

instruct them on the law to be applied to the case.²⁰⁴ Certain instructions must be given *sua sponte* by the military judge and counsel's failure to request them or object to them will normally constitute waiver absent plain error.²⁰⁵

Those instructions are as follows: (1) Instructions as to the elements of the offenses charged²⁰⁶ and any lesser included offenses;²⁰⁷ (2) Instructions on special (affirmative) defenses reasonably in issue;²⁰⁸ (3) Instructions that the court members consider only matters properly before them;²⁰⁹ (4) Instructions that the accused is presumed to be innocent until his guilt is established by legal and competent evidence beyond a reasonable doubt;²¹⁰ (5) Instructions on deliberation and voting procedures;²¹¹ and (6) Other instructions offering explanations, definitions, or directions that have been requested or that are *sua sponte* required.²¹²

On appeal, the courts will examine, *de novo*,²¹³ the instructions as a whole to determine if they provided meaningful legal principles for the members' consideration.²¹⁴

[b] Sample Instructions

Sample instructions for Article 119a death or injury to an unborn child offenses can be found in the Military Judges' Benchbook, DA Pam. 27-9, para. 3-44A-1.

§ 6.5 Article 120—Sexual Offenses

[1] Official Text

§ 920. Art. 120. Rape and sexual assault generally

- (a) Rape. Any person subject to this chapter who commits a sexual act upon another person by—

²⁰⁴ Art. 51(c), U.C.M.J.; R.C.M. 920(a). *See generally* Schlueter, MILITARY CRIMINAL JUSTICE: PRACTICE AND PROCEDURE § 15-14 (8th ed. 2012) (discussion of instructions to court members).

²⁰⁵ R.C.M. 920(f). *See* § 3.3[c][3], *supra*.

²⁰⁶ R.C.M. 920(e)(1).

²⁰⁷ R.C.M. 920(e)(2).

²⁰⁸ R.C.M. 916. *United States v. Taylor*, 26 M.J. 127 (C.M.A. 1988) (duty to instruct on affirmative defenses rests primarily on Article 51 and not *Manual* provisions; thus failure to request instruction on affirmative defenses was not waived by failure to request).

²⁰⁹ R.C.M. 920(e)(4).

²¹⁰ Art. 51(c)(1), U.C.M.J.; R.C.M. 920(e)(5)(A).

²¹¹ R.C.M. 920(e)(6).

²¹² R.C.M. 920(e)(7).

²¹³ *United States v. Ignacio*, 71 M.J. 125 (2012).

²¹⁴ *United States v. Schap*, 49 M.J. 317 (1998) (on whole, instructions were legally correct); *United States v. Truman*, 42 C.M.R. 106 (C.M.A. 1970); *United States v. Alford*, 31 M.J. 814 (A.F.C.M.R. 1990).

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- (1) using unlawful force against that other person;
 - (2) using force causing or likely to cause death or grievous bodily harm to any person;
 - (3) threatening or placing that other person in fear that any person will be subjected to death, grievous bodily harm, or kidnapping;
 - (4) first rendering that other person unconscious; or
 - (5) administering to that other person by force or threat of force, or without the knowledge or consent of that person, a drug, intoxicant, or other similar substance and thereby substantially impairing the ability of that other person to appraise or control conduct; is guilty of rape and shall be punished as a court-martial may direct.
- (b) Sexual Assault. Any person subject to this chapter who—
- (1) commits a sexual act upon another person by—
 - (A) threatening or placing that other person in fear;
 - (B) causing bodily harm to that other person;
 - (C) making a fraudulent representation that the sexual act serves a professional purpose; or
 - (D) inducing a belief by any artifice, pretense, or concealment that the person is another person;
 - (2) commits a sexual act upon another person when the person knows or reasonably should know that the other person is asleep, unconscious, or otherwise unaware that the sexual act is occurring; or
 - (3) commits a sexual act upon another person when the other person is incapable of consenting to the sexual act due to—
 - (A) impairment by any drug, intoxicant, or other similar substance, and that condition is known or reasonably should be known by the person; or
 - (B) a mental disease or defect, or physical disability, and that condition is known or reasonably should be known by the person; is guilty of sexual assault and shall be punished as a court-martial may direct.
- (c) Aggravated Sexual Contact. Any person subject to this chapter who commits or causes sexual contact upon or by another person, if to do so would violate subsection (a) (rape) had the sexual contact been a sexual act, is guilty of aggravated sexual contact and shall be punished as a court-martial may direct.
- (d) Abusive Sexual Contact. Any person subject to this chapter who commits or causes sexual contact upon or by another person, if to do so

would violate subsection (b) (sexual assault) had the sexual contact been a sexual act, is guilty of abusive sexual contact and shall be punished as a court-martial may direct.²¹⁵

[2] Historical Overview of Article 120

[a] In General

No offense under the Uniform Code of Military Justice has undergone more change in the past several years than rape and related sexual assault offenses. Before examining the current statute, it is useful to briefly examine some of the background of how the crime of rape has been codified in the U.C.M.J. and the changes that have taken place in the past several years.

[b] Article 120—Before 2007

Before 2007, Article 120 was divided into two sections; rape and carnal knowledge. The elements of rape were: (a) the accused committed an act of sexual intercourse; and (b) the act of sexual intercourse was done by force and without consent. The elements of carnal knowledge were: (a) the accused committed an act of sexual intercourse with a certain person; (b) the person was not the accused's spouse; and (c) first, at the time of the sexual intercourse the person was under the age of 12; or second, at the time of the sexual intercourse the person had attained the age of 12 but was under the age of 16.

This codification of rape was very similar to rape as defined at common law.²¹⁶ Until 2007 the only two significant modifications to traditional common law rape were removing the spousal exception to rape and writing the offense in gender neutral terms so that either a male or a female can perpetrate or be the victim of a rape.²¹⁷

Factually, the most complicated aspects of a rape prosecution under this traditional rape statute were the requirements that the government must prove the sexual intercourse was done by force and without the victim's consent. While each of the elements, force and lack of consent must be proven separately, in many cases they are closely related and often the same facts will be used to prove both elements.²¹⁸

Actual force was defined as the use of physical violence or power by the accused to compel the victim to submit against her will. Under this definition the force required for rape must be greater than the amount of force necessary to accomplish

²¹⁵ MCM, Part IV, para. 45(a).

²¹⁶ See W. MILITARY LAW AND PRECEDENT 676-77 (2d ed. 1920 Reprint) (rape defined as the unlawful carnal knowledge of a woman forcibly and against her will and consent).

²¹⁷ United States v. Stanley, 43 M.J. 671 (Army Ct. Crim. App. 1995).

²¹⁸ United States v. Simpson, 58 M.J. 368, 377 (C.A.A.F. 2003) (offenses of rape and forcible sodomy both require proof that the act was committed by force and without consent; although force and lack of consent are separate elements, our case law recognizes that there may be circumstances in which the two elements are so closely intertwined that both elements may be proved by the same evidence).

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penetration.²¹⁹ At common law, the victim was required to resist the force to her utmost ability. Under military law, the government was not required to prove that the victim resisted. Resistance or lack of resistance was relevant on the question of force if the victim had the capacity to resist.²²⁰

In many cases, particularly in situations involving acquaintance rape, actual force may not exist. In such cases, if the government could prove constructive force, then the force element for rape was satisfied. In general terms, constructive force involves intimidation or threats of death or great bodily harm which makes resistance on the part of the victim futile. Constructive force can exist in many forms. Whether constructive force was used in a particular situation was a fact specific inquiry. The threat of death or great bodily harm could be against the victim or against some other person.²²¹

Closely related to force was the victim's lack of consent, which was also an element that the government must prove.²²² If the victim consented to the sexual intercourse, it was not rape. The lack of consent required was more than the lack of acquiescence.²²³ Likewise, if the victim in possession of her mental faculties failed to make her lack of consent reasonably manifest by taking such measures of resistance as are called for under the circumstances, consent could be inferred. If the victim was incapable of consenting because of age, or mental, or physical incapacity, then consent could not be inferred.

This traditional common law crime of rape was seen as problematic for a number of reasons.²²⁴ First, rape was an "all or nothing" crime. There were no degrees of rape or sexual assault to account for the varying types of sexual offenses that did not involve sexual intercourse by force. Second, force was primarily viewed as overt physical force. While military law did recognize constructive force, because there were no different degrees of sexual assault offenses, it was often difficult to show that constructive force raised to the level of force required to prove rape. Additionally, the requirement that the government prove the victim's lack of consent placed the burden on the victim for the rape if she failed to adequately make her lack of consent known to the accused.

²¹⁹ *United States v. Bonano-Torres*, 31 M.J. 175 (C.M.A. 1990) (victim claimed that she was tired and ultimately gave into accused's persistent demands for sex so that the accused would leave her alone; court held that the facts were insufficient to establish the element of force for rape conviction).

²²⁰ *United States v. Bonano-Torres*, 31 M.J. 175, 178-79 (C.M.A. 1990); *United States v. Carr*, 18 M.J. 297, 299 (C.M.A. 1984) (alleged victim offered no resistance and did not scream; while resistance is tangentially probative of the issues of consent and mistake of fact, proof of resistance is central to finding the element of force).

²²¹ *United States v. Simpson*, 58 M.J. 368 (C.A.A.F. 2003).

²²² *United States v. Trigueros*, 69 M.J. 604 (Army Ct.Crim.App. 2010).

²²³ *United States v. Bonano-Torres*, 29 M.J. 845 (A.C.M.R. 1989) (victim claimed that she was tired and ultimately gave into accused's persistent demands for sex so that the accused would leave her alone. Army court held that the facts were insufficient to establish rape).

²²⁴ *United States v. Leak*, 61 M.J. 234 (C.A.A.F. 2005); *United States v. Pierce*, 40 M.J. 584 (Army Ct.Crim.App. 1994).

Due in large part to these and other criticisms,²²⁵ major revisions to Article 120 came into effect on 1 October 2007. It is important to note that while the crime of rape has undergone significant revisions, much of the older case law may still be applicable to many concepts, such as force, consent, and sexual intercourse. The discussion that follows will reference these older cases where applicable.

