
observations of others in the victim’s company can have relevance too, like the courts assessed in this case.

In the District Court A’s and other girls’ behavior was assessed to be like a behavior of a person of their age. According to the Court, considering all the circumstances H should have had doubts about the accuracy of his observations and should have clarified whether A was old enough. Now H hasn’t even claimed to have tried to clarify the A’s age, though he had had a chance to do that and a good reason to suspect that A wasn’t yet 16 years old. According to the Court, H had taken a risk that his perception of A’s age was not correct. Despite this risk, H had now neglected to find out the A’s age and by engaging in sexual intercourse with A he had intentionally sexually abused a child under 16 years of age.

The Court of Appeal heard two new witnesses, one telling that the girls had told in A’s house that A was 14, but didn’t know whether this was before or after the sex. She also didn’t think A had looked older than she was. The other witness told that either she or another girl had told already in the bus stop that A was under 16 years of age. The Court of Appeal thought that this supported the other evidence that H had had good reasons to suspect that A had been under 16 years of age.

As we have seen, a child’s consent can’t negate the intent, but it can be relevant when the blameworthiness of the act is assessed. When the victim in this case had clearly been the initiator to sex, the District Court didn’t consider the act to have been aggravated sexual abuse of a child and convicted him of sexual abuse of a child. The Court of Appeal upheld this conviction.

The recent Finnish Supreme Court decision KKO 2014:54 was a case about intent in sexual abuse of a child. In the case, actor A had had sexual intercourse with victim B, who had been 15 years of age at the time and had turned 16 in exactly two months from this sexual intercourse. A had known B’s year of birth and had assumed that B was already 16 years of age, but had not known or clarified B’s exact age. Both the District Court of Central Finland and the Court of Appeal of Vaasa had acquitted A of intentional sexual abuse of a child. The Supreme Court now had to assess whether A had intent required for the offence of sexual abuse of a child.

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222 KKO 2014:54.
According to the Supreme Court, intention should not be negated in a sexual abuse of a child case where it can be inferred from the circumstances that the actor has intentionally kept themselves ignorant of the victim’s age. The Supreme Court has dealt with this kind of deliberate ignorance in a drug case *KKO 2006:64*\(^\text{223}\), where it concluded that deliberate ignorance of two drug runners about the nature of the drugs did not negate their intent in regard to these drugs.

In recent years, the Supreme Court has without exception used the intent based on probability also in the cases where it has dealt with intent in regard to offence elements other than consequences. The Supreme Court has also acknowledged this in the case and has now set this form of intent as the starting point of its interpretation in this case.

A had not known B previously, but had come to know B’s year of birth during that night before the sexual intercourse had occurred. According to the Supreme Court, since A had known B’s year of birth, A has been able perceive to be much more likely that B had already turned 16 than that B had not. A had also been able to compare B’s appearance with that of A’s own sister, who had already turned 16, and from this comparison come to the conclusion that B was older. A’s friend R as a witness in this case had come to this conclusion, as well, considering B as 16 or 17 years of age.

According to the Supreme Court, the circumstances in this case don’t indicate that A would have intentionally stayed ignorant whether B had already turned 16 or not.\(^\text{224}\) So even though the Supreme Court has earlier in this decision acknowledged the possibility of giving relevance to the attitude the actor has had towards finding out the victim’s age\(^\text{225}\), it has now not given any particular relevance to the fact that A had not tried to clarify B’s exact age.

The Supreme Court concluded that A had not under these circumstances considered at the time of the sexual intercourse that B would quite probably be under 16 years of age. Thus A had not acted intentionally and could not be held guilty of the sexual abuse of a child offence that needs to be committed intentionally in all regards.

\(^{223}\) *KKO 2006:64.*
\(^{224}\) *KKO 2014:54,* 17.
\(^{225}\) *KKO 2014:54,* 14.
The actor has been convicted of sexual abuse of a child when they have shown their penis in public and asked the child to evaluate it. The fact that the acts have been done near a school in the morning and that the victim has looked young three years after the act have been considered enough for proving intention. This offence doesn’t necessarily require physical act or even meeting the child. Detailed describing of sexual acts to the child and discussing sexual fantasies with the child can be enough, when these are seen harmful to the child’s development. The medium for this can be almost anything: phone, text messages or instant message chat services, but often it has been some Internet-site, which young people tend to use.

If the age of the victim has been visible in this kind of page, the actor is seen to have known about the age. If it hasn’t been, the intent concerning the age has to be proven some other way. In a Court of Appeal case, the actor had known that the victim went to upper comprehensive school (yläaste), which usually means that the person is under 16 years of age. When the actor had continued sending sexual messages without trying to clarify the victim’s age and there hadn’t been any other reason to think that the victim was already 16, the act was considered intentional.

There has been from time to time some discussion and proposals of extending the scope of the age of the victim offence element of sexual crimes against children to cover negligence, too. For example, the Parliament of Åland has made an initiative about reviewing the sexual offences legislation and in this initiative LTB 35/2011, among other things, included a proposal of extending the scope of criminal responsibility in sexual crimes to cover negligence, too. The Constitutional Law Committee of the Finnish Parliament rejected the initiative, since it was out of the jurisdiction of the Parliament of Åland. Professor Niemi has also suggested that negligence could be enough in regard to the age of a victim, since sexual abuse of a child is harmful for the child, no matter how old the child looks.

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228 THO 28.11.2014 R 14/1028
229 Ibid.
230 LTB 35/2011.
231 Oikeusministeriö 2012, p. 50.
5.3.2 Sweden

In Sweden, there used to be a form of intent called “dolus Alexanderson”, named after a Supreme Court judge, who was prominent in the Supreme Court’s decision NJA 1941, s. 466\(^{232}\), which shaped this form of dolus. This was a sexual abuse of a child case, where the actor H had had sexual intercourse with a child under 15 years of age.

To avoid the awareness of the 14-year-old victim M’s age and intention thereof, he was seen to have intentionally avoided finding out her exact age, because then his knowledge of the age could have been proven. So he kept himself in uncertainty, like Alexanderson later wrote (“jag måste alltså hålla mig i ovisshet om hur det är med hennes exakta ålder”).\(^{233}\) H himself had told the Court he had asked the age and M had replied she was 15, but M denied this having happened.

The Supreme Court convicted H based on his deliberate ignorance of the age, when it must have been clear to H that M wasn’t yet 15 from her appearance and when H knew she still went to school. Dolus Alexanderson and its form sparked a lot of academic debate and was later rejected, for good also in cases concerning the age of the victim in sexual offences against children, when in the new Swedish Penal Code actor’s negligence was seen to be enough.

Today Swedish criminal law doesn’t require intent in regard to the age of the victim in cases of sexual abuse of a child. According to Section 13 of the Swedish Penal Code, Chapter 6, the criminal responsibility in offences of Chapter 6, where the victim needs to be under certain age, is not limited to actors with intent regard to the victim’s age, but it extends also to those negligent actors that had not realized the victim’s age, but had had reasonable grounds to believe (skälig anledning att anta) that the victim had not reached the required age.

This expression needs to be interpreted with great caution. If the actor has demonstrated a high degree of negligence in relation to the child's age, this is enough for conviction.\(^{234}\) If the child under 15 years of age has given their consent to the acts

\(^{232}\) NJA 1941, s. 466.
\(^{233}\) Alexanderson 1945, 297.
that fulfill the statutory definition of rape of a child under Section 4, this consent can’t lead to impunity of the actor. However, Section 14 can be under certain circumstances applied to the offence of sexual abuse of a child under Section 5.

So great caution and careful assessment is needed in the application of sexual offences where the victim is a child under 15 years of age, especially taking into consideration this Section 14 of the Swedish Penal Code, Chapter 6, concerning cases where there is only a little age difference between the actor and the child under 15 years of age. For example, if the actor is 15 and their sexual partner is 14 years old, there could be a reason to believe that no crime has occurred.

In Swedish Supreme Court case *NJA 2007, s. 201*, the actor was a 17-years old boy, who had had sex with a 14-year-and-seven-month old girl. The Supreme Court concluded that there had been no abuse of the girl and the case was not considered as a criminal offence. According to the court, the girl was under 15, but still very near it, and the boy wasn’t much older than the girl.

### 5.3.3 Germany

According to Frisch, dolus should be understood as acceptance of a prohibited risk. He has suggested that an actor takes a prohibited risk if the uncertainty in circumstances like the age of the sexual partner could be easily removed, but the actor still goes ahead with the act without removing this uncertainty. But what kind of intent is required today in Germany?

In Germany, the offence of sexual abuse of a child requires at least conditional intent in regard to the age of the victim. This has been stated, for example, in cases *BGH 12.8.1997 – 4 StR 353/97* and *BGH 16.4.2008 – 5 StR 589/07*. In Germany, the actor must have held it at least to be possible that the child was under 14 years of age. If the actor, however, had not given any thought to the age of the child, there is...
no required intent for the offence of sexual abuse of a child. The actor’s attempts to justify their behavior should be, however, regarded with caution.

In cases where the actor denies having had the required intent as to the age, conditional intent can’t be inferred yet from the fact that the actor has known the victim for some time before the offence. Instead, the court needs to assess the victim’s appearance and bodily development.

If the actor had made a mistake about the child’s age, thinking the victim to be older than the victim really was, this can lead to mistake of fact. Mistake of fact is defined in Section 16(1) of the German Criminal Code. According to this section, the actor who at the time of the commission of the offence was unaware of a fact, which was a statutory element of the offence, shall be deemed to lack intention. According to Section 16(2), the actor that at the time of commission of the offence mistakenly assumed the existence of facts, which would satisfy the elements of a more lenient provision, may only be punished for the intentional commission of this more lenient provision. So if the actor that had thought the victim was older than 12 years of age but less than 18 years of age, they can still be charged and convicted of the offence of abuse of juvenile according to Section 182(3) of the German Criminal Code. Conditional intent is enough for the sexual offence under Section 176(2).

5.3.4 England

Sexual Offences Act 2003 offences “rape of a child under 13” (Section 5), “assault of a child under 13 by penetration” (Section 6), “sexual assault of a child under 13” (Section 7) and “causing or inciting a child under 13 to engage in sexual activity” (Section 8) are strict liability offences. This means that it is irrelevant whether there is consent given to these acts by a child under 13 or not. This means also that there is no need to show that a defendant was aware that the child was under 13. So there is no defence of reasonable mistake for a defendant who thought a child to be 13 years old of age or older.

242 BGH 27.11.1952 – 4 StR 440/52.
243 Renzikowski §176, 30 in Joecks and Miebach, p. 1318
244 Ibid.
245 Ibid.
The only mens rea requirement is the intent to penetrate, to touch or to cause the child to engage in sexual activity. Thus, for example, rape of a child under 13 is automatically committed by intentionally having sexual intercourse with a child under the age of 13. Only that this act has happened and the age of the victim need to be proved in the court. Ashworth has suggested that the threshold of reasonable belief could have been too favorable to the actors committing sexual offences, when they could pretend to have been ignorant or mistaken.\(^{246}\)

The age of criminal responsibility in England is 10. Thus children of the age of 10–12 can be convicted of having sexual acts meant in sections 5–8 with a child of similar age. With the strict liability sex offences there is a great reliance on prosecutorial discretion not to convict of cases where no real harm has happened. According the guidelines given by the Crown Prosecution Service, no child will be prosecuted unless there is coercion, deception or other untoward circumstances.\(^{247}\) If other children are to be charged of the offences against children under 13, it can also by done through Section 13 and Sections 9 to 12 of the Sexual Offences Act, with less severe sentences than the sentences are on the general rape offences.

Strict liability was enforced in *R v G*.\(^{248}\) In this case, a 15-year old actor was charged with rape of 12-year old victim. According to this decision the offence of rape of a child under 13 in Section 5 of the Sexual Offences Act 2003 imposes strict liability as to the age of the victim. The majority of the House of Lords was unwilling to accept human rights arguments that this kind of strict liability can be seen to breach the presumption of innocence under Article 6(2) of the European Convention of Human Rights as well as the same convention’s Article 8 of the rights of the accused, who in this case was only 15 years of age.

Strict liability is necessary here in order to ensure the protection of children from the sexual attention of others. Allowing a defence of reasonable mistake (a negligence standard) would reduce that protection unacceptably. The unfairness and stigma of convicting a mistaken defendant of this serious offence is seen to be less important, even when that defendant is also below the age of consent and could have been charged with a lesser offence under Sections 9 to 12.

\(^{246}\) Ashworth and Horder 2012, pp. 365–366.
\(^{248}\) [2008] UKIHL 37.
Next I will shortly take a look at a specific offence, buying sexual services from an adult selling them. How is this criminalized, if it is, and what kind of intent is needed?

### 5.4 Intention in offences of purchase of sexual services

Section 8(1) of the Finnish Criminal Code, Chapter 20, criminalizes inducing a victim of procuring or human trafficking to engage in sexual intercourse or in a comparable act by promising or giving remuneration. According to subsection 2, likewise is punished the actor who takes advantage of the remuneration promised or given by a third person, by engaging in sexual intercourse or a comparable sexual act with the victim. So it is illegal to buy sex from the victims. These are intentional acts.

In the Supreme Court case KKO 2012:66\(^{249}\), the actor X had bought sexual services from A, who was a victim of procuring. The actor needs to be aware that the person is such a victim in order to their act to be seen as intentional and to be committed as a crime. The Supreme Court had to assess whether X had acted intentionally, thus whether he had known about the procuring or at least considered it quite probable. X denied this.

The Supreme Court quashed X’s conviction of abuse of a victim of sex trade. Unlike the District Court and the Court of Appeal, the Supreme Court concluded that it couldn’t be proven that X had considered it to be quite probable that A had been a victim of procuring. X had known that A came from some Baltic country, but this wasn’t enough to indicate X’s intent, which would have required some more solid evidence, for example, A’s complete lack of language skills or X handing the money to another person than A. After the decision, Tapani suggested lowering the required awareness so that the act would be criminal also as a negligent act, if the actor could have and should have known that they were buying sex from a victim of sex trade.\(^{250}\)

The high threshold of intent clearly came as a surprise to the legislator, which almost immediately started the process to change the law. Finally on November 13, 2014, the Government Proposal HE 229/2014\(^{251}\) was given. It proposed criminalizing the

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\(^{249}\) KKO 2012:66.

\(^{250}\) Tapani 2012, p. 619.

\(^{251}\) HE 229/2014 vp.
negligent act, too. For the reasons of proportionality and rule of law, the Constitutional Law Committee of the Finnish Parliament would have set the threshold to gross negligence. However, the Law Committee of the Finnish Parliament decided to set it lower, to standard negligence, fearing that otherwise the threshold would be still too high. With this change, the act requires that the actor buying sex had a reason to suspect that the seller was a victim of procuring of human trafficking. This reason can be, for example, the lack of language skills or some other external circumstance that has created for the actor a reason to suspect that the person is a victim, even if they otherwise wouldn’t have thought that their act would fulfill this offence. According to the Law Committee, in the end this is an overall consideration, where the relevance of individual circumstances varies.

The Finnish Parliament passed this law amendment on March 14, 2015. According to the Government Proposal HE 229/2014, it will enter into force either on June 1, 2015 or January 1, 2016. According to this new subsection 3, similarly to subsections 1 and 2 is punished the actor who has committed an act referred in subsection 1 or 2 and has had reason to suspect (syytä epäillä) that the other person, the sex seller, was a victim of procuring or human trafficking. This is a negligent act. According to new subsection 4, an attempt of intentional act is also punishable. The sentence for all subsections is a fine or imprisonment for at most 6 months.

Sweden has had a sex purchase ban in force since 1999. All buying of sex is illegal, but selling is not criminalized. According to Section 11(1) of the Swedish Penal Code, Chapter 6, the actor that acquires a temporary sexual relationship (tillfällig sexuell förbindelse) against remuneration shall be convicted of purchase of a sexual service (köp av sexuell tjänst) and sentenced to a fine or to imprisonment for at most 1 year. According to subsection 2, this applies also if the remuneration was promised or paid by another person. If the seller is a child, Section 9 applies instead of this. The actor needs to have intention in regard to all the statutory offence elements. According to Section 15, attempted purchase is also punishable.

252 PeVL 56/2014 vp, pp. 2–4.
253 LaVM 38/2014 vp, p. 3.
255 LaVM 38/2014 vp, p.4.
256 At the time of turning in this thesis, it wasn’t yet sure when the amendment would enter into force.
257 The seller is not guilty of any crime, see Holmqvist et al. 2009, 6:50.
In England, it is a crime to pay for sexual services of a prostitute subjected to force. According to Section 53A(1) of the Sexual Offences Act, the actor A commits this offence if they make or promise payment for the sexual services of a prostitute B, who has been induced or encouraged to provide these services by C that has engaged in exploitative conduct of likely to induce or encourage the selling of sexual services.

Required is also that C has engaged in that conduct for or in the expectation of gain for themselves or another person (not A or B). According to subsection 3, C has engaged in exploitative conduct if they have used force, violent or non-violent threats or any other form of coercion, or if they have practiced any form of deception.

According to subsection 2, it is irrelevant where in the world the sexual services are to be provided and whether those services are provided, and whether A is, or ought to be, aware that C has engaged in exploitative conduct. So this is a strict liability offence. It doesn’t matter if A has known that they were buying sex from a person subjected to force or other exploitative conduct. If the sex seller has been such a victim, A has automatically committed this offence by paying for their sexual services. This is even stricter than in Finland, but also not surprising since sexual offences against a child under 13 have this strict liability too. The vulnerability and need for protection in both cases is considered to need this kind of heavy measures.

The Netherlands and Germany don’t have any kind of ban on buying sex from adults. Often these countries are seen as one of the main destinations for human trafficking in sexual exploitation purposes. However, there has been no desire to ban purchasing sex.

Now I have finished with sexual offences and I will take a deeper and more comparative look at intent in homicides and assaults.

6 Intention in homicides and assaults

6.1 Introduction

In the sixth chapter, I will take a brief look at two famous Dutch homicide cases that have shaped the Dutch form of lowest level of intent, conditional intent, remarkably. Then I will briefly look at murder discussion in 6.2, before taking three larger
subchapters of case study comparison of court cases about Russian roulette, driving towards the police officer and HIV-cases. I will look at how these cases have been ruled and what the intent has been. After this chapter, I will conclude my thesis and present my conclusions.

6.2 The Netherlands: Hoorn Pie and Porsche

The Hoorn Pie case\textsuperscript{259} for the first time defined conditional intent in Dutch criminal law, but it also defined it in a murder case. In this case, the actor Beek had bought a pie, added a lethal amount of arsenic, and sent the poisoned pie to M, whom Beek wanted dead. However, it wasn’t M but his wife who ate the pie and died as a result. Beek’s defence was that he lacked intent to kill the wife. The Supreme Court convicted Beek of murder, concluding that Beek’s plan to kill M also included the possibility of death of those other people who could eat the pie, especially M’s wife.

The much more recent Porsche case\textsuperscript{260} can be considered as one of the most relevant Dutch cases when it comes to defining the Dutch concept of intention and defining the threshold of conditional intent. In this case, the actor A’s extremely dangerous driving with his Porsche had resulted in deaths of five other people. The Court of Appeal convicted A of voluntary manslaughter, when he had consciously accepted the substantial chance of causing the deaths.