[c] Article 120—October 2007-June 2012.

Changes to Article 120, which went into effect on 1 October of 2007, revolutionized the way rape, sexual assault and other sexual misconduct is prosecuted in the military. These changes represented Congress's response to mounting pressure over the past several years that the military change and modernize its rape and sexual assault statutes to better reflect the realities of modern military life.²²⁶

This "new Article 120" established varying degrees of non-consensual sexual conduct into a number of offenses. In addition, these changes brought the crimes of indecent liberties with a child, indecent acts and indecent exposure under Article 120. These offenses were formally prosecuted under Article 134. Finally, the "new Article 120" included the creation of two new offenses, forcible pandering and wrongful sexual contact. The offenses codified under this "new Article 120" were: Rape, Rape of a Child, Aggravated Sexual Assault, Aggravated Sexual Assault of a Child, Aggravated Sexual Contact, Aggravated Sexual Abuse of a Child, Aggravated Sexual Contact with a Child, Abusive Sexual Contact, Abusive Sexual Contact with a Child, Indecent Liberty with a Child, Indecent Act, Forcible Pandering, Wrongful Sexual Contact, and Indecent Exposure.

This section will briefly discuss some of the most significant changes that were brought about by the "new Article 120." Because this "new Article 120" was significantly amended and these amendments went into effect on 28 June 2012, more detailed information can be found in the discussion of the current law set out in the next section.

In addition to establishing varying types and degrees of non-consensual sexual conduct, the "new Article 120" changed several important definitions. Force is defined as: action to compel submission of another or to overcome or prevent another's resistance by (A) the use or display of a dangerous weapon or object; (B) the suggestion of possession of a dangerous weapon or object that is used in a manner to cause another to believe it is a dangerous weapon or object; or (C) physical violence,

²²⁵ Dalton, *The Sexual Assault Crisis in the United States Air Force Academy*, 11 CARDOZO WOMEN'S L.J. 177 (2004); (calls for legal reform starting with policy changes); Pickands, *Reveille for Congress: A Challenge to Revise Rape Law in the Military*, 45 WM. & MARY L. REV. 2425 (2004).

²²⁶ See, e.g., SEX CRIMES AND THE UCMJ: A REPORT FOR THE JOINT SERVICE COMMITTEE ON MILITARY JUSTICE 103 (FEB. 2005) available at http://www.dod.mil/dodgec/php/docs/subcommittee_reportMarkHarvey1-13-05.doc; REPORT OF THE COMMISSION ON THE 50TH ANNIVERSARY OF THE UNIFORM CODE OF MILITARY JUSTICE (May 2001); REPORT OF THE DEFENSE TASK FORCE ON SEXUAL HARASSMENT & VIOLENCE AT THE MILITARY SERVICE ACADEMIES 31 (June 2005); TASK FORCE REPORT ON CARE FOR VICTIMS OF SEXUAL ASSAULT 50-51, 57 (Apr. 2004).

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strength, power, or restraint applied to another person, sufficient that the other person could not avoid or escape the sexual conduct.

The term “sexual intercourse” from the prior Article 120 was replaced with the much more expansive term, “sexual act.” Sexual act was defined as: (A) contact between the penis and the vulva, and for purposes of this subparagraph contact involving the penis occurs upon penetration, however slight; or (B) the penetration, however slight, of the genital opening of another by a hand or finger or by any object, with an intent to abuse, humiliate, harass, or degrade any person or to arouse or gratify the sexual desire of any person.”

The article also added a new term, “sexual contact.” Sexual contact was defined as; “the intentional touching, either directly or through the clothing, of the genitalia, anus, groin, breast, inner thigh, or buttocks of another person, or intentionally causing another person to touch, either directly or through the clothing, the genitalia, anus, groin, breast, inner thigh, or buttocks of any person, with an intent to abuse, humiliate, or degrade any person or to arouse or gratify the sexual desire of any person.”

The other significant change in the “new Article 120” was that lack of consent was no longer an element of rape. Consent and mistake of fact were treated as affirmative defenses. As affirmative defenses the burden shifted to the accused to prove the defense by a preponderance of evidence. Once the defense met this burden either during the presentation of the government’s case or in the defense case in chief, the government must prove beyond a reasonable doubt that the affirmative defense did not exist.

“Consent” was defined as: words or overt acts indicating a freely given agreement to the sexual conduct at issue by a competent person. An expression of lack of consent through words or conduct means there is no consent. Lack of verbal or physical resistance or submission resulting from the accused’s use of force, threat of force, or placing another person in fear does not constitute consent. A person cannot consent to sexual activity if (A) under 16 years of age; or (B) substantially incapable of (i) appraising the nature of the sexual conduct at issue due to (I) mental impairment or unconsciousness resulting from consumption of alcohol, drugs, a similar substance, or otherwise; or (II) mental disease or defect that renders the person unable to understand the nature of the sexual conduct at issue; (ii) physically declining participation in the sexual conduct at issue; or (iii) physically communicating unwillingness to engage in the sexual conduct at issue. This definition of consent was much broader than under past law, however, it does not require the accused to show that the victim affirmatively consented to the sexual act.²²⁷

The accused’s mistake of fact as to consent must be honest and reasonable. The “new Article 120” provided that the term “mistake of fact as to consent” means the accused held, as a result of ignorance or mistake, an incorrect belief that the other

²²⁷ See e.g. Knies, *Two Steps Forward, One Step Back: Why the New UCMJ’s Rape Law Missed the Mark, and How an Affirmative Consent Statute Will Put It Back on Target*, ARMY LAW., Aug. 2007, at 1.

person engaging in the sexual conduct consented. The ignorance or mistake must have existed in the mind of the accused and must have been reasonable under all the circumstances.

Immediately after this “new Article 120” became effective, it was the subject of both criticism and legal challenges.²²⁸ The criticism focused primarily on the complexity and unwieldiness of the new law. Bringing all of the types and degrees of non-consensual sexual offenses under one section of the code created confusion. Additionally, some of the definitions on consent and capacity used circular language.²²⁹

The legal challenges focused primarily on consent as an affirmative defense and shifting the burden of proof to the defense to disprove an element of the offense.²³⁰ In one instance the Court of Appeals for the Armed Forces narrowed a term to preserve the constitutionality of the new law. In *United States v. Neal*,²³¹ the court held that the language in the statute which said, “consent is not an issue” does not mean that consent is never an issue and it is not a prohibition against considering evidence of consent. However, in two other cases, the court held that provisions of the new law which shifted the burden of proof to the defense to prove the victim’s consent, were unconstitutional.²³²

Because of the practical and legal problems in this “new Article 120,” it had a very short life. The “new Article 120” was substantially revised by section 541 of the National Defense Authorization Act for Fiscal Year 2012. The most current version of the law went into effect on 28 June, 2012 and applies to all offenses that arise after that date. The 2012 version of Article 120 revises the 2007 version by removing child sexual offenses and miscellaneous sexual misconduct from the statute and placing

²²⁸ See, e.g., Cornett, *The U.S. Military Responds to Rape: Will Recent Change be Enough?*, 29 WOMEN’S RTS. L. REP. 99 (2007) (noting problem of sexual assault in the military and how it has been handled in light of the military’s unique culture regarding opportunity, power, and gender); Lofland, *The Neglected Debate Over Sexual Assault Policy in the Department of Defense*, 55 NAVAL L. REV. 311 (2008) (noting that amendments relieve the government of its burden to prove that a sexual assault occurred and shifts the burden to the defendant to prove that he or she is innocent and that these changes are based on bad social science and worse policy assumptions, both under the façade of deterrence and punishment); Lorenz & Nevin, *Neither a Model of Clarity Nor a Model Statute: An Analysis of the History, Challenges, and Suggested Changes to the ‘New’ Article 120*, 67 A.F. L. REV. 269 (2011) (concluding that amendments Congress to Article 120, U.C.M.J. in 2007 needed to be refined to allow for the clarification of the concept of consent in military sexual assault investigations and cases); Knies, *Two Steps Forward, One Step Back: Why the New UCMJ’s Rape Law Missed the Mark, and How an Affirmative Consent Statute Will Put It Back on Target*, ARMY LAW., Aug. 2007, at 1.

²²⁹ See Defense Task Force on Sexual Assault in the Military Recommendations 2009.

²³⁰ Clark, *A Camel is a Horse Designed by Committee: Resolving Constitutional Defects in Uniform Code of Military Justice Article 120’s Consent and Mistake of Fact as to Consent Defenses*, ARMY LAW., July 2011, at 3.

²³¹ 68 M.J. 289 (C.A.A.F. 2009).

²³² *United States v. Prather*, 69 M.J. 338 (C.A.A.F. 2011); *United States v. Medina*, 69 M.J. 462 (C.A.A.F. 2011). See also, *United States v. Stewart*, 71 M.J. 38 (C.A.A.F. 2012).

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them in newly created Articles 120b and 120c, respectively. The 2012 statute also addresses the constitutional problems identified by the Court of Appeals for the Armed Forces, simplifies the statutory scheme of Article 120, and expands the definition of “sexual act” to make the offense gender neutral. A detailed discussion of the 2012 law is set out in the section that follows.

Practitioners should note, however, that allegations which arose before 1 October 2007 are covered by the law that existed at that time. Allegations that arose between 1 October 2007 and 28 June 2012 are covered by the 2007 law. Appendix 27 of the 2012 Manual for Courts-Martial sets out the elements of rape and carnal knowledge as that crime was defined prior to 1 October 2007. The appendix also includes a discussion of the offense, applicable definitions, model specifications and maximum punishments. Appendix 28 of the 2012 Manual for Courts-Martial sets out the elements of the non-consensual sex offenses as those crimes were defined between 1 October 2007 and 28 June 2012. The appendix also includes a discussion of the offenses, applicable definitions, model specifications and maximum punishments.

[3] Overview of Offense—Rape and Sexual Assault

Article 120 is divided into four sections; rape, sexual assault, aggravated sexual contact, and abusive sexual contact. These four sections create different types and degrees of non-consensual sex offenses against adult victims. Each section will be discussed separately. Definitions and concepts that apply to more than one section will be noted as applicable. Practitioners should note that allegations that arose before 1 October 2007 are covered by the law that existed at that time. Allegations that arose between 1 October 2007 and 28 June 2012 are covered by the 2007 law. Allegations that arise after 28 June 2012 are covered by this law.

[4] Proving the Offense—Rape**[a] Elements of the Offense**

As of July 2012, the President has not yet prescribed the elements of this offense. The 2012 Manual for Courts-Martial states that practitioners should refer to appropriate statutory language and, to the extent practicable, use Appendix 28 as a guide.²³³

[b] Proving the Elements

Rape is the most serious sex crime under Article 120 and it requires the government to prove force by establishing actual force; causing grievous bodily harm; threatening or placing the victim in fear of death or grievous bodily harm; threatening to kidnap the victim; rendering the victim unconscious; or administering a substance rendering the victim incapable of appraising or controlling her conduct.

There are several key definitions related to force, the threat of fear, grievous bodily harm, threat, sexual act, and consent that are important in understanding the crime of rape.

Force means: (A) the use of a weapon; (B) the use of such physical strength or

²³³ MCM, Part IV, para. 45 Note.

violence as is sufficient to overcome, restrain, or injure a person; or (C) inflicting physical harm sufficient to coerce or compel submission by the victim.²³⁴ Unlawful force means an act of force done without legal justification or excuse.²³⁵

The term 'grievous bodily harm' means serious bodily injury. It includes fractured or dislocated bones, deep cuts, torn members of the body, serious damage to internal organs, and other severe bodily injuries. It does not include minor injuries such as a black eye or a bloody nose.²³⁶

Threatening or placing that other person in fear means a communication or action that is of sufficient consequence to cause a reasonable fear that non-compliance will result in the victim or another person being subjected to the wrongful action contemplated by the communication or action.²³⁷ In proving that a person made a threat, it need not be proven that the person actually intended to carry out the threat or had the ability to carry out the threat.²³⁸

The term "sexual intercourse" used in traditional rape statutes was replaced with the broader term "sexual act." Sexual act means (A) contact between the penis and the vulva or anus or mouth, and for purposes of this subparagraph contact involving the penis occurs upon penetration, however slight;²³⁹ or (B) the penetration, however slight, of the vulva or anus or mouth of another by any part of the body or by any object, with an intent to abuse, humiliate, harass, or degrade any person or to arouse or gratify the sexual desire of any person.²⁴⁰

Traditionally, rape has been viewed as a general intent crime, meaning that the prosecution did not need to prove any mens rea or intent beyond the intent necessary to engage in forcible sexual intercourse without the victim's consent. That intent was sufficient to identify the accused as morally blameworthy. Under the expansive definition of "sexual act" if the prosecution alleges that the sexual act was an act defined in paragraph 45(g)(1)(B), the prosecution must show that the accused committed a sexual act with the intent to abuse, humiliate, harass, or degrade any person or to arouse or gratify the sexual desire of any person.²⁴¹ The terms abuse, humiliate, harass, and degrade are not further defined in the statute.

The term 'consent' means a freely given agreement to the conduct at issue by a

²³⁴ MCM, Part IV, para. 45(g)(5).

²³⁵ MCM, Part IV, para. 45(g)(6).

²³⁶ MCM, Part IV, para. 45(g)(4).

²³⁷ MCM, Part IV, para. 45(g)(7).

²³⁸ MCM, Part IV, para. 45(e).

²³⁹ *United States v. Huit*, 25 M.J. 136 (C.M.A. 1987).

²⁴⁰ MCM, Part IV, para. 45(g)(1). *State v. Ludlum*, 303 N.C. 666, 281 S.E.2d 159 (1981); *State v. Whittemore*, 255 N.C. 583, 122 S.E.2d 396 (1961); *see also United States v. Williams*, 25 M.J. 854 (C.M.R. 1988); *United States v. Tu*, 30 M.J. 587 (C.M.R. 1990); *United States v. Aleman*, 2 C.M.R. 269, 275 (A.B.R.1951) (court held that, "any penetration, however slight, of a woman's genitals is sufficient to constitute the element of rape"); *United States v. Williams*, 25 M.J. 854 (A.F.C.M.R. 1988).

²⁴¹ MCM, Part IV, para. 45(g)(1)(B).

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competent person. An expression of lack of consent through words or conduct means there is no consent. Lack of verbal or physical resistance or submission resulting from the use of force, threat of force, or placing another person in fear does not constitute consent. A current or previous dating or social or sexual relationship by itself or the manner of dress of the person involved with the accused in the conduct at issue shall not constitute consent.²⁴²

A sleeping, unconscious, or incompetent person cannot consent. A person cannot consent to force causing or likely to cause death or grievous bodily harm or to being rendered unconscious. A person cannot consent while under threat or fear or when induced to consent under the fraudulent representation that the sexual act serves a professional purpose, or when inducing a belief by artifice, pretense, or concealment that the person whom the victim is engaging in the sexual act is another person.²⁴³

Lack of consent may be inferred based on the circumstances of the offense. All the surrounding circumstances are to be considered in determining whether a person gave consent, or whether a person did not resist or ceased to resist only because of another person's actions.²⁴⁴ This provision creates a permissive inference for lack of consent.

[5] Proving the Offense—Sexual Assault**[a] In General**

Practitioners should note that allegations that arose before 1 October 2007 are covered by the law that existed at that time. Allegations that arose between 1 October 2007 and 28 June 2012 are covered by the 2007 law. Allegations that arise after 28 June 2012 are covered by this law.

[b] Elements of the Offense

As of July 2012 the President has not yet prescribed the elements of this offense. The 2012 Manual for Courts-Martial states that practitioners should refer to appropriate statutory language and, to the extent practicable, use Appendix 28 as a guide.

[c] Proving the Elements**[i] In General**

Sexual assault is a lesser offense to rape and it primarily differs from the crime of rape in the amount of force, compulsion or incapacitation used by the accused to accomplish the sexual act. The sexual act itself is exactly the same as the sexual act for the crime of rape and the same definition applies.

To be guilty of sexual assault the accused must commit a sexual act upon the victim in one of several ways.

[ii] Threatening the Victim

First, an accused may be guilty of sexual assault if the accused threatens or places

²⁴² MCM, Part IV, para, 45(g)(8)(A).

²⁴³ MCM, Part IV, para, 45(g)(8)(B).

²⁴⁴ MCM, Part IV, para, 45(g)(8)(C). *United States v. Tollinchi*, 54 M.J. 80 (C.A.A.F. 2000).

the victim in fear of a lesser degree than the fear required for rape. "Threatening or placing that other person in fear" means a communication or action that is of sufficient consequence to cause a reasonable fear that non-compliance will result in the victim or another person being subjected to the wrongful action contemplated by the communication or action.²⁴⁵ The specific difference between a threat of fear in sexual assault from the threat of fear in rape, is that for sexual assault, the threat of fear is less than a threat of death, grievous bodily harm, or kidnapping. Such lesser threat of harm includes (i) physical injury to another person or to another person's property; or (ii) a threat (I) to accuse any person of a crime; (II) to expose a secret or publicize an asserted fact, whether true or false, tending to subject some person to hatred, contempt, or ridicule; or (III) through the use or abuse of military position, rank, or authority, to affect or threaten to affect, either positively or negatively, the military career of some person.²⁴⁶ In proving that a person made a threat, it need not be proven that the person actually intended to carry out the threat or had the ability to carry out the threat.²⁴⁷

[iii] Causing Bodily Harm to the Victim

Second, the accused may also be guilty of sexual assault if he commits a sexual act upon the victim by causing bodily harm to the victim. The definition for bodily harm is very broad. It includes any offensive touching of another, however slight, including any nonconsensual sexual act or nonconsensual sexual contact.²⁴⁸ The breadth of the definition of bodily harm means that any offensive touching of the victim by the accused satisfies the requirement for bodily harm. Sexual act is defined above. Sexual contact is defined as: (A) touching, or causing another person to touch, either directly or through the clothing, the genitalia, anus, groin, breast, inner thigh, or buttocks of any person, with an intent to abuse, humiliate, or degrade any person; or (B) any touching, or causing another person to touch, either directly or through the clothing, any body part of any person, if done with an intent to arouse or gratify the sexual desire of any person. Touching may be accomplished by any part of the body.²⁴⁹

As defined, sexual contact is specific intent action.²⁵⁰ The prosecution must establish that the accused touched the victim with the intent to abuse, humiliate, harass, or degrade any person or to arouse or gratify the sexual desire of any person. The terms abuse, humiliate, harass, and degrade are not further defined in the statute. Any offense

²⁴⁵ MCM, Part IV, para. 45(g)(7).

²⁴⁶ *United States v. Simpson*, 58 M.J. 368 (C.A.A.F. 2003). *See also* *United States v. Palmer*, 33 M.J. 7 (C.M.A.1991) ("[C]onsent induced by fear, fright, or coercion is equivalent to physical force"); *United States v. Bradley*, 28 M.J. 197 (C.M.A. 1989); *United States v. Hicks*, 24 M.J. 3 (C.M.A.1987) (such "constructive force may consist of expressed or implied threats of bodily harm").

²⁴⁷ MCM, Part IV, para. 45(e).

²⁴⁸ MCM, Part IV, para. 45(g)(3).

²⁴⁹ MCM, Part IV, para. 45(g)(2)(A) and (B). *United States v. Aguilar*, 70 M.J. 563 (A.F.Ct.Crim.App. 2011)(victim's testimony that accused touched her genital area after she told him that she wanted to leave and the accused responded by pushing the victim down was sufficient evidence of sexual contact).

²⁵⁰ Traditional rape under Article 120 was viewed as a general intent crime. *See United States v. Willis*, 41 M.J. 435 (C.A.A.F. 1995).