The Supreme Court now had to consider whether A had acted intentionally and whether he was guilty of five counts of voluntary manslaughter under Section 287 of the Dutch Penal Code or had only acted negligently. Thus the Supreme Court had to consider especially whether very dangerous driving can be a proof of conditional intent, where the actor can be seen to have accepted the substantial chance of his actions causing death.

A had first gotten drunk at bars, then driven his Porsche at excessive speeds, turning corners with burning tires and driving through red lights. He had already overtaken several cars with quick maneuvers, when he tried to overtake a Seat. However, his three attempts to overtake it were unsuccessful. He tried the fourth time, changed to

\textsuperscript{259} HR 19 June, 1911, W 9203.
\textsuperscript{260} HR 15 October 1996, NJ 1997, 199.
the other line and collided directly head-on with a car oncoming on this line. All four people of this car and A’s friend travelling in A’s car died in the crash.

Especially relevant in this case was how the Supreme Court interpreted whether A’s conditional intent to kill and the substantial chance of causing the death of another person could be reconciled with the foreseeable and undesirable thought that he himself would also die if his car crashed as a result of A’s very dangerous driving. The conditional intent requires that the actor has consciously accepted the substantial chance of causing the result, but in a situation like this Porsche case, can A really seen to have accepted his own death?

The Dutch Supreme Court acquitted A of intending to kill the victims of the car crash. The Court concluded that A had not accepted the risk the conditional intent would have required, since this kind of acceptance would have implied that he would have taken into the bargain also his own death. A was later convicted of negligent homicide in traffic.

In some cases, conditional intent has been accepted, when the actor has shown no indication that they have tried to avoid a collision, but in the Porsche case, A had already aborted several of his attempts to overtake, which didn’t support the notion that he would have accepted the possibility of his own death.

6.3 England: Too broad or too narrow murder definition?

In England, as we now have seen, the offence of murder requires either intent to kill or intent to cause grievous bodily harm. This can be described with a view that the actor A had intended to kill if it had been their aim to kill by their act (or omission), in such a way that they would have considered it to have been a failure if V hadn’t died as a result. 261 According to Ashworth, the golden rule in English criminal law is that intention should be left without further description or definition other than this in most cases and the broader, full definition should be only used for cases where the actor claims that their purpose for their act had been something else than to cause injury to V. 262 It is naturally easier for the jury to understand a more simple definition. It is important to remember that in common law countries England and

261 Ashworth and Horder 2013, p. 244.
262 Ibid.
the United States, the jury decided whether there has been the required mens rea element, not the judge, like in civil law countries.

The full intention is considered to include, in addition to the proof of the actor A’s aim or purpose of killing, the proof that A had foreseen the victim V’s death to have been virtually certain to result from A’s act or omission. In this case there is no difference, whether A had considered V’s unlikely survival of A’s act as a failure to achieve A’s purpose. If in a homicide case the jury is sure that A had acted this way, acting despite knowing to be virtually certain, they are entitled to find that A had intended to kill. However, for the murder conviction it is already enough that the prosecution is able to show that A had intended to cause grievous bodily harm to V, which means that it is enough to show that A had foreseen a grievous bodily harm to V as virtually certain consequence of A’s act.

This is based on the case R v Cunningham, where the actor, thinking that the victim was having an affair with the actor’s fiancé, went to a bar and struck the victim on the head repeatedly with a bar chair, causing injuries to the victim, from which the victim died a week later. The actor was convicted of murder and appealed to the House of Lords, stating that he had not intended to kill. According to the House of Lords, the intent to cause grievous bodily harm is sufficient for murder and it doesn’t need proof that the actor has even contemplated the possibility that death would result as a consequence. This is a clear distinction between English criminal law and criminal laws of civil law countries, which explicitly require that the actor was aware that their act could result in another person’s death.

Today the law on murder has been seen both too broad and too narrow. For example, Lord Steyn has stated that the new definition could be “intention to kill or intention to cause really serious harm coupled with awareness of the risk of death.” The terrorist example by Pedain has been often used to define the limits in the English law definition of intent in murder offences. According to this example, a terrorist plants a bomb in a public place. Usually in these cases this act would

263 Ibid.
264 Ibid.
266 Herring 2012, pp. 119–120.
267 Herring 2012, p. 125.
easily constitute murder when the actor intends to kill or cause grievous injury by planting the bomb. But Pedain’s example asks, what if this terrorist is not intending to kill anyone, but is instead seeking to gain publicity? In this example the terrorist sets the bomb to go off in two hours’ time and gives the police a warning, so that the place can be evacuated in time.\(^{269}\) So clearly the terrorist doesn’t unconditionally want the bomb to explode.

However, in this example, a bomb disposal expert is killed when they are trying to dismantle the bomb. Should the terrorist be convicted of this? The terrorist has clearly intentionally created a risk of death, which has resulted in the bomb expert’s death. But the terrorist has not intended to kill or to cause grievous bodily harm. If the terrorist didn’t foresee the death, they cannot be convicted of murder. Pedain, however, argues that the terrorist should and could be convicted of murder, since they have created this risk of harm, which risk has been essential for them to achieve their purpose of gaining publicity and thus they have approved the possible harmful consequences, like death, which can be undesired but not disassociated from.\(^{270}\)

In November 2006, the Law Commission gave its report on the law reform of homicide.\(^{271}\) The Commission proposed a new homicide offence structure with first-degree murder, second-degree murder and manslaughter. First-degree murder with mandatory life penalty would include cases where the actor has killed another intentionally or where the actor has had the intention to cause serious injury, coupled with an awareness of a serious risk of causing death.\(^{272}\)

Second-degree murder would include cases where the actor has intended to do serious injury to the victim. It would also include cases where the actor has intended to cause some injury or a fear or risk of injury, and has been aware of a serious risk of causing death. This could include cases like Russian roulette, if the victim would be seen to have had a fear of injury.\(^{273}\) Also partial defences, like diminished responsibility, would deem the act to be second-degree murder where otherwise it would have been first-degree.\(^{274}\) Manslaughter would include the cases where the

\(^{269}\) Pedain 2003, p. 583.
\(^{270}\) Pedain 2003, p. 592.
\(^{271}\) Law Com No 304, 2006.
\(^{272}\) Law Com No 304, 2006, p. 16.
\(^{273}\) Horder 2007, p. 27.
\(^{274}\) Law Com No 304, 2006, pp. 16–17.
actor has killed through gross negligence as to the risk of causing death, or if the actor has killed another with a criminal act that was intended to cause injury of where there was an awareness that this act involved a serious risk of causing injury.

Manslaughter would also include cases of participating in a joint criminal venture, where another would do the second-degree murder.\textsuperscript{275} So in this new model, the actor could be convicted of murder only if they had been aware of the risk of death of another person. This would be much more reasonable than the situation now and it would be also more similar to murder offences in other countries of my research.

6.4 Case study: Russian roulette

An interesting case are Russian roulette scenarios, where an actor places a single round in a revolver, places the muzzle against another person’s head and pulls the trigger. Is there intent to kill? Mathematically the probability is $1/6$ or $16.67\%$ that the round is in the chamber and the revolver fires. Is this kind of chance enough?

According to Frände, an actor doing this can be seen to have intended to kill another person.\textsuperscript{276} So the killing would then have been their purpose and purpose-intent would be enough for conviction of voluntary manslaughter, if the person dies, and of attempted voluntary manslaughter, if the person does not die.

But if the person dies without the actor having intended to kill the person, Frände thinks that dolus eventualis doesn’t apply either, since the actor has not considered the death of the person as a quite probable consequence of their action. Thus there is no intent based on probability and therefore no intent at all. The actor could be convicted only of a negligent offence, of negligent manslaughter, if the person has died.\textsuperscript{277}

According to Frände, cases of Russian roulette are no reason to abandon the intent threshold based on probability, since this kind of cases are so rare.\textsuperscript{278} This is the case, not only in Finland, but elsewhere too. In Germany, the closest to this scenario has come the hanging play in the case BGH 7.4.1983 – 4 StR 164/83.\textsuperscript{279} In this case the

\textsuperscript{275} Law Com No 304, 2006, p. 17.
\textsuperscript{276} Frände 2012, p. 122.
\textsuperscript{277} Frände 2012, p. 122.
\textsuperscript{278} Ibid.
\textsuperscript{279} BGH 7.4.1983 – 4 StR 164/83.
actors S and W had decided to play hanging with the victim D and a rope had been tied around D’s neck. S had then pushed D in the back, the rope had tightened around D’s neck and D had been hanging 35 cm above the ground. D had felt fear of death, until he had fallen down to the ground because the rope had either snapped or the knot dissolved. S had then immediately loosened the rope around D’s neck.

The District Court convicted S and W of attempted manslaughter. The BGH, however, considered that S and W hadn’t known that their act could lead to D’s death and hadn’t approved this possible consequence. S and W hadn’t discussed how the hanging game should exactly be played. They had also thought that death in hanging could only come by suffocation, not knowing about the more immediate death possibility by broken neck. Matikkala has written about this case and compared it with the Russian roulette situation where participants in Russian roulette would have firmly believed that the revolver has less revolver rounds than it actually had, when S and W now had not known about the other possibility D could have died.280

In the Swedish case NJA 2004, s. 176281, the Swedish Supreme Court mentioned cases of Russian roulette as an example that does not work with intent based on probability, because the probability of killing another person with one round in the magazine is mathematically low. However, according to the Court, a person’s life is at stake and intent can be seen to reasonably exist. Thus intent based on pure probability is not suitable as a limit of intent (“knappast är lämpligt som en generell avgränsning av uppsåtets”).282

The United States has had a Russian roulette case, Commonwealth v. Malone283 already back in 1946, so before the Model Penal Code. In this case, the 17-years old actor Malone found a revolver and used it to play Russian roulette with the 13-years old L. Malone put a bullet in one chamber of the five-chamber revolver, placed it against L’s head and three times pulled the trigger. On the third time the revolver fired, killing L.