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under Article 120 that includes sexual contact as the actus reus is a specific intent crime. In the context of most cases establishing specific intent will not be a difficult hurdle for the prosecution to overcome. Nonetheless, it is an element that the prosecution must establish, and if the prosecution fails to establish this specific intent, or if it can be shown that the accused performed the contact with a purpose other than one listed in the statute, the government will have failed to prove its case.

[iv] Fraudulent Representations to the Victim

Third, an accused can be guilty of sexual assault are by certain specific fraudulent representations. In turn, there are several subsets of frauds. The first subset is sometimes referred to as fraud in factum and was recognized by the pre-2007 version of Article 120.²⁵¹ This type of fraud arises in situations where the victim's consent is invalid because the victim does not understand to what he or she is consenting. One specific type of fraud involves making a fraudulent representation that the sexual act serves a professional purpose. This situation most often arises when an accused commits a sexual act on the false representation that it was for a medical purpose. The second subset of fraud arises where the accused fraudulently induces a victim to believe that the accused was some other person.

[v] Victim Unaware of or Unable to Consent to Sexual Act

Fourth, the accused can be guilty of sexual assault if he or she commits a sexual act upon a victim who is unaware that the sexual act is occurring or is unable to consent to the sexual act. A victim is unaware of the sexual act if they are asleep, unconscious, or otherwise unaware that the sexual act is occurring. A victim may be incapable of consenting to the sexual act if they are impaired by any drug, intoxicant, or similar substance, or due to a mental disease, defect, or physical disability. In each of these instances, the accused must know, or reasonably should know of the victim's condition. This situation differs from rape because here the accused is not the source or the cause of the victim's incapacity or lack of awareness.

[6] Proving the Offense—Aggravated Sexual Contact**[a] In General**

Practitioners should note that allegations that arose before 1 October 2007 are covered by the law that existed at that time. Allegations that arose between 1 October 2007 and 28 June 2012 are covered by the 2007 law. Allegations that arise after 28 June 2012 are covered by this law.

[b] Elements of the Offense

As of July 2012 the President has not yet prescribed the elements of this offense. The 2012 Manual for Courts-Martial states that practitioners should refer to appropriate statutory language and, to the extent practicable, use Appendix 28 as a guide.

²⁵¹ See *United States v. Booker*, 25 M.J. 114 (C.A.A.F. 1987).

[c] Proving the Elements**[i] Lesser Included Offense of Rape**

Aggravated sexual contact is a lesser offense to rape. The force components for this offense are exactly the same as the force requirements for rape under Article 120(a) and the definitions applicable for that offense are equally applicable here. What distinguishes this offense from rape is not the force used but the acts engaged in by the accused. Under this offense, the accused is guilty if he commits *sexual contact* rather than a *sexual act* upon the victim. Sexual contact is less invasive than a sexual act. Sexual contact is defined as: (A) touching, or causing another person to touch, either directly or through the clothing, the genitalia, anus, groin, breast, inner thigh, or buttocks of any person, with an intent to abuse, humiliate, or degrade any person; or (B) any touching, or causing another person to touch, either directly or through the clothing, any body part of any person, if done with an intent to arouse or gratify the sexual desire of any person. Touching may be accomplished by any part of the body.²⁵²

[ii] Specific Intent Crime

As defined, sexual contact is specific intent action. The prosecution must establish that the accused touched the victim with the intent to abuse, humiliate, harass, or degrade any person or to arouse or gratify the sexual desire of any person. The terms abuse, humiliate, harass, and degrade are not further defined in the statute. Any offense under Article 120 that includes sexual contact as the actus reus is a specific intent crime. In the context of most cases establishing specific intent will not be a difficult hurdle for the prosecution to overcome. Nonetheless, it is an element that the prosecution must establish, and if the prosecution fails to establish this specific intent, or if it can be shown that the accused performed the contact with a purpose other than one listed in the statute, the government will have failed to prove its case.

[7] Proving the Offense—Abusive Sexual Contact**[a] In General**

Practitioners should note that allegations that arose before 1 October 2007 are covered by the law that existed at that time. Allegations that arose between 1 October 2007 and 28 June 2012 are covered by the 2007 law. Allegations that arise after 28 June 2012 are covered by this law.

[b] Elements of the Offense

As of July 2012 the President has not yet prescribed the elements of this offense. The 2012 Manual for Courts-Martial states that practitioners should refer to appropriate statutory language and, to the extent practicable, use Appendix 28 as a guide.

[c] Proving the Elements**[i] In General**

Abusive sexual contact is a lesser offense to sexual assault and it differs from the

²⁵² MCM, Part IV, para. 45(g)(2)(A) and (B).

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crime of sexual assault with respect to the nature of the sexual activity involved. Rather than committing a *sexual act* as defined, an accused may be guilty of abusive sexual contact if he engages in *sexual contact* as defined.

To be guilty of abusive sexual assault the accused must commit sexual contact upon the victim in one of six ways.

[ii] Threats to the Victim

The first way an accused may be guilty of abusive sexual contact if the accused threatens or places the victim in fear of a lesser degree than the fear required for rape. "Threatening or placing that other person in fear" means a communication or action that is of sufficient consequence to cause a reasonable fear that non-compliance will result in the victim or another person being subjected to the wrongful action contemplated by the communication or action.²⁵³

The specific difference between a threat of fear in abusive sexual contact from the treat of fear in rape, is that for abusive sexual contact, the threat of fear is less than a threat of death, grievous bodily harm, or kidnapping. Such lesser threat of harm includes (i) physical injury to another person or to another person's property; or (ii) a threat (I) to accuse any person of a crime; (II) to expose a secret or publicize an asserted fact, whether true or false, tending to subject some person to hatred, contempt, or ridicule; or (III) through the use or abuse of military position, rank, or authority, to affect or threaten to affect, either positively or negatively, the military career of some person.²⁵⁴ In proving that a person made a threat, it need not be proven that the person actually intended to carry out the threat or had the ability to carry out the threat.²⁵⁵

[iii] Causing Bodily Harm to the Victim

The accused may also be guilty of abusive sexual contact if he commits sexual contact upon the victim by causing bodily harm to the victim. The definition for bodily harm is very broad. It includes any offensive touching of another, however slight, including any nonconsensual sexual act or nonconsensual sexual contact.²⁵⁶ The breath of the definition of bodily harm means that any offensive touching of the victim by the accused satisfies the requirement for bodily harm. Sexual contact is defined as: (A) touching, or causing another person to touch, either directly or through the clothing, the genitalia, anus, groin, breast, inner thigh, or buttocks of any person, with an intent to abuse, humiliate, or degrade any person; or (B) any touching, or causing another person to touch, either directly or through the clothing, any body part of any person, if done with an intent to arouse or gratify the sexual desire of any person.

²⁵³ MCM, Part IV, para. 45(g)(7).

²⁵⁴ United States v. Simpson, 58 M.J. 368 (C.A.A.F. 2003). See also, United States v. Palmer, 33 M.J. 7 (C.M.A.1991) ("[C]onsent induced by fear, fright, or coercion is equivalent to physical force"); United States v. Bradley, 28 M.J. 197 (C.M.A. 1989); United States v. Hicks, 24 M.J. 3 (C.M.A.1987) (such "constructive force may consist of expressed or implied threats of bodily harm").

²⁵⁵ MCM, Part IV, para. 45(e).

²⁵⁶ MCM, Part IV, para. 45(g)(3).

Touching may be accomplished by any part of the body.²⁵⁷

As defined, sexual contact is specific intent action. The prosecution must establish that the accused touched the victim with the intent to abuse, humiliate, harass, or degrade any person or to arouse or gratify the sexual desire of any person. The terms abuse, humiliate, harass, and degrade are not further defined in the statute. Any offense under Article 120 that includes sexual contact as the actus reus is a specific intent crime. In the context of most cases establishing specific intent will not be a difficult hurdle for the prosecution to overcome. Nonetheless, it is an element that the prosecution must establish, and if the prosecution fails to establish this specific intent, or if it can be shown that the accused performed the contact with a purpose other than one listed in the statute, the government will have failed to prove its case.

[iv] Fraudulent Representations to the Victim

The third and fourth ways an accused can be guilty of abusive sexual contact are by certain specific fraudulent representations. These are sometimes referred to as fraud in factum and they were recognized by the pre-2007 version of Article 120.²⁵⁸ They arise in situations where the victim's consent is invalid because the victim does not understand to what he or she is consenting. One specific type of fraud involves making a fraudulent representation that the sexual contact serves a professional purpose. This situation most often arises when an accused commits sexual contact on the false representation that it was for a medical purpose. The second specific type of fraud is fraudulently inducing a belief in the victim that the accused was some other person.

[v] Victim is Unaware of or Unable to Consent to Sexual Contact

The final ways the accused can be guilty of abusive sexual contact if they commit sexual contact upon a victim who is unaware that the sexual contact is occurring or is unable to consent to the sexual contact. A victim is unaware of the sexual contact if they are asleep, unconscious, or otherwise unaware that the sexual contact is occurring. A victim may be incapable of consenting to the sexual contact if they are impaired by any drug, intoxicant, or similar substance, or due to a mental disease, defect, or physical disability. In each of these instances, the accused must know, or reasonably should know of the victim's condition.

[8] Defenses—Rape, Sexual Assault, Aggravated Sexual Contact, Abusive Sexual Contact

An accused may raise any applicable defense. See Chapter 3 for a general discussion of defenses. Marriage is not a defense for any conduct in issue in any prosecution under this section.²⁵⁹

The most common defense that an accused is likely to raise is mistake of fact as to

²⁵⁷ MCM, Part IV, para. 45(g)(2)(A) and (B).

²⁵⁸ See *United States v. Booker*, 25 M.J. 114 (C.A.A.F. 1987).

²⁵⁹ MCM, Part IV, para. 45(f).

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the victim's consent.²⁶⁰ Unlike the 2007 rape statute, the accused can raise a mistake of fact defense without any burden shifting.²⁶¹ Military case law requires that the accused's mistake of fact as to consent must be honest and reasonable.²⁶² "Mistake of fact as to consent" means the accused held, as a result of ignorance or mistake, an incorrect belief that the other person engaging in the sexual conduct consented. The ignorance or mistake must have existed in the mind of the accused and must have been reasonable under all the circumstances. To be reasonable, the ignorance or mistake must have been based on information, or lack of it, that would indicate to a reasonable person that the other person consented. Additionally, the ignorance or mistake cannot be based on the negligent failure to discover the true facts. Negligence is the absence of due care. Due care is what a reasonably careful person would do under the same or similar circumstances. The accused's state of intoxication, if any, at the time of the offense is not relevant to mistake of fact. A mistaken belief that the other person consented must be that which a reasonably careful, ordinary, prudent, sober adult would have had under the circumstances at the time of the offense.

[9] Maximum Punishment-Rape, Sexual Assault, Aggravated Sexual Contact, Abusive Sexual Contact**[a]**

As of July 2012 the President has not yet prescribed the maximum punishments for this offense. The 2012 Manual for Courts-Martial states that practitioners should refer to appropriate statutory language and, to the extent practicable, use Appendix 28 as a guide.

[b] Constitutionality of Authorized Punishments

The maximum punishment for rape under 2007 version of Article 120 is death. The rules for court-martial indicate two aggravating circumstances where death can be considered as a punishment for rape. Rule for Courts-Martial, 1004(c)(6) indicates that the death penalty for rape is authorized when the offense was committed in time of war and in territory in which the United States or its ally was an occupying power or in which the United States armed forces were engaged in active hostilities.²⁶³ Rule for Courts-Martial 1004(c)(9) indicates that the death penalty for rape is authorized where the victim is under the age of 12 or the accused maimed or attempted to kill the victim.²⁶⁴

In *Coker v. Georgia*,²⁶⁵ a plurality of the Supreme Court held that the death penalty

²⁶⁰ See § 3.4[19](a)(iv).

²⁶¹ See *United States v. Prather*, 69 M.J. 338 (C.A.A.F. 2011); *United States v. Medina*, 69 M.J. 462 (C.A.A.F. 2011).

²⁶² *United States v. Carr*, 18 M.J. 297 (C.M.A. 1984); *United States v. Taylor*, 26 M.J. 127 (C.M.A. 1988); *United States v. Peel*, 29 M.J. 235 (C.M.A. 1989).

²⁶³ R.C.M. 1004(c)(6).

²⁶⁴ R.C.M. 1004(c)(9).

²⁶⁵ 433 U.S. 584 (1977).

for the rape of an adult woman is unconstitutional where the woman is not otherwise harmed. And in 2008, The Supreme Court held that the Eighth Amendment barred Louisiana from imposing the death penalty for the rape of a child where the crime did not result, and was not intended to result, in the victim's death. These rulings render Rule for Courts-Martial 1004(c)(6) and 1004(c)(9) unconstitutional.²⁶⁶

[10] Lesser Included Offenses-Rape, Sexual Assault, Aggravated Sexual Contact, Abusive Sexual Contact

As of July 2012, the President has not yet identified lesser included offenses of this offense. The 2012 Manual for Courts-Martial states that practitioners should refer to appropriate statutory language and, to the extent practicable, use Appendix 28 as a guide.

Note that while the Appendix 28 to the Manual for Courts-Martial lists several offenses as lesser included offenses of 2007 version of Article 120, practitioners cannot automatically assume that these are in fact lesser included offenses. In *United States v. Jones*,²⁶⁷ the Court of Appeals for the Armed Forces expressly returned to the elements test in order to determine if an offense is a lesser included offense of another offense. Thus, the fact that the President in the Manual for Courts-Martial or the courts in prior opinions may have listed an offense as a lesser included offense when the offense has no elements in common with the greater offense does not provide adequate notice to the accused, and does not make the offense a lesser included offense.

Practitioners must therefore, conduct an elements analysis to determine if an offense is in fact a lesser included offense.²⁶⁸

[11] Sample Specifications-Rape, Sexual Assault, Aggravated Sexual Contact, Abusive Sexual Contact

As of July 2012, the President has not yet created sample specifications for this offense. The 2012 Manual for Courts-Martial states that practitioners should refer to appropriate statutory language and, to the extent practicable, use Appendix 28 as a guide.

[12] Judge's Instructions-Rape, Sexual Assault, Aggravated Sexual Contact, Abusive Sexual Contact

[a] In General

If the accused is being tried by a court with members, the military judge must instruct them on the law to be applied to the case.²⁶⁹ Certain instructions must be given

²⁶⁶ Kennedy v. Louisiana, 554 U.S. 945 (2008).

²⁶⁷ 68 M.J. 465 (C.A.A.F. 2010).

²⁶⁸ United States v. Aguilar, 70 M.J. 563 (A.F.Ct.Crim.App. 2011) (in this post-*Jones* case the Air Force court held that assault consummated by a battery was a lesser included offense of rape by force); United States v. Bonner, 70 M.J. 1 (C.A.A.F. 2011) (assault consummated by a battery is a lesser included offense of wrongful sexual contact).

²⁶⁹ Art. 51(c), U.C.M.J.; R.C.M. 920(a). See generally Schlueter, MILITARY CRIMINAL JUSTICE:

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sua sponte by the military judge and counsel's failure to request them or object to them will normally constitute waiver absent plain error.²⁷⁰

Those instructions are as follows: (1) Instructions as to the elements of the offenses charged²⁷¹ and any lesser included offenses;²⁷² (2) Instructions on special (affirmative) defenses reasonably in issue;²⁷³ (3) Instructions that the court members consider only matters properly before them;²⁷⁴ (4) Instructions that the accused is presumed to be innocent until his guilt is established by legal and competent evidence beyond a reasonable doubt;²⁷⁵ (5) Instructions on deliberation and voting procedures;²⁷⁶ and (6) Other instructions offering explanations, definitions, or directions that have been requested or that are *sua sponte* required.²⁷⁷

On appeal, the courts will examine, *de novo*,²⁷⁸ the instructions as a whole to determine if they provided meaningful legal principles for the members' consideration.²⁷⁹

[b] Sample Instructions

Sample instructions for Article 120 offenses can be found in the Military Judges' Benchbook, DA Pam. 27-9, beginning at para. 3-45-3. Note that the most recent version of the Benchbook was published in 2010, before the most recent version of Article 120 came into effect.

§ 6.6 Article 120a—Stalking

[1] Official Text

§ 920a. Art. 120a. Stalking

(a) Any person subject to this section:

(1) who wrongfully engages in a course of conduct directed at a

PRACTICE AND PROCEDURE § 15-14 (8th ed. 2012) (discussion of instructions to court members).

²⁷⁰ R.C.M. 920(f). See § 3.3[c][3], *supra*.

²⁷¹ R.C.M. 920(e)(1).

²⁷² R.C.M. 920(e)(2).

²⁷³ R.C.M. 916. *United States v. Taylor*, 26 M.J. 127 (C.M.A. 1988) (duty to instruct on affirmative defenses rests primarily on Article 51 and not *Manual* provisions; thus failure to request instruction on affirmative defenses was not waived by failure to request).

²⁷⁴ R.C.M. 920(e)(4).

²⁷⁵ Art. 51(c)(1), U.C.M.J.; R.C.M. 920(e)(5)(A).

²⁷⁶ R.C.M. 920(e)(6).

²⁷⁷ R.C.M. 920(e)(7).

²⁷⁸ *United States v. Ignacio*, 71 M.J. 125 (2012).

²⁷⁹ *United States v. Schap*, 49 M.J. 317 (1998) (on whole, instructions were legally correct); *United States v. Truman*, 42 C.M.R. 106 (C.M.A. 1970); *United States v. Alford*, 31 M.J. 814 (A.F.C.M.R. 1990).

specific person that would cause a reasonable person to fear death or bodily harm, including sexual assault, to himself or herself or a member of his or her immediate family;

- (2) who has knowledge, or should have knowledge, that the specific person will be placed in reasonable fear of death or bodily harm, including sexual assault, to himself or herself or a member of his or her immediate family; and
- (3) whose acts induce reasonable fear in the specific person of death or bodily harm, including sexual assault, to himself or herself or to a member of his or her immediate family; is guilty of stalking and shall be punished as a court-martial may direct.²⁸⁰

[2] Overview of Offense—Stalking

In addition to the many changes in Article 120, a new offense Article 120a, stalking, was added to the Code in 2007. Prior to the addition of this offense, stalking was typically charged under the General Article 134, Clause 3.²⁸¹ With the addition of this new offense, stalking should no longer be charged as a 134 offense, but should be charged under Article 120a.

[3] Proving the Offense—Stalking

[a] Elements of the Offense

To prove the offense of stalking, the prosecution must establish that:

- (1) The accused wrongfully engaged in a course of conduct directed at a specific person that would cause a reasonable person to fear death or bodily harm to himself or herself or a member of his or her immediate family;
- (2) The accused had knowledge, or should have had knowledge, that the specific person would be placed in reasonable fear of death or bodily harm to himself or herself or a member of his or her immediate family; and
- (3) The accused's acts induced reasonable fear in the specific person of death or bodily harm to himself or herself or to a member of his or her immediate family.²⁸²

[b] Proving the Elements

Stalking under Article 120a has three components. First, the accused's conduct must be directed at a specific individual and the conduct must be of the type that would cause a reasonable person to be put in fear of death, bodily harm, to himself or herself or an immediate family member. As can be seen from this language, the conduct that

²⁸⁰ MCM, Part IV, para. 45a.(a).

²⁸¹ Eldridge, "Stalking and the Military: A Proposal to Add an Anti-Stalking Provision to Article 134, Uniform Code of Military Justice," 165 MIL. L. REV. 116 (2000).

²⁸² MCM, Part IV, para. 45a.(b).

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can serve as the *actus reus* for this component of the offense can be very broad, so long as it would place a reasonable person in fear.

The second component of the offense is the *mens rea*. Here the accused must either know, or he should know that the specific person would be placed in fear. This “should know” language suggests that the *mens rea* for this offense is some level of negligence, possibly gross or criminal negligence. Under this provision, the prosecution does not need to prove the accused’s actual knowledge. The *mens rea* can be established if the accused failed to be aware but should have been aware that his conduct places the victim in fear.