280 Matikkala 2005, p. 393.
281 NJA 2004, s. 176.
282 NJA 2004, s. 176.
283 354 Pa. 180, 47 A.2d 445.
Malone denied having had the intent to kill and claimed having thought that the bullet was in the last chamber, and that at most he had been reckless to L’s death. However, Malone was charged with murder and the Trial Court convicted him of second-degree murder. The Supreme Court of Pennsylvania upheld the conviction.

The Pennsylvania Supreme Court stated that the first-degree murder requires specific intent to kill and the second-degree gross recklessness and a reasonable anticipation that it will lead to death of another. According to the Court, L’s death resulted from Malone’s intentionally committed act with reckless disregard of the consequences. The Court stated that the chances of L’s death were at least 60% certain from Malone’s three attempts to discharge the revolver, which was aimed at L’s vital body part and had a bullet. Thus this was murder with malice “evidenced by the intentional doing of an uncalled-for act in callous disregard of its likely harmful effects on others.” According to Section 210.2(1)(b) of the Model Penal Code, he would also have been convicted of murder, when his act was committed “recklessly and under circumstances manifesting extreme indifference to the value of human life.”

A recent Finnish Supreme Court case KKO 2013:82 was about Russian roulette and whether it should be seen as attempted voluntary manslaughter, when the victim hadn’t died. In this case defendant A had twice randomly spun the revolver cylinder and after each spin pulled the trigger while the revolver was a meter away from victim B’s forehead. There was a single round in the revolver, so only one revolver chamber out of six chambers was loaded.

The Court now had to assess, whether B’s death as a result of A’s act could be held quite probable in such way that A should be held liable to attempted voluntary manslaughter. Thus this case was about probability intent and about as how probable A had considered B’s death.

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284 The Supreme Court of Pennsylvania apparently assessed that the first time had the probability of 20%, the second 40% and the third 60%. It could be, however, argued that the chances instead were respectively 20%, 25% and 33%. Unlike in the Finnish case, as we will see, in this case the actor didn’t shuffle the chambers before each time he pulled the trigger.


286 The actor’s young age could, however, lead to jury deciding that the actor has been rather ignorant than indifferent. See Robinson 1997, p. 723.

287 KKO 2013:82.
According to the District Court of Oulu it could not be ruled out that A was aware that the single round was on the revolver chamber so that the firing of the revolver would not pose an immediate threat to B's life. The Court dismissed the charge of attempted manslaughter and convicted A of menace and causing danger.

The Court of Appeal of Rovaniemi overruled the District Court's decision and convicted A of attempted voluntary manslaughter. According to the Court, B had been in mortal danger both times the trigger was pulled and A had to perceive this. The probability of A's act causing B's death was so substantial that A's conduct met the statutory offence elements of attempted voluntary manslaughter.

The Supreme Court now had to consider the question whether B's death as a result of A's actions could be seen as a quite probable on the basis of facts given by the Court of Appeal's judgment. The Supreme Court concluded that B's death could not be held as a quite probable consequence of A's act. Thus because A had not even dolus eventualis intent to kill B, he could not be convicted of attempted voluntary manslaughter, but only of menace (laiton uhkaus) and imperilment (vaaran aiheuttaminen).

According to the Supreme Court, in order to have a sufficient intent, A should have considered B's death more probable than B's staying alive. However, it was clearly more probable that A’s actions wouldn’t result in B’s death, and according to the Court there had not been any such circumstances regarding the revolver or events that would make it necessary to assess probability differently from A’s perspective at the time of the act.

But was it clearly more probable that B would not die? The Supreme Court relied in its ruling on the legislation preparatory work regarding intention, according to which it is not the aim of the law that probability would be assessed with statistical estimates, but instead with everyday evaluation made from the perspective of the actor of how plausible he considers fulfillment of statutory offence elements. Unlike the District Court, the Supreme Court didn’t use mathematical probabilities, which had been assessed in the District Court as 17 %.

According to the Supreme Court, fulfillment of probability-intent can be assessed by examining the facts that actor has been able to consider regarding the consequences
of his actions at the time of the acts. The Supreme Court did not consider whether A could see in which chamber the single revolver round was.

There had been evidence presented in the Court of Appeal showing that when the revolver magazine cylinder was attached to the revolver, a round could be seen from the side of the revolver only if the round was on the notch left side of the revolver, and otherwise only when rotating the revolver and from the front of it, but not directly from behind the revolver when pulling the trigger. The Supreme Court's ruling does not contain any of this kind of reflection and examination.

The Supreme Court's arguments are very limited and do not indicate how the Supreme Court has exactly come to the conclusion that in this case it has been much more probable that A's described conduct would not cause B's death. In practice, the Supreme Court can be considered to have reached this solution, because the probability was not “quite probable” by not exceeding the 50% probability often proposed in the legal literature, even though the Supreme Court has been now careful not to use maths and statistics.

The Supreme Court has held to be quite probable only the fact that a revolver round in the chamber at the point of the firing pin would have quite probably caused B's death, but the number of rounds (one) and spins before the two times trigger was pulled have decreased the probability of B's death.

If we compare this case to Malone, there are some clear differences. In Malone, the revolver had five chambers instead of six, so pure mathematical chances of firing the revolver were lower in the Finnish case. In this Finnish case, the chambers were also shuffled before each time the trigger was pulled. So in theory it could take any number of times before the revolver would fire. Surely at some point there needs to be some limit to this game where the actor is seen to have been too indifferent of the result of the revolver firing, which is almost certainly another person’s death. This is not like the HIV-cases, where there is a comparably low probability of infecting another person with a virus and with today’s treatment possibilities, an infection will only under certain circumstances lead to this person death.  

288 See Chapter 6.6.
If we apply the theory of intent based on quite probably threshold, a million times pulling the trigger and shuffling afterwards would still never reach over 50 % chance when each time triggered would still be that 17%. Should we at least in this kind of cases change what we require from intent? Malone was convicted of murder and would have been convicted also under the Model Penal Code. The Dutch Supreme Court applies the requirement of a considerable chance, which can sometimes be quite a low chance, and in Germany the volition of the actor is more important than the chance. Even with the *Hemmschwellenetheorie* the Russian roulette cases could be ruled there differently. In Sweden, with intent of indifference, this could be an even clearer case with the actor being indifferent to another person’s life and death.

Related to this case, Professor emeritus Virolainen has suggested on his blog that the intent evaluation should shift from “quite probable” to the assessment on whether the actor could perceive the occurrence of the consequence and in spite of that awareness still acted in a way that shows indifference in their attitude towards the occurrence of the consequence. This kind of approach would take the assessment of intent closer to the Swedish version of indifference of intent. The Supreme Court, however, has in the Russian roulette case been unanimous in its ruling, and there has been now no judges suggesting an intention threshold lower than the probability-intent.

### 6.5 Case study: Running over a police officer

Other examples of intention and risk assessment in the relation between dangerous driving and intentional killing are the cases where a car driver is ordered to stop by a police officer. If the driver refuses to stop and continues to drive, the police officer has to jump aside to escape collision with the car. How should these situations be viewed in terms of intention and risk? I will now review how this kind of cases have been dealt with differently in different countries.

In the Netherlands, a driver risking the collision is often convicted of attempted intentional killing, if the police officer manages to avoid the collision. In the case *NJ 2008* the actor D drove a car without lights on straight towards a police officer, increasing the speed of the car instead of stopping his car. At the last moment, D

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289 Virolainen 2013, 7.
steered to the left to avoid the collision, but could not see what happened to the officer.

The Supreme Court considered whether D had knowingly exposed the victim to a significant risk that a collision will happen. According to the Court, to establish that the actor knowingly exposed the victim to such a risk, it is not only required that the actor had knowledge of the significant risk that the result will occur, but also that at the time of the conduct they had consciously accepted this risk. According to the Supreme Court, in this case, D had by driving in the dark without his car lights on and by increasing the speed of his car exposed the victim to a considerable risk that the car could hit him and that serious injury would be inflicted on the victim.

According to the Supreme Court, the actor D couldn’t foresee how the police would react to his act, so he consciously accepted the substantial risk and “took into bargain” (op de koop toe heeft genomen) that the police officer would in response to the actor’s actions jump off in a different direction than the actor anticipated or might fall down when trying to evade the car and collide with it, resulting in a serious injury. This was supported by D’s own statement that he hadn’t foreseen how the victim would react to D’s act. Based on this the court concluded that the conditional intent was proven of inflicting grievous bodily harm to the victim.

In Germany, it is widely acknowledged that somebody acts with conditional intent if they recognize that there is a risk of causing the relevant result and yet accept this risk or at least live with it. Therefore, the Federal Court of Justice holds that the objective dangerousness of an action for the life of others cannot suffice to infer intent. It may only be regarded as an indication of the actor’s mens rea. So the court demands a close examination of all the circumstances in each individual case.

In Germany, however, charges of attempted intentional killing in these cases are usually unsuccessful and are overruled in the Federal Court of Justice. The Court generally uses its inhibition threshold theory to acquit actors of intentional killings. According to this theory, a person is generally assumed to have a high inhibition threshold for the acts that could cause another person’s death. Thus the threshold for conditional intent is higher.
In Germany, an actor that drives straight at a police officer who is giving them a sign to stop, can generally bank on the reaction of the police officer and them jumping aside to avoid the collision, even if this endangered officer could only save themselves by jumping into the ditch.\textsuperscript{291}

This has been based on statistics that these situations hardly ever have led to fatal results in Germany\textsuperscript{292} and on experience that people generally try to avoid the collision by quickly getting off the road. Police officers are seen to expect that not all drivers will stop at their stop sign and police officers are already mentally prepared to jump aside.