The last component of this offense is the result. The prosecution must show that the accused did in fact induce reasonable fear in the specific victim to which the accused was directing his conduct.

Article 120a defines “course of conduct” as: (A) a repeated maintenance of visual or physical proximity to a specific person; or (B) a repeated conveyance of verbal threat, written threats, or threats implied by conduct, or a combination of such threats, directed at or towards a specific person.²⁸³ For the course of conduct to be repeated, it must occur two or more times.²⁸⁴ “Immediate family member” is defined as: a spouse, parent, child, or sibling of the person, or any other family member, relative, or intimate partner of the person who regularly resides in the household of the person or who within the six months preceding the commencement of the course of conduct regularly resided in the household of the person.²⁸⁵

[4] Defenses—Stalking

For a discussion of possible defenses to the offense of stalking, see § 3.4, *supra*.

[5] Maximum Punishments—Stalking

The maximum punishment for stalking is a dishonorable discharge, forfeiture of all pay and allowances, and confinement for three years.²⁸⁶

[6] Lesser Included Offenses—Stalking

The lesser included offense for the offense of stalking is Article 80 (attempts).²⁸⁷

Note that while the Manual for Courts-Martial may list an offense as lesser included offenses of this charged offense, practitioners cannot automatically assume that this is the case. In *United States v. Jones*,²⁸⁸ the court expressly returned to the elements test in order to determine if an offense is a lesser included offense of another offense. Thus, the fact that the President in the Manual for Courts-Martial or the courts in prior

²⁸³ MCM, Part IV, para. 45a(b)(1).

²⁸⁴ MCM, Part IV, para. 45a(b)(2).

²⁸⁵ MCM, Part IV, para. 45a(b)(3).

²⁸⁶ MCM, Part IV, para. 45a(e).

²⁸⁷ MCM, Part IV, para. 45a(d).

²⁸⁸ 68 M.J. 465 (C.A.A.F. 2010).

opinions may have listed an offense as a lesser included offense when the offense has no elements in common with the greater offense does not provide adequate notice to the accused, and does not make the offense a lesser included offense.

Practitioners must therefore, conduct an elements analysis to determine if an offense is in fact a lesser included offense.

[7] Sample Specification—Stalking

The following is a sample specification for alleging the offense of stalking under Article 120a:²⁸⁹

In that (personal jurisdiction data), who (knew) (should have known) that _____ would be placed in reasonable fear of (death) (bodily harm) to (himself) (herself) (_____, a member of his or her immediate family) did (at/on board location), (subject-matter jurisdiction data, if required), (on or about _____ 20_____) (from about _____ to about _____ 20_____), wrongfully engage in a course of conduct directed at _____, to wit: thereby inducing in _____, a reasonable fear of (death) (bodily harm) to (himself) (herself) (_____, a member of his or her immediate family).

[8] Judge's Instructions—Stalking

[a] In General

If the accused is being tried by a court with members, the military judge must instruct them on the law to be applied to the case.²⁹⁰ Certain instructions must be given *sua sponte* by the military judge and counsel's failure to request them or object to them will normally constitute waiver absent plain error.²⁹¹

Those instructions are as follows: (1) Instructions as to the elements of the offenses charged²⁹² and any lesser included offenses;²⁹³ (2) Instructions on special (affirmative) defenses reasonably in issue;²⁹⁴ (3) Instructions that the court members consider only matters properly before them;²⁹⁵ (4) Instructions that the accused is presumed to be innocent until his guilt is established by legal and competent evidence beyond a reasonable doubt;²⁹⁶ (5) Instructions on deliberation and voting procedures;²⁹⁷ and (6)

²⁸⁹ MCM, Part IV, para. 45a(f).

²⁹⁰ Art. 51(c), U.C.M.J.; R.C.M. 920(a). *See generally* Schlueter, MILITARY CRIMINAL JUSTICE: PRACTICE AND PROCEDURE § 15-14 (8th ed. 2012) (discussion of instructions to court members).

²⁹¹ R.C.M. 920(f). *See* § 3.3[c][3], *supra*.

²⁹² R.C.M. 920(e)(1).

²⁹³ R.C.M. 920(e)(2).

²⁹⁴ R.C.M. 916. *United States v. Taylor*, 26 M.J. 127 (C.M.A. 1988) (duty to instruct on affirmative defenses rests primarily on Article 51 and not *Manual* provisions; thus failure to request instruction on affirmative defenses was not waived by failure to request).

²⁹⁵ R.C.M. 920(e)(4).

²⁹⁶ Art. 51(c)(1), U.C.M.J.; R.C.M. 920(e)(5)(A).

²⁹⁷ R.C.M. 920(e)(6).

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Other instructions offering explanations, definitions, or directions that have been requested or that are *sua sponte* required.²⁹⁸

On appeal, the courts will examine, *de novo*,²⁹⁹ the instructions as a whole to determine if they provided meaningful legal principles for the members' consideration.³⁰⁰

[b] Sample Instructions

Sample instructions for Article 120a stalking offenses can be found in the Military Judges' Benchbook, DA Pam. 27-9, para. 3-45A-1.

§ 6.7 Article 120b—Rape and Sexual Assault of a Child

[1] Official Text

§ 920b. Art. 120b. Rape, sexual assault, sexual abuse of a child

- (a) Rape of a Child. Any person subject to this chapter who—
- (1) commits a sexual act upon a child who has not attained the age of 12 years; or
 - (2) commits a sexual act upon a child who has attained the age of 12 years by—
 - (A) using force against any person;
 - (B) threatening or placing that child in fear;
 - (C) rendering that child unconscious; or
 - (D) administering to that child a drug, intoxicant, or other similar substance; is guilty of rape of a child and shall be punished as a court-martial may direct.
- (b) Sexual Assault of a Child. Any person subject to this chapter who commits a sexual act upon a child who has attained the age of 12 years is guilty of sexual assault of a child and shall be punished as a court-martial may direct.
- (c) Sexual Abuse of a Child. Any person subject to this chapter who commits a lewd act upon a child is guilty of sexual abuse of a child and shall be punished as a court-martial may direct.³⁰¹

²⁹⁸ R.C.M. 920(e)(7).

²⁹⁹ United States v. Ignacio, 71 M.J. 125 (2012).

³⁰⁰ United States v. Schap, 49 M.J. 317 (1998) (on whole, instructions were legally correct); United States v. Truman, 42 C.M.R. 106 (C.M.A. 1970); United States v. Alford, 31 M.J. 814 (A.F.C.M.R. 1990).

³⁰¹ MCM, Part IV, para. 45b.(a).

[2] Overview of Offense—Rape, Sexual Assault, Sexual Abuse of a Child

Article 120b is new. The 2012 amendments to the rape statute removed rape and other sexual offenses involving child victims out of Article 120 and created a separate statutory regime now found in Article 120b. Article 120b is divided into three sections; rape of a child, sexual assault of a child, and Sexual abuse of a child. These three sections create different types and degrees of sex offenses against child victims. Each section will be discussed separately. Definitions and concepts that apply to more than one section will be noted as applicable.

[3] Proving the Offense—Rape of a Child**[a] Applicable Law**

Practitioners should note that allegations that arose before 1 October 2007 are covered by the law that existed at that time. Allegations that arose between 1 October 2007 and 28 June 2012 are covered by the 2007 law. Allegations that arise after 28 June 2012 are covered by this law.

[b] Elements of the Offense

As of July 2012, the President has not yet prescribed the elements of this offense. The 2012 Manual for Courts-Martial states that practitioners should refer to appropriate statutory language and, to the extent practicable, use Appendix 28 as a guide.³⁰²

[c] Analysis the Offense of Rape of a Child**[i] In General**

Rape of a child is the most serious sex crime under Article 120b and it requires the government to prove that the accused committed a sexual act on a child under the age of 12 or that the accused committed a sexual act on a child who has attained the age of 12 or older by using force against any person; threatening or placing the child victim in fear; rendering the child victim unconscious; or by administering to the child victim a drug or other intoxicant. The statute makes any sexual act with a child under the age of 12 child rape. No force, harm, threat of fear, or other conduct beyond the sexual act by the accused need be proven. For child victims between 12 and 16 any sexual act that was accomplished by force, threat of fear, or where the accused rendered the child unconscious or administered an intoxicant to the child, is child rape. If the accused administered a drug or other intoxicant to the child victim, it does not need to be proven that the intoxicant had any effect on the victim.

There are several key definitions related to force, the threat of fear, child, and sexual act that are important in understanding the crime of rape of a child.

[ii] Definition of “Force”

The term ‘force’ means (A) the use of a weapon; (B) the use of such physical strength or violence as is sufficient to overcome, restrain, or injure a child; or (C) inflicting physical harm. In the case of a parent-child or similar relationship, the use

³⁰² MCM. Part IV, para. 45b Note.

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or abuse of parental or similar authority is sufficient to constitute the use of force.³⁰³ This definition of force is broader than the force required for the rape of an adult. First, the definition expressly states that abuse of a parent-child relationship meets the definition of force in and of itself. Second, any infliction of physical harm on a child satisfies the definition of force.

[iii] Definition of “Threatening or Placing Child in Fear”

The term ‘threatening or placing that child in fear’ means a communication or action that is of sufficient consequence to cause the child to fear that non-compliance will result in the child or another person being subjected to the action contemplated by the communication or action.³⁰⁴ It is important to note that the treat can be directed against any person, not just the child victim.

The prosecution does not need to prove that the person actually intended to carry out the threat or had the ability to carry out the threat.³⁰⁵

[iv] Definition of “Child”

The term ‘child’ means any person who has not attained the age of 16 years.³⁰⁶ In a prosecution under this section, it need not be proven that the accused knew the age of the other person engaging in the sexual act. It is not a defense that the accused reasonably believed that the child had attained the age of 12 years.³⁰⁷ The prosecution need not prove that the accused knew that the other person engaging in the sexual act had not attained the age of 16 years. And it is not a defense that the accused reasonably believed that the child had attained the age of 16 years.³⁰⁸ Thus, rape of a child is a strict liability offense with respect to the victim’s age.