Thus it is reasonable for a driver to assume that the police officer will jump aside and that there is no substantial risk of the police officer’s death. The actor might accept endangering the police officer, but the actor can still be seen having considered the chance of the officer’s death as improbable.\textsuperscript{293} This kind of actor’s awareness of only a small chance of the police officer’s death suggests that the actor has not accepted the chance of police officer’s death. Thus in Germany continuing to drive and forcing a police officer to jump aside to avoid a collision has not been considered to constitute intentional attempted killing.

This is the starting point, but exceptions to the rule exist. For example, the Federal Court of Justice has upheld a conviction of attempted murder in a case where the victim had turned their back on the actor, who had driven directly towards the victim and then over the victim.

There has been some case in Finland, too. The case \textit{KKO 2010:19}\textsuperscript{294} was such a case brought to the Supreme Court of Finland. In this case, a police officer had managed to avoid getting run over by jumping aside at the last moment. In the Raasepori District Court, the defendant M had been convicted of attempted murder and other crimes and sentenced to five years’ imprisonment. The Court of Appeal of Turku, however, quashed the attempted murder conviction, as well as the secondary charge of attempted aggravated assault. The case was then brought to the Supreme Court.

\textsuperscript{291} Bohlander 2009, p. 65.
\textsuperscript{292} Blomsma 2012, p. 107.
\textsuperscript{293} Ibid.
\textsuperscript{294} KKO 2010:19.
In the case, defendant M had been suspected of drunk driving and had been ordered to stop, but he had continued driving with his car towards the police officer O with a speed of 80 km/h. According to the Supreme Court, M must have realized that if he hits O with his car, the result will quite probably be O’s death or a serious bodily injury to him. The Supreme Court then considered, how probable M had considered the car’s collision with O.

According to the Supreme Court, it can be held as a premise that a police officer seeks to evade if he notices that a driver is not going to comply with the stop sign. However, this requires circumstances that make it possible to notice in advance what the driver is going to do and succeed in avoiding the collision. There are always considerable risks in driving through in these situations.

The location of the traffic stop in this case was in a long straight road. Thus the police officer O had plenty of time to observe M’s oncoming car and its movements. O had noticed the car had approached the traffic stop with steady speed without breaking or reacting to the stop sign.

According to the Supreme Court, M could conclude from the stop sign that O had already noticed him from a distance. There were no conditions in this case that would show that M would have intentionally made it harder for O to evade the collision. According to the Supreme Court, it could still have been possible that O could have interpreted the situation wrongly and failed to jump aside or tripped getting hit by M’s car. In these circumstances, however, it was significantly more likely that O would survive unharmed from this potentially hazardous situation.

Thus the Supreme Court concluded that the collision between M’s car and the police officer O and consequently O’s death or serious bodily harm to O were not so probable consequences of M’s actions that M could be held guilty of attempted murder or attempted aggravated assault. Instead, M was convicted of violent resistance to a public official and of causing a serious traffic hazard.

Vihriälä has suggested that A’s purpose was to collide with the police officer O or to get away from the scene at the risk that it would require driving over O. Thus only the consequences of the collision would be assessed with probability, which could
lead to conviction of at least attempted aggravated assault. According to Vihriälä, this was not a normal traffic situation, but instead A has used his car as a means of assault, which would support the conviction, when A would be held responsible for all the quite probable consequences of his deliberate action.

In Sweden the Supreme Court decision NJA 2002 s. 449 is also a good example of this assessment. In the case, actor KB was ordered to stop by a police officer, but KB continued to drive past a police car parked on the road and towards the police officer, who had to jump aside to escape the collision with K’s car.

The District Court convicted K of attempted aggravated assault. The court concluded that if K had collided with the police officer N, N would have been seriously injured. The Court of Appeal used the hypothetical test and concluded that it was not certain that K would have acted the way he did had he considered the collision with the police officer to be certain. K had never been previously convicted of violent crimes.

The Court of Appeal then considered whether K had acted intentionally even if his action would not fulfill any traditional definition of intention. Thus it considered also the criticism against the hypothetical test and the proposal of new form of intention (insiktsuppsät) that had been made in SOU 1996:185. The Court of Appeal concluded that, despite his intoxication, the actor K must have realized that a very high possibility existed that N would be very seriously injured by the way K was driving the car. The court upheld the conviction given by the District Court.

According to the Supreme Court, indifference can be intention, too. If the defendant has acted although a consequence has been very probable (en mycket hög sannonlikhet), they can be seen to have acted with indifference to the consequence. Majority of the Supreme Court then rejected the use of previously used hypothetical eventual intent and the hypothetical test as a threshold of intention and its lowest form dolus eventualis. Instead it applied a new form of intention based on indifference.

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295 Vihriälä 2012, p. 147.
296 Ibid.
297 NJA 2002 s. 449.
According to the Court, indifference combined with probability assessment could establish liability. Intent of indifference had been suggested already earlier and been considered as an alternative to the hypothetical test, but now it was used for the first time by the Swedish Supreme Court.

The Supreme Court ruled that the risk of serious bodily injury was considerable and that K’s behavior showed indifference to the possible consequence. The Supreme Court convicted K of aggravated attempted assault. The decision wasn’t unanimous. One dissenting judge would have upheld the Court of Appeal’s decision as it was; another judge would have used the hypothetical test to this case and dismissed the charges against K.

The Supreme Court didn’t in this case yet first examine whether the actor had foreseen the risk of criminal consequence as a result of his act and then consider the actor’s indifferent attitude toward the predicted consequence and the realization of this consequence. This finer version of intent of indifference developed only later.

6.6 Case study: HIV-cases and intent

Another interesting case is the human immunodeficiency virus (HIV), its relation to criminal offences and the chance of being infected with HIV. If a person is aware that they have the infection, but hides this fact from their sexual partner, how should this situation be viewed? If the person intentionally tries to infect another, should this be treated even as attempted manslaughter or maybe as intentional infliction of grievous bodily injury? How likely must the consequence of infection be in order to accept conditional intent? Is it rather a negligent crime or no crime at all if there is no purpose of transmitting the virus? Can the consent of the partner negate the intent in HIV-cases?

For a long time, the decision in R v Clarence\textsuperscript{298} from 1888 was the leading case in English criminal law concerning a sexually transmitted disease. In this case, the actor Clarence infected his wife with gonorrhea through their consensual intercourse. In the 19th century, gonorrhea was still considered as an incurable and fatal disease. Clarence had known about his disease, but hadn’t told his wife about it.

\textsuperscript{298} [1888] 22 QBD 23.
He was charged with and convicted of offences under Sections 20 and 47 of the Offences against the Person Act 1861, inflicting grievous bodily harm and assault occasioning actual bodily harm. However, on appeal the Court of Crown Cases Reserved quashed the convictions.

According the majority of the court, a person infecting another with a life-threatening disease is not guilty of inflicting grievous bodily harm or assault occasioning actual bodily harm, since transmitting this disease couldn’t constitute infliction of grievous bodily harm, when the natural and plain meaning of the word “inflict” suggested an immediate and necessary connection between the actor’s conduct and the harm suffered by the victim. According to Stephen J., rather than assault, this infection was kind of poisoning under Sections 23 and 24, maliciously administering any poison or other destructive or noxious thing.

Another, maybe even more relevant question in this case was the question of consent. The wife had consented to sexual intercourse with Clarence, but in the court she told that she wouldn’t have consented had she know about the disease. Clarence’s defence relied on consent, stating that relevant is whether the person had consented to the activity in which the infection has occurred, not the consent to this infection itself. The majority of the court accepted this view, founding that fraudulent conduct only vitiates the victim’s consent when it has been related to the nature of the act itself, or to the actor doing this act.\textsuperscript{299} According to the majority, sexual intercourse with a diseased person wasn’t different in its nature compared to one with a healthy person, and Clarence’s failure to disclose his disease didn’t constitute a fraud vitiating the consent.

Finally in 2004, in the case \textit{R v Dica}\textsuperscript{300}, it was ruled that \textit{Clarence} was no longer a law. In this case a HIV-positive actor had known about his infection, but had had unprotected sexual intercourse with two women, transmitting the HIV-virus. According to the Court of Appeal, the fact that the women had consented to sexual intercourse didn’t mean that they had consented to a grievous bodily harm from a sexually transmitted HIV. So the defence of consent didn’t apply here. Had there

\textsuperscript{299} For this kind of situation before Clarence, see case \textit{R v Flattery}, [1877] 2 QBD 410, and after Clarence see \textit{R v Williams}, [1923] 1 KB 340.

\textsuperscript{300} [2004] EWCA Crim 1103.
been consent to the risk of infection, according to the court, this would have provided a defence under Section 20.

It is noteworthy that Dica wasn’t convicted of intentionally causing grievous bodily harm under Section 18, but of inflicting a grievous bodily harm under Section 20, which merely requires recklessness rather than intent. According to the court, consent wouldn’t even have applied as a defence under Section 18. In 2003, Dica had been initially charged and also convicted for intentionally causing the infections under Section 18 to imprisonment for 8 years, but in retrial he was convicted under Section 20 and sentenced to imprisonment for 4.5 years.

The conviction of Dica was the first HIV-transmission conviction in England, but the same questions were soon considered in another Court of Appeal case R v Konzani. In this case, HIV-positive Konzani had repeatedly had unprotected sexual intercourse with three women. The defence of Konzani was that the women had by consenting to unprotected sexual intercourse consented to a risk of getting a sexually transmitted disease. However, according to the Court of Appeal, since the women didn’t know that Konzani was HIV-positive, they couldn’t give their fully informed consent required for the defence against conviction under Section 20 of inflicting a grievous bodily harm. Konzani was convicted of this offence in Crown Court and the Court of Appeal upheld this conviction and the sentence of imprisonment for 10 years. In this case Konzani wasn’t even tried under Section 18.

As we can see, both of these cases concern recklessness and the risks of transmitting HIV were seen in these cases to be unreasonable. In English criminal law, this assessment is not only based on the probability of the risk, but also on the wider perspective and on the social utility of the act. This can lead to a small risk of great harm, which HIV could be, becoming a relevant and unreasonable risk.

Blomsma even goes so far as suggesting that “there is no social utility in having unprotected instead of protected sexual intercourse”. This, of course, also refers to how easy it is to avoid the risk and that having protected sex significantly reduces the risk of HIV-transmission, which already in many unprotected sex cases today can be

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301 [2005] EWCA Crim 706.
302 Blomsma 2012, p. 137.
303 Ibid.
considered very low. Naturally, a case where the HIV-positive actor has known about their disease and still had unprotected sexual intercourse without disclosing the risk of infection to their sex partner, can also indicate this actor’s reckless attitude.

But these English cases didn’t go as far as finding Dica and Konzani having had intent to infect, or even the intent to kill the victim by transmitting a lethal disease, which would require both the actus reus and mens rea elements of murder or manslaughter proven. This kind of intent could be hard to prove, even with the provision that the actor can be convicted of murder also when they have intended to cause a grievous bodily harm and the victim has died as a result of this. However, such convictions in HIV-cases haven’t been given in England and Section 20 has been instead applied. As we have seen, recklessness can be seen to cover the same cases as dolus eventualis, so now I will take a closer look whether these cases are considered intentional in the countries applying the concept of dolus eventualis.

In a BGH case *BGHSt 36, 1* 304 an HIV-positive actor A had twice had unprotected anal sexual intercourse with another man D as well as received unprotected oral sexual intercourse from D. However, A had on both times put a condom on before ejaculating. A hadn’t told D about his HIV-infection. D didn’t get infected with HIV. The court now had to assess what kind of risk of HIV-transmission A had created.

The District Court and BGH both carefully assessed the risk of HIV-transmission. Based on expert opinions it wasn’t possible to find the exact probability for infection, but the risk of infection got greater the more the disease progressed towards AIDS. Unprotected anal sex was seen especially dangerous compared to other forms. Withdrawing from the intercourse before the emission reduced the risk, but didn’t eliminate it. This had been also told to A when had been diagnosed to have HIV.

According to the District Court, infecting another person with HIV can constitute the offence of causing bodily harm by dangerous means under Section 223a (now Section 224). The Court assessed there was a risk of infection required for conditional intent, and the Court held that A had accepted and condoned this possibility of infecting D. A was convicted of three offences of attempted causing of

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304 BGH 4.11.1988 – 1 StR 262/88.
bodily harm by dangerous means, and was sentenced to imprisonment for 2 years. The BGH accepted this reasoning of the District Court.

This German case is a good example of conditional intent and that low, but not remote, chance of the occurrence of the consequence can still be significant and enough for conditional intent. It can also be seen to apply the Approval theory. The intent in this case wasn’t, however, seen to be enough intent for attempted homicide charges. In Germany, this case has also been the leading case of intentional offence of HIV-exposure and there has been many other convictions since.

The Dutch Supreme Court has been less eager than German courts to use conditional intent. In case NJ 2005, 154, the Supreme Court stated that conditional intent generally requires certain circumstances that increase the risk (bijzondere risicoverhogende omstandigheden) of the infection of sexually transmitted disease, for example, according to an expert in this case, the risk in unprotected anal intercourse was from 1/200 to 1/300, high in medical sense. Since in this case there weren’t such special circumstances, the Supreme Court didn’t now assess the risk of HIV-infection as considerable and actor A was thus acquitted.

In case NJ 2007, 313, the Supreme Court stated that having unprotected intercourse doesn’t alone mean that the HIV-positive person would have accepted the risk of infecting their partner. In this case, repeated unprotected anal and oral intercourse in a relationship didn’t constitute conditional intent, though it was seen to have increased the risk. According to the Supreme Court, the fact that the HIV-positive actor A had lied to his partner whether he had HIV-infection could mean that he had knowingly accepted the risk of infecting the partner, but this didn’t either increase the risk of infection.

The District Court had convicted A of premeditated aggravated physical abuse under Article 303 of the Dutch Penal Code, which a quite severe offence with maximum imprisonment of 12 years. A had been sentenced to imprisonment for 1 year and 3 months. The Court of Appeal quashed the conviction. The Supreme Court considered

305 About homicide intent in this case, see Matikkala 2005, pp. 370–371.
306 Blomsma 2012, p. 106.
whether A was guilty under Section 302 and intentionally inflicting serious bodily harm, not under the more aggravate Section 303. The Supreme Court acquitted A.\textsuperscript{309}

The more recent Dutch case \textit{Groningen HIV}\textsuperscript{310} was even more about causality than intent. In this case, three men were accused of injecting their HIV-positive blood into victims in gay sex parties between 2005-2007. 12 men were diagnosed with HIV-infection. The District Court and Court of Appeal convicted the actors P and H of intentionally inflicting a serious bodily harm, under Section 302 of the Dutch Penal Code, to five of the HIV-infected. P was sentenced to imprisonment for 12 years and H for 9 years. A third actor D had been convicted by the District Court for 1 year.

According to the Supreme Court, in this case it couldn’t be proven that the men had got infected because of these blood infections. The Supreme Court didn’t find it highly unlikely (\textit{hoogstonwaarschijnlijk}) that any of the men had got infected as a result of having unprotected anal intercourse with someone who was HIV-positive. It was also uncertain whether the men had been drugged or they had by themselves used too much drugs in these sex parties.

The Supreme Court stated that the fact that the risk of HIV-infection in this way is much smaller compared to injections with HIV-positive blood doesn’t mean that the risk in anal sex would be so small that it could be considered as highly unlikely. The Supreme Court emphasized that this was a very specific case and that determining the causality doesn’t always require that every possible scenario that offers an alternative to one in the offence charges would need to be excluded with certainty.

According to the Supreme Court, there still remained a reasonable doubt that the victims had been infected already before this by having unprotected anal sex rather than being infected in this sex party with injected HIV-positive blood. The Supreme Court sent the case back to the Court of Appeal, which gave its new decision\textsuperscript{311} with lower sentences. P was sentenced to imprisonment for 8 years and H for 5 years.

\textsuperscript{309} Similarly before this were acquitted HR 25 March 2003 NJ 2003, 55 and HR 24 June 2003, NJ 2003, 555.
In the Finnish Supreme Court case *KKO 1993:92*, the HIV-positive actor S had during the years 1986-1987 repeatedly had unprotected anal sex with his partner P without disclosing to P his HIV-infection. P had got infected with HIV and eventually died as a result of AIDS in 1990. The District Court convicted S of aggravated assault and negligent manslaughter and sentenced him to imprisonment of 2 years. The Court of Appeal convicted S of aggravated assault and gross negligent manslaughter and sentenced him to imprisonment of 4 years.

The Supreme Court convicted S of aggravated negligent manslaughter. More serious charges of voluntary manslaughter and aggravated assault were dismissed. According to the Supreme Court, there was no evidence shown about S’s intention to infect his partner. Considering the information available at that time about the magnitude of infection risk, there were no grounds to assume that S had considered the materialization of infection as a certain or very probable consequence of his action. So in this case S was only convicted of negligent offence. The dissenting Judge Pellinen would have convicted S of aggravated assault and negligent manslaughter, stating that S must have understood that repeated unprotected sexual intercourse would quite probably result to P getting HIV-infection as a consequence.

The Finnish Supreme Court decision KKO 1993:92 also set the probability-intent and a Finnish version of the intent of indifference, *positivinen tahtoteoria*, against each other. This form of intent emphasized the actor’s volitional element, the actor was having the required intent when they accepted the consequence or was indifferent to it.  

So this is quite similar to what Sweden now uses. This theory by Honkasalo used to be popular in Finland, but as we have seen, the Finnish Supreme Court has adapted the probability-intent with the threshold of a quite probable consequence. The Court used the probability-intent in this case, too. It is probable that if the intent of indifference would have been applied, S could have been seen to act intentionally and would have been convicted of voluntary manslaughter or aggravated assault.

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312 *KKO 1993:92.*
Later that year, the Court of Appeal of Helsinki in its decision 10.12.1993\textsuperscript{314} convicted an HIV-positive and Hepatitis B-positive actor K of attempted voluntary manslaughter. The Court concluded that K must have known that it was at least quite probable that the victim would get infected with HIV-virus as consequence of A’s act. According to the Court of Appeal, already one sexual intercourse can be enough to transmit the virus, and with Hepatitis B the risk was several ten times the normal risk. A dissenting judge would have convicted K only of imperilment, concluding that he had had no intent to kill or harm the health of the victim.

In the more recent 2004 HIV-exposure decision\textsuperscript{315} an HIV-positive actor A had several times had unprotected sexual intercourse with several victims. A hadn’t disclosed his HIV-positivity to any of the victims. A was charged with several counts of attempted voluntary manslaughter, but instead both the District Court and the Court of Appeal convicted A of several counts of attempted aggravated assault. Both courts ruled that since an HIV-infection can be treated today so that it won’t anymore lead to death of infected person, these acts couldn’t be seen as attempted voluntary manslaughters. The Supreme Court didn’t grant the leave to appeal.