[v] Definition of Sexual Act

Sexual act means (A) contact between the penis and the vulva or anus or mouth, and for purposes of this subparagraph contact involving the penis occurs upon penetration, however slight; or (B) the penetration, however slight, of the vulva or anus or mouth of another by any part of the body or by any object, with an intent to abuse, humiliate, harass, or degrade any person or to arouse or gratify the sexual desire of any person.³⁰⁹ This is the same definition used in Article 120.

Traditionally, rape has been viewed as a general intent crime, meaning that the

³⁰³ MCM, Part IV, para. 45b(h)(2).

³⁰⁴ MCM, Part IV, para. 45b(h)(3).

³⁰⁵ MCM, Part IV, para. 45b(e).

³⁰⁶ MCM, Part IV, para. 45b(h)(4).

³⁰⁷ MCM, Part IV, para. 45b(d)(1).

³⁰⁸ MCM, Part IV, para. 45b(d)(2).

³⁰⁹ MCM, Part IV, para. 45(g)(1). *State v. Ludlum*, 303 N.C. 666, 281 S.E.2d 159 (1981); *State v. Whittemore*, 255 N.C. 583, 122 S.E.2d 396 (1961); *see also* *United States v. Williams*, 25 M.J. 854 (C.M.R. 1988); *United States v. Tu*, 30 M.J. 587 (C.M.R. 1990); *United States v. Aleman*, 2 C.M.R. 269, 275 (A.B.R.1951) (court held that, “any penetration, however slight, of a woman’s genitals is sufficient to constitute the element of rape”); *United States v. Williams*, 25 M.J. 854 (A.F.C.M.R. 1988).

prosecution did not need to prove any mens rea or intent beyond the intent necessary to engage in forcible sexual intercourse without the victim's consent. That intent was sufficient to identify the accused as morally blameworthy. Under the expansive definition of "sexual act" if the prosecution alleges that the sexual act was an act defined in paragraph 45(g)(1)(B),³¹⁰ the prosecution must show that the accused committed a sexual act with the intent to abuse, humiliate, harass, or degrade any person or to arouse or gratify the sexual desire of any person.³¹¹ The terms abuse, humiliate, harass, and degrade are not further defined in the statute.

[vi] Lack of Consent Not an Element

Lack of consent is not an element and does not need to be proven. Likewise, consent is not a defense to rape of a child because a child cannot consent as a matter of law. This is consistent with long-standing military law.

[4] Proving the Offense—Sexual Assault of a Child

[a] Applicable Law

Practitioners should note that allegations that arose before 1 October 2007 are covered by the law that existed at that time. Allegations that arose between 1 October 2007 and 28 June 2012, are covered by the 2007 law. Allegations that arise after 28 June 2012 are covered by this law.

[b] Elements of the Offense

As of July 2012, the President has not yet prescribed the elements of this offense. The 2012 Manual for Courts-Martial states that practitioners should refer to appropriate statutory language and, to the extent practicable, use Appendix 28 as a guide.³¹²

[c] Proving the Elements

Sexual assault of a child is very similar to the offense of rape of a child under Article 120b(a)(1) and it is a lesser offense of rape of a child under 120b(a)(2). This provision is designed to address cases where the accused engages in a sexual act with a child who has attained at least the age of 12 but has not yet attained the age of 16. In such cases the prosecution need only prove that the accused engaged in a sexual act with the victim. The prosecution does not need to prove that the sexual act was accomplished by force, threat of fear, that the victim was unconscious, or that the accused administered an intoxicant to the victim. Because of the relative ease of proof, it is likely that in most cases where the victim is between the ages of 12 and 16, the prosecution will elect to prosecute the accused under this provision. In those instances where the facts suggest that force, threat, incapacitation or administering intoxicants may exist, the government can elect to prosecute the accused under Article 120b(a)(2).

The definitions of "child" and "sexual act" are the same as those set out for rape of

³¹⁰ MCM, Part IV, para. 45(g)(1)(B).

³¹¹ MCM, Part IV, para. 45(g)(1)(B).

³¹² MCM, Part IV, para. 45b Note.

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a child. However, unlike rape of a child, sexual assault of a child is not a strict liability offense with respect to the victim's age. If the accused can prove by a preponderance of the evidence that the accused reasonably believed that the child had attained the age of 16 it is a defense to this offense. As with rape of a child, a child cannot consent to a sexual assault as a matter of law, except in the case of marriage discussed below.

[5] Proving the Offense—Sexual Abuse of a Child**[a] Applicable Law**

Practitioners should note that allegations that arose before 1 October 2007 are covered by the law that existed at that time. Allegations that arose between 1 October 2007 and 28 June 2012 are covered by the 2007 law. Allegations that arise after 28 June 2012 are covered by this law.

[b] Elements of the Offense

As of July 2012, the President has not yet prescribed the elements of this offense. The 2012 Manual for Courts-Martial states that practitioners should refer to appropriate statutory language and, to the extent practicable, use Appendix 28 as a guide.³¹³

[c] Proving the Elements**[i] In General**

This is a new offense and is intended to consolidate what had previously been several different offenses under one offense. The statute does this by adopting a broad definition of the term "lewd acts" and makes it a crime for an accused to commit a lewd act on a child. This is a lesser offense to rape of a child and sexual assault of a child.

[ii] Lewd Act

"Lewd act" is defined as (A) any sexual contact with a child; (B) intentionally exposing one's genitalia, anus, buttocks, or female areola or nipple to a child by any means, including via any communication technology, with an intent to abuse, humiliate, or degrade any person, or to arouse or gratify the sexual desire of any person; (C) intentionally communicating indecent language to a child by any means, including via any communication technology, with an intent to abuse, humiliate, or degrade any person, or to arouse or gratify the sexual desire of any person; or (D) any indecent conduct, intentionally done with or in the presence of a child, including via any communication technology, that amounts to a form of immorality relating to sexual impurity which is grossly vulgar, obscene, and repugnant to common propriety, and tends to excite sexual desire or deprave morals with respect to sexual relations.³¹⁴

[iii] Sexual Contact

Sexual contact is defined as: (A) touching, or causing another person to touch, either

³¹³ MCM, Part IV, para. 45b Note.

³¹⁴ MCM, Part IV, para. 45b(h)(5).

directly or through the clothing, the genitalia, anus, groin, breast, inner thigh, or buttocks of any person, with an intent to abuse, humiliate, or degrade any person; or (B) any touching, or causing another person to touch, either directly or through the clothing, any body part of any person, if done with an intent to arouse or gratify the sexual desire of any person. Touching may be accomplished by any part of the body.³¹⁵

[iv] Child

The definition of “child” is the same as set out for rape of a child. However, unlike rape of a child, sexual abuse of a child is not a strict liability offense with respect to the victim’s age. If the accused can prove by a preponderance of the evidence that the accused reasonably believed that the child had attained the age of 16 it is a defense to this offense. As with rape of a child, a child cannot consent to a sexual abuse as a matter of law, except in the case of marriage discussed below.

[6] Defenses—Rape, Sexual Assault, Sexual Abuse of a Child

There are a limited number of defenses available for these offenses. As noted above, a child cannot consent to any of the offenses in this section as a matter of law. Therefore, mistake of fact as to the victim’s consent is not a defense to any charge under this section. Also, the accused’s mistaken belief as to the age of the victim is not a defense to rape of child. As noted above, for the offenses of sexual assault of a child and sexual abuse of a child, if the accused reasonably believes that the victim had attained the age of 16, that is a defense. The accused has the burden of proving that belief by a preponderance of evidence.

This section also recognizes a limited marriage defense to the offenses of sexual assault and sexual abuse. It is a defense, which the accused must prove by a preponderance of the evidence, that the persons engaging in the sexual act or lewd act were at that time married to each other, except where the accused commits a sexual act upon the person when the accused knows or reasonably should know that the other person is asleep, unconscious, or otherwise unaware that the sexual act is occurring or when the other person is incapable of consenting to the sexual act due to impairment by any drug, intoxicant, or other similar substance, and that condition was known or reasonably should have been known by the accused.³¹⁶ This limited defense also allows the accused to claim mistake of fact as to the victim’s consent if the accused and victim are married to each other.³¹⁷

For a discussion on other possible defenses, see § 3.4, *supra*.

[7] Maximum Punishment—Rape, Sexual Assault, Sexual Abuse of a Child

[a] In General

As of July 2012, the President has not yet prescribed the maximum punishments for this offense. The 2012 Manual for Courts-Martial states that practitioners should refer

³¹⁵ MCM, Part IV, para. 45(g)(2)(A) and (B).

³¹⁶ MCM, Part IV, para. 45b(f).

³¹⁷ MCM, Part IV, para. 45b(g).

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to appropriate statutory language and, to the extent practicable, use Appendix 28 as a guide.

[b] Constitutionality of Authorized Punishments

The maximum punishment for rape of a child under 2007 version of Article 120 is death. The rules for court-martial indicate two aggravating circumstances where death can be considered as a punishment. Rule for Courts-Martial. 1004(c)(6) indicates that the death penalty for rape is authorized when the offense was committed in time of war and in territory in which the United States or its ally was an occupying power or in which the United States armed forces were engaged in active hostilities.³¹⁸ Rule for Courts-Martial 1004(c)(9) indicates that the death penalty for rape is authorized where the victim is under the age of 12 or the accused maimed or attempted to kill the victim.³¹⁹

In *Coker v. Georgia*,³²⁰ a plurality of the Supreme Court held that the death penalty for the rape of an adult woman is unconstitutional where the woman is not otherwise harmed. And in 2008, The Supreme Court held that the Eighth Amendment barred Louisiana from imposing the death penalty for the rape of a child where the crime did not result, and was not intended to result, in the victim's death. These rulings render Rule for Courts-Martial 1004(c)(6) and 1004(c)(9) unconstitutional.³²¹

[8] Lesser Included Offenses—Rape, Sexual Assault, Sexual Abuse of a Child

As of July 2012, the President has not yet identified lesser included offenses of this offense. The 2012 Manual for Courts-Martial states that practitioners should refer to appropriate statutory language and, to the extent practicable, use Appendix 28 as a guide.