These cases are already 10 and 20 years old. How about today, if a person knows about their HIV-infection, but doesn’t intend to infect their partner, does dolus eventualis apply? Frände thinks not, even if there are multiple sexual acts, since every individual act is assessed separately in regard to probability of infection.\textsuperscript{316} In a single act of sexual intercourse, the probability that an infection occurs is much smaller than the probability that the infection doesn’t occur. So every single act only has that small probability.\textsuperscript{317}

Matikkala, however, has suggested that multiple sex acts between an HIV-positive actor and an HIV-negative victim should be assessed as a single act, if the actor at the time considered that they were repeating the dangerous act towards this victim.\textsuperscript{318}

\textsuperscript{314}HHO 10.12.1993 R 5419
\textsuperscript{315}HHO 5.7.2004 R 03/2292.
\textsuperscript{316}Frände 2012, p. 121.
\textsuperscript{317}For the probabilities of HIV-transmission, see Matikkala 1995, pp. 6-12. Today these are even lower with medical treatment. Vihriälä has used the act of an HIV-positive person having a single unprotected sexual intercourse as a Puppe’s theory example of something that isn’t probable enough to happen and that this act can’t be intentional homicide even if this person would want to infect another. Vihriälä 2012, p. 115.
\textsuperscript{318}Matikkala 2005, p. 163.
With this logic, multiple acts would together constitute a single act in the legal sense and the chance of infection would be calculated as more probable than if the probability would be calculated separately for every act.

The low probability of HIV-transmission has been seen in the Swedish courts, too. *NJA 2004, s. 176*\(^{319}\) was a Swedish HIV-case in which the Supreme Court of Sweden had to assess whether the HIV-positive actor S should be convicted of attempted aggravated assault or only of creating danger to another. In this case, S had had unprotected sexual intercourse with ten different people. None of them was infected with HIV as a result of intercourse with S.

S admitted having had unprotected sexual intercourse but stated that he had such a low values of viral particles in his blood that he could not transmit an HIV-infection or at least he had been convinced that he could not transmit the infection. The defence thus argued then that he had lacked the intent to aggravated assault.

Both District Court and the Court of Appeal convicted S for attempted aggravated assault. According to the District Court, S had lacked both direct and indirect intent, but the lowest form of intent was fulfilled. S was sentenced to imprisonment for 4 years. The Court of Appeal reduced the sentence to 3 years of imprisonment, but otherwise agreed on the judgment with the District Court.

The Supreme Court quashed this conviction and instead convicted S of the gross negligent offence of creating danger to another under Section 9 of the Swedish Penal Code, Chapter 3. He was sentenced to imprisonment for one year. According to the Supreme Court, the statistical probability of transmitting an HIV was very low and the probability that the consequence would occur was less than considerable.

Considering this low chance of infection, S was considered not to have been indifferent, as required by the intent of indifference, about the consequence of transmitting the HIV. In this case indifference explicitly was assessed in regard to the consequence, as the Swedish rule in this form of intent now is.

Even when there was now no required intent in this case, the Supreme Court ruled that since the HIV-positive S hadn’t used a condom, he had created an unacceptable

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\(^{319}\) *NJA 2004, s. 176.*
risk and had been negligent. There have been many similar convictions after this. The new Communicable Diseases Act (Smittskyddslag) entered into force in Sweden on April 21, 2004, a little after the Supreme Court decision. The act requires an HIV-positive person to inform their partner of HIV-positivity and to practice only protected sex.\(^{320}\) Failure to comply with these requirements of disclosure and safe sex has lead to various convictions, mostly of the offence of creating danger to another.\(^{321}\)

A quite recent Swedish HIV-exposure case might have changed this course. On 29.10.2013, the HIV-positive A was acquitted by the Court of Appeal for Skåne and Blekinge.\(^{322}\) The District Court had convicted A of creating danger to four women by having unprotected vaginal intercourse with them and having not disclosed his HIV-positivity to any of the women. None of the women was infected. A had been sentenced to imprisonment for one year.

The Court of Appeal agreed on what had happened, but concluded that the risk of infection was very small, even in unprotected sex, since A’s HIV-treatments had worked well and his virus levels were undetectably low. The assessment of the risk was largely based on expert opinions given by the Swedish Institute for Infectious Disease Control and Professor Albert from the Karolinska Institute. According to these opinions, when the HIV-positive person is under stable medical treatment, the risk of infection is so small that there is no real danger. Similarly had stated a little before this decision the National Board of Health and Welfare (Socialstyrelsen).\(^{323}\)

According to the Court of Appeal, the conviction would have required a concrete danger (konkret fara) that the women would be infected. According to the court, it was not enough that the act could have caused the infection, but there also needed to be some probability in such way that it would have been reasonable to expect the infection as a consequence. Now this wasn’t the case. Unlike in many other Swedish HIV-cases before this case, A was now acquitted.

\(^{320}\) Smittskyddslag (2004:168), Chapter 4.
\(^{321}\) See e.g. Gröön and Berggren 2009, pp. 36–37.
\(^{323}\) Socialstyrelsen 2013.
The Swedish Supreme Court didn’t grant the prosecutor the leave to appeal, stating that the circumstances in this case were similar than in case *NJA 2004, 176*, which case, according to the Supreme Court, is still the indicative (*vägledande*) case instead the new one given by the Court of Appeal for Skåne and Blekinge.\(^{324}\)

After this Swedish case, the Court of Appeal of Turku has also given a decision on an HIV-exposure case.\(^{325}\) In this case, the HIV-positive actor K had had unprotected sexual intercourse with the victim T. K had known about her infection and that the virus might be transmitted in the intercourse, but hadn’t told T about her HIV.

According to T’s testimony, K and T had met in a bar and then went to T’s place. In the morning, T had started to caress K, performed unprotected oral sex on her and briefly penetrated her with a condom on. Later they had sexual intercourse again, but T stopped it after 30 seconds having realized he had forgotten condom. Later they had sex one more time and they went separate ways.

T later found out that K was HIV-positive and called her, but K told him that she had no disease that could infect T. K had not talked about her infection with T during the time they were together and T had been the one to take the initiative for protected sex. T had not been infected. K was charged with the offence of imperilment, which requires that the actor had intentionally or through gross negligence placed another person in serious danger of losing their life or health.

In the District Court, K denied that any kind of sexual intercourse had occurred, and secondarily denied having placed T’s life or health in serious danger. Based on testimonies by K, T and T’s friends, the court concluded that the acts had occurred. The court then assessed the risk of infection and concluded that since K had been under treatment, the statistical risk of infection had been less than 0,001 %, but based on medical reports and an expert opinion, the risk is also affected by other individual factors, which are not always known to the actor.

According to the court, even more important than the probability in this case and in gross negligence is the greatness of risk the actor has taken, what their attitude towards the risk has been and if it has been a risk the other person was aware of. In  

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\(^{324}\) Rättsläget oförändrat när det gäller samlag med hiv-smittad.  
\(^{325}\) THO 26.6.2014 R 14/234.
this case, K had not told T about her HIV-infection and had taken the risk that T might get a disease that could be lethal if untreated. K had known about the risks and how she should have acted. According to the court, K had been grossly negligent towards the use of condoms and had not taken precautions to avoid the risk of infecting T. T hadn’t known about the HIV-infection, so there had been no shared risk.

The District Court concluded that K had acted with indifference towards the risk of infecting T with a serious disease. She has been convicted already before and she hadn’t changed her attitude, which, according to the court, increases the blameworthiness of the act. The court convicted K of imperilment under Section 13 of the Criminal Code, Chapter 21. K was sentenced to imprisonment for 6 months.

The Court of Appeal accepted the District Court’s reasoning and upheld the conviction. It also stated that the risk of infection always exists despite the small statistical probability, and that this is why a HIV-positive person needs to follow the clear guidance given to them of having only safe sex, since the person can never know all the factors affecting the risk of infection.

According to the Court of Appeal, K should have followed this guidance, which she had told having understood, and at least K should have told T about her infection. K had acted with indifference and against her duty of care in a situation where the risk of infection hadn’t been only theoretical, because K had not been able to control all the factors affecting this risk.

According to the Court of Appeal, the seriousness of the possible consequence has a greater emphasis in this case than the probability of infection. The court stated that an actor who intends to create a danger to the victim usually intends to harm this person and that this could be seen as intentional offence of assault. In this case, the court didn’t think that K had had the intent to cause a serious danger to T’s health, but K had still been reckless and indifferent to an causing infection to T. According to the court, she should have had only safe sex and at least told T about her HIV-infection.
According to Court of Appeal, K had consciously taken the risk that T could get infected and as a whole had acted with high degree of indifference. Thus the court concluded that she had acted with gross negligence and was guilty of imperilment.

This offence requires at least gross negligence, so the actor doesn’t need to have intent. The question of intent wasn’t truly considered in this case, even though K was seen to have been indifferent not only to the risk of infection, but also to the consequence of T getting infected. The Court of Appeal also concluded that K had consciously taken the risk that T could be infected. It’s still not likely that this kind of case could cross the required threshold of quite probable. In this case, the number of unprotected acts was still very small, even if the last act would have been unprotected, too. The Supreme Court has in 2013 granted two leave to appeals in HIV-cases, both of them concerning unprotected sexual intercourse without the HIV disclosure, one of attempted aggravated assault\textsuperscript{326} and one of imperilment\textsuperscript{327}.

7 Conclusions

7.1 The threshold of intent

As we now have seen, the threshold of intent in Finland, Sweden, Germany and the Netherlands is dolus eventualis with different variations, this extended version of dolus where the consequences can be seen to have been intended by the actor, even though they were not wanted or known for sure. As we can see from this research, the most heinous acts and even most of all the criminal offences need to be intentional. There are even specific provisions in the criminal codes stating that negligent acts are not crimes, unless otherwise is stated explicitly in the statutory offence definitions. If there are no such exceptions in these definitions and no negligent counterparts to intentional offences, the line between intent and negligence is a very important line. We have now seen how severe the sentences might be. It could be either that or acquittal. Some times the too high threshold of intent has led to changes in laws, like in Finland with purchasing sex from a victim of sex trade.

\textsuperscript{326} VL:2013-14. 
\textsuperscript{327} VL:2013-13.
Naturally, the offences of my thesis are of the gravest kind, taking another person’s life, body and health. But when the sentence can be imprisonment for life, it is important to know that only those whose acts and thoughts have been with guilt and fault are convicted of these crimes. All the countries of this research have different forms and levels of homicides, sexual crimes and assaults, some more mitigating or aggravating forms and factors than others. The question of intent is important in all of these fields. If, for example, a person has the condition of sexsomnia, the imprisonment for 2 years and the label of rape offender could be considered quite more than an excessive punishment for an act they weren’t aware of. It could be argued that people with sexsomnia should be given obligations to be careful like HIV-positive persons. But it is questionable whether either of these conditions should lead to criminal convictions if such guidelines weren’t followed.

It can be argued that in many cases the punishment for negligent offences would be too low if there was nothing like dolus eventualis between higher forms of dolus and negligence. The borderline for negligence can be a fine line. The line still has to be set somewhere. England sets a strict liability about the age of a child in sexual offences against children and about the sex seller being a victim of exploitative conduct. English recklessness can still be compared with dolus eventualis, but has completely eliminating the mens rea element gone too far? So far the other countries of my research haven’t gone a similar way. Strict liability in general should be used very carefully. The Swedish form of indifference intent is much more humane, when the actor still needs to be both aware of and indifferent to the consequence.

Can people be set with requirements to know that specific conduct is dangerous? With acts like stabbing another person in the heart this question can probably be quite easily answered. It doesn’t really matter if the actor didn’t know the exact probability that the person would die. But not all the acts are as apparent. It might be much easier to prove the probability-intent or the conditional intent with possible and not too remote consequences than it is to prove that the actor wanted something to happen or knew that it was certain to happen. But when it comes to homicides, should we convict the actor who has known that death was a quite probable consequence of their act, or just a possible consequence of the act, and should this
actor be convicted like the one that has planned and wanted to kill another human being? As we now have seen, the answer to this question varies.

In Germany, the BGH has set its own line that lethal offences require more from the intent than in less serious offences, where any chance of consequence materializing might be enough if this is accepted. We have now seen this German theory of *Hemschwelle*, that people are naturally against the active killing of other people, and that it is rather presumed that the actor’s has not taken the deaths *in kauf* (has not accepted them), so a German court needs to seriously consider whether there is the possibility of conscious negligence in lethal acts rather than dolus eventualis, regardless of what the facts of the case at first indicate, with exceptions in extremely violent acts. In the Netherlands, the intent in non-lethal offences has been often concluded from the knowledge of the high risk that the act has had. Lethal offences, however, need also more than that. As we have seen in the *Porsche*-case, it can be argued that there is a strong assumption that the actor doesn’t accept a consequence if it can also cause his own death. But is this kind of caution limited just to the context of driving a vehicle? And in this context, too, some people might want to die.

When the person knows that something is dangerous and likely to cause a dangerous result as a consequence of the act, it can be assumed that when this person still acts, that they have accepted the consequence, if not even wanted it to happen. However, it is good to remember that in Germany trusting in a good outcome could negate the volitional element, if a person honestly and seriously believes that it will be fine. The actor aware of the risk is no longer intentional but negligent. This provision, of course, has limits, too, so it doesn’t go way too far with people’s hopes and beliefs.\(^{328}\) This kind of possibility is still very far away from English criminal law reasoning that intent to cause grievous bodily harm can lead to murder conviction without any awareness of death as a consequence. But maybe England will change this law eventually. Reports and proposals of a change have already been made.

As we have now seen, the chance of the prohibited consequence occurring can be possible, considerable, substantial, probable or even certain. The problem then, of course, is how we measure these kinds of terms in percentages. In the Netherlands experts have often been used to assess the risks in probabilities using empirical data

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\(^{328}\) See e.g. BGH 8.5.2001 – 1 StR 137/01.
and calculations. The Supreme Court of Finland, as well as the Finnish legislator, has been quite resistant to the idea of openly using “quite probably” to mean more than 50% probability. Some courts have been eager put more weight to statistical chances of transmitting HIV to another person, some have been less eager. This kind of difference can even be seen inside a country, like Sweden, where the Court of Appeal very recently acquitted the actor in an HIV-exposure case, but the Supreme Court has stated that their decision from 2004 is still the leading case. However, the recent Swedish acquittal is a clear indication that the risks of HIV-transmission are getting all the time smaller and also less severe from the criminal law point of view.

If we use statistics, can we trust that the cases will keep on being similar to the ones that have been already dealt with or is it better to rule case by case, always taking a close look at the circumstances and every judge assessing their own probabilities enough to show the intent? And if we don’t use statistics and the risks keep on getting smaller and smaller, can we still trust on the old precedents given, for example, 10 years ago? Or should the laws and the courts always try to keep on with the progress of the world? We can see the clear difference between substantial laws of the American Model Penal Code from 1962 and the gender-neutral laws of today.

In this Model Penal Code, the risk needs to be substantial and unjustified. What is unjustified? The legislator and the courts can give weight to different things. They can protect certain people or certain things. The value given to life or health by the legislator and the courts can prevent individuals from deciding about their lives and bodies by themselves. The legislation can go so far to protect the children that it will prohibit two same-age children from kissing or so far that it will prohibit two adults from freely having consensual rough sex. This has happened in England. It can go the other way round, too, like in the Netherlands, and allow cases of euthanasia and lower sentences for people who have acted out of compassion. There need to be some limits, too, who we require to know what is unjustifiable or dangerous. It is important that the age of criminal responsibility is high enough for the person to understand their conduct and the concepts intentional offences involve. Maybe the European Union will someday harmonize this age of criminal responsibility.

In general, it can be said that criminal intent requires that the actor needed at the time of their act to be aware of the possible fulfillment of the consequences of this act. In
addition to this, in Germany acceptance or condoning is needed and in Sweden indifferent attitude towards this consequence. The Netherlands and Finland have been more likely to see that the high chance can include the volitional element. So there is a risk that something will happen and there is the awareness of this risk, and merely the risk may occur or the consequence will occur. Where does the intent need to be? Intent needs to go the farthest, not just to the risk, but also beyond the risk. Like the Finnish Supreme Court has been keen to say, the actor must have understood that X was a quite probable consequence of their act. Is this the best way?

I would say that there has to be some kind of relation between the actor and a critical fact, whether it then is a consequence or any other element of the offence. I would say that the actor’s relation with this fact should always include two elements, both the knowledge and the volitional element. In cases of criminal consequences, this volitional attitude can then be baked inside the knowledge, thus into taking the action while being aware of the consequence that the act can have.

So if the actor considers it to be probable, quite probable or a considerable chance that the victim will die if they stab the victim in the stomach and then goes and stabs the victim this way, taking this action itself shows that they have considered the consequence with an attitude of approval or with indifference. So it is not required that the volitional element is explicitly written out, but it is still there and this act would not have occurred without this actor’s approval or indifference. Cases where the actor has been extremely indifferent to another person’s life, like in Russian roulette, could still require a lower mathematical probability. I don’t think that it’s mandatory to have one specific percentage threshold for all the offences, without any margin to go below this, even though this kind of certain percentage could be seen as a way to maintain the principle of legal certainty.

The condition elements other than the consequences are a bit different cases. For example, a child’s age is what it is, and it is not dependent on anyone else’s will or attitude, not even the actor’s. Thus it makes sense to somehow describe the actor’s attitude about the knowledge, because in any case the attitude is there if the actor takes an action to have sex with the child with the actor’s sufficient awareness about the child’s insufficient age.
This child’s age should be seen as a hard fact, and the actor’s knowledge and awareness of the certainty of their knowledge as separate issues from this fact. In the end, this awareness is significant, up to the point where we are in a situation where the actor is by different indications constructed duties to find out the age of the child.

7.2 Limitations of this work and ideas for further research

I have now researched the topic and theme quite thoroughly and achieved my goal to find and compare the thresholds of intent in the legal systems of Finland and other selected countries and to investigate recent developments in legislation and court decisions. However, the extent of the project as well as language barriers didn’t allow me to go to the core of all laws and provisions.

The different languages have set some limits to my work and especially Dutch criminal law has been difficult, since it is not well covered in any other language than in Dutch. I have mostly had to do all the translations myself, especially from Finnish and Dutch. Luckily I have been able to find many good Dutch Supreme Court cases for my research and these have taken me better inside this legal system. The same can be said about German and Swedish court cases.

I could not compare every aspect I investigated in the Finnish system with all of the other countries, as this would have extended my thesis too much. Thus further research should tackle these investigations and go fully to the core of the laws and legal systems of all the investigated countries. Further and deeper research would also be needed with more specific research questions concerning the differences in areas like risks and awareness. The concepts of recklessness have now been only a small part of my research. I would be interested to find out much more.

Originally I wanted to also take a look at intent in European Union criminal law and in the Rome Statute of the International Criminal Court, but I now thought that it would have been too much for this thesis and decided to specifically compare these countries. However, this even more multi- and international dimension is a very good idea for further research, as well as would be, for example, the comparison of Commonwealth countries.
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