Note that while the Appendix 28 to the Manual for Courts-Martial lists several offenses as lesser included offenses of 2007 version of Article 120, practitioners cannot automatically assume that these are in fact lesser included offenses. In *United States v. Jones*,³²² court expressly returned to the elements test in order to determine if an offense is a lesser included offense of another offense. The fact that the President in the Manual for Courts-Martial or the courts in prior opinions may have listed an offense as a lesser included offense when the offense has no elements in common with the greater offense does not provide adequate notice to the accused, and does not make the offense a lesser included offense. Practitioners must therefore, conduct an elements analysis to determine if an offense is in fact a lesser included offense.

[9] Sample Specifications—Rape, Sexual Assault, Sexual Abuse of a Child

As of July 2012 the President has not yet created sample specifications for this

³¹⁸ R.C.M. 1004(c)(6).

³¹⁹ R.C.M. 1004(c)(9).

³²⁰ 433 U.S. 584 (1977).

³²¹ *Kennedy v. Louisiana*, 554 U.S. 945 (2008).

³²² 68 M.J. 465 (C.A.A.F. 2010).

offense. The 2012 Manual for Courts-Martial states that practitioners should refer to appropriate statutory language and, to the extent practicable, use Appendix 28 as a guide.

[10] Judge's Instructions—Rape, Sexual Assault, Aggravated Sexual Contact, Abusive Sexual Contact

[a] In General

If the accused is being tried by a court with members, the military judge must instruct them on the law to be applied to the case.³²³ Certain instructions must be given *sua sponte* by the military judge and counsel's failure to request them or object to them will normally constitute waiver absent plain error.³²⁴

Those instructions are as follows: (1) Instructions as to the elements of the offenses charged³²⁵ and any lesser included offenses;³²⁶ (2) Instructions on special (affirmative) defenses reasonably in issue;³²⁷ (3) Instructions that the court members consider only matters properly before them;³²⁸ (4) Instructions that the accused is presumed to be innocent until his guilt is established by legal and competent evidence beyond a reasonable doubt;³²⁹ (5) Instructions on deliberation and voting procedures;³³⁰ and (6) Other instructions offering explanations, definitions, or directions that have been requested or that are *sua sponte* required.³³¹

On appeal, the courts will examine, *de novo*,³³² the instructions as a whole to determine if they provided meaningful legal principles for the members' consideration.³³³

[b] Sample Instructions

Sample instructions for Article 120 offenses can be found in the Military Judges' Benchbook, DA Pam. 27-9, beginning at para. 3-45-3. Note that the most recent

³²³ Art. 51(c), U.C.M.J.; R.C.M. 920(a). *See generally* Schlueter, MILITARY CRIMINAL JUSTICE: PRACTICE AND PROCEDURE § 15-14 (8th ed. 2012) (discussion of instructions to court members).

³²⁴ R.C.M. 920(f). *See* § 3.3[c][3], *supra*.

³²⁵ R.C.M. 920(e)(1).

³²⁶ R.C.M. 920(e)(2).

³²⁷ R.C.M. 916. *United States v. Taylor*, 26 M.J. 127 (C.M.A. 1988) (duty to instruct on affirmative defenses rests primarily on Article 51 and not *Manual* provisions; thus failure to request instruction on affirmative defenses was not waived by failure to request).

³²⁸ R.C.M. 920(e)(4).

³²⁹ Art. 51(c)(1), U.C.M.J.; R.C.M. 920(e)(5)(A).

³³⁰ R.C.M. 920(e)(6).

³³¹ R.C.M. 920(e)(7).

³³² *United States v. Ignacio*, 71 M.J. 125 (2012).

³³³ *United States v. Schap*, 49 M.J. 317 (1998) (on whole, instructions were legally correct); *United States v. Truman*, 42 C.M.R. 106 (C.M.A. 1970); *United States v. Alford*, 31 M.J. 814 (A.F.C.M.R. 1990).

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version of the Benchbook was published in 2010, before the most recent version of Article 120 came into effect.

§ 6.8 Article 120c—Other Sexual Misconduct**[1] Official Text****§ 920c. Art. 120c. Other sexual misconduct****a. Text of Statute**

- (a) Indecent Viewing, Visual Recording, or Broadcasting. Any person subject to this chapter who, without legal justification or lawful authorization—
 - (1) knowingly and wrongfully views the private area of another person, without that other person's consent and under circumstances in which that other person has a reasonable expectation of privacy;
 - (2) knowingly photographs, video tapes, films, or records by any means the private area of another person, without that other person's consent and under circumstances in which that other person has a reasonable expectation of privacy; or
 - (3) knowingly broadcasts or distributes any such recording that the person knew or reasonably should have known was made under the circumstances proscribed in paragraphs (1) and (2); is guilty of an offense under this section and shall be punished as a court-martial may direct.
- (b) Forcible Pandering. Any person subject to this chapter who compels another person to engage in an act of prostitution with any person is guilty of forcible pandering and shall be punished as a court-martial may direct.
- (c) Indecent Exposure. Any person subject to this chapter who intentionally exposes, in an indecent manner, the genitalia, anus, buttocks, or female areola or nipple is guilty of indecent exposure and shall be punished as a court-martial may direct.³³⁴

[2] Overview of Offense—Other Sexual Misconduct

This is a new offense and is intended to consolidate what had previously been several different offenses under one offense. The statute criminalizes the indecent viewing, recording, or broadcasting the private area of another person. In addition, the statute criminalizes forcible pandering and indecent exposure. Some of this conduct

³³⁴ MCM, Part IV, para. 45c.(a).

was previously criminalized under Article 134 of the code. Case law applicable to those prior offenses may be relevant here as well.

[3] Proving the Offense—Other Sexual Misconduct

[a] Applicable law

Practitioners should note that allegations that arose before 1 October 2007 are covered by the law that existed at that time. Allegations that arose between 1 October 2007 and 28 June 2012 are covered by the 2007 law. Allegations that arise after 28 June 2012, are covered by this law.

[b] Elements of the Offense

As of July 2012, the President has not yet prescribed the elements of this offense. The 2012 Manual for Courts-Martial states that practitioners should refer to appropriate statutory language and, to the extent practicable, use Appendix 28 as a guide.³³⁵

[c] Proving the Elements

[i] In General

For misconduct involving the viewing, recording or broadcasting, the essence of the offense is the definitions of “private area,” “reasonable expectation of privacy,” “broadcast,” and “distribute.”

[ii] Definitions of Key Terms

The term ‘private area’ means the naked or underwear clad genitalia, anus, buttocks, or female areola or nipple.³³⁶

The term ‘under circumstances in which that other person has a reasonable expectation of privacy’ means (A) circumstances in which a reasonable person would believe that he or she could disrobe in privacy, without being concerned that an image of a private area of the person was being captured; or (B) circumstances in which a reasonable person would believe that a private area of the person would not be visible to the public.³³⁷

The term ‘broadcast’ means to electronically transmit a visual image with the intent that it be viewed by a person or persons.³³⁸

The term ‘distribute’ means delivering to the actual or constructive possession of another, including transmission by electronic means.³³⁹

[iii] General Intent Crime

This is not a specific intent crime. The prosecution is not required to prove that the

³³⁵ MCM, Part IV, para. 45 Note.

³³⁶ MCM, Part IV, para. 45c(c)(2).

³³⁷ MCM, Part IV, para. 45c(c)(3).

³³⁸ MCM, Part IV, para. 45c(c)(4).

³³⁹ MCM, Part IV, para. 45c(c)(5).

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conduct was engaged in by the accused for any specific purpose. It is sufficient to establish that the accused engaged in the conduct knowingly and wrongfully. These terms are not further defined.

[iv] Pandering

Forcible pandering is another offense criminalized in this section. This offense does not replace pandering or prostitution under Article 134. Rather, it adds a new offense to the prosecutor's arsenal, forcibly pandering someone to engage in prostitution. The act of "prostitution" is defined as: a sexual act, sexual contact, as defined in Article 120(g) on account of which anything of value is given to, or received by, any person.³⁴⁰

"Force" is not otherwise defined in this section nor is the term "pandering". However, under Article 134, pandering requires the accused to direct another person to the victim and that person must engage in the act of prostitution with the victim.³⁴¹

[v] Indecent Exposure

The final offense criminalized in this section is indecent exposure. This offense criminalizes the intentional exposure of the genitalia, anus, buttocks, or female areola or nipple in an indecent manner. The term 'indecent manner' means conduct that amounts to a form of immorality relating to sexual impurity which is grossly vulgar, obscene, and repugnant to common propriety, and tends to excite sexual desire or deprave morals with respect to sexual relations.³⁴² This is similar to former offenses under Article 134 and the 2007 version of Article 120 with one important distinction. Under this section the exposure does not have to specifically be in a public place or in a place where it would not be reasonably expected to be viewed by people other than members of the accused's family. This potentially broadens the applicability of the statute.

[4] Defenses—Other Sexual Misconduct

See Chapter 3 for a discussion of defenses generally.

[5] Maximum Punishment—Other Sexual Misconduct

As of July 2012, the President has not yet prescribed the maximum punishments for this offense. The 2012 Manual for Courts-Martial states that practitioners should refer to appropriate statutory language and, to the extent practicable, use Appendix 28 as a guide.

[6] Lesser Included Offenses—Other Sexual Misconduct

As of July 2012, the President has not yet identified lesser included offenses of this

³⁴⁰ MCM, Part IV, para. 45c(c)(1).

³⁴¹ MCM, Part IV, para. 99b(2)(a).

³⁴² MCM, Part IV, para. 45c(c)(6). *United States v. King*, 71 M.J. 50 (C.A.A.F. 2012)(defining the term "indecent conduct" from Article 120(k) which is now defined as "indecent manner"; court held that asking step-daughter to lift up her shirt and expose her breasts was an attempt where the step-daughter refused to comply).