

45. Article 120—Rape and sexual assault generally

a. Text of statute.

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

- (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

Comment [GH1]: This is part of Issue #8 and was the subject of much comment at the April meeting; the prevailing question was, "what does this mean?" It seems to indicate that a sex act can be committed if done with "lawful" force. It's possible this concept was adopted from the assault/battery statute (Art. 128) and is misplaced in 120. It likely appears in the assault/battery statute to protect law enforcement or similar types of actors when they have to execute force in order to apprehend a suspect.

Comment [GH2]: This is Issue #4. Professor Schulhofer noted it should be reworked to criminalize the intentional administration of a drug or intoxicant to the victim with the purpose of impairing the victim's capacity to consent and thereby doing so.

Comment [GH3]: This is Issue #6. It is addressed on page 10 of Tab 17 in your April materials. Some presenters believe it needs clarification and other presenters believe it is sufficient as written to cover the types of scenarios that arise in the military justice system.

Comment [GH4]: This is Issue #5 and was the subject of discussion at the April meeting. It is addressed at page 9 of Tab 17 in your April read ahead materials. A majority of presenters stated it should be clarified and one said it does not need to be clarified. This is another concept, like "unlawful force" which appears in the assault/battery statute (Art. 128), and may be misplaced in 120.

Comment [GH5]: This is Issue #10 and is addressed on page 14 of Tab 17 in your April read ahead materials. Two presenters argued it should be amended to remove this additional mens rea requirement, and none argued against amending it.

Comment [GH6]: This is Issue #3 and it is addressed on page 6-7 of Tab 17 in your April read ahead materials. Several presenters argued it needs to be defined and none argued otherwise.

Comment [GH7]: This is the same phrase that appears in Issue #10.

Comment [GH8]: This is the same phrase that appears in Issue #10.

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.

(e) Proof of Threat. In a prosecution under this section, 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.

(f) Defenses. An accused may raise any applicable defenses available under this chapter or the Rules for Court-Martial. Marriage is not a defense for any conduct in issue in any prosecution under this section.

(g) Definitions. In this section:

(1) **Sexual act.** The term “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.

(2) **Sexual contact.** The term “sexual contact” means—

(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.

(3) **Bodily harm.** The term “bodily harm” means any offensive touching of another, however slight, including any nonconsensual sexual act or nonconsensual sexual contact.

Comment [GH9]: This is [issue #2](#) and is addressed on page 4-5 of Tab 17 of your April read ahead materials. Several presenters argued it is unclear whether the defenses of consent, mistake of fact, and mistake of fact as to consent are available defenses for a military accused; consent and mistake of fact as to consent were listed in the 2007 version of Article 120 and were taken out of the present version; numerous presenters argued these defenses are available under case law and should be put back into the statute or in the Manual for Courts-Martial.

Comment [GH10]: This is [issue #9](#) and is addressed on page 13 of Tab 17 in your April read ahead materials. Several presenters argued for clarifying the definition to include an object being used.

Comment [GH11]: This is [issue #9](#) and is addressed on page 13 of Tab 17 in your April read ahead materials. Several presenters argued for clarifying the definition to include an object being used.

Comment [GH12]: As stated above in Comment 4, this is [issue #5](#) and was the subject of discussion at the April meeting. It is addressed at page 9 of Tab 17 in your April read ahead materials. A majority of presenters stated it should be clarified and one said it does not need to be clarified. This is another concept, like “unlawful force” which appears in the assault/battery statute (Art. 128), and may be misplaced in 120.

(4) Grievous bodily harm. 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.

(5) 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 person; or

(C) inflicting physical harm sufficient to coerce or compel submission by the victim.

(6) Unlawful Force.—The term “unlawful force” means an act of force done without legal justification or excuse.

(7) Threatening or placing that other person in fear. The term “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.

(8) Consent.

(A) The term “consent” means a freely given agreement to the 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 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 in the conduct at issue shall not constitute consent.

(B) 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 in fear or under the circumstances described in subparagraph (C) or (D) of subsection (b)(1).

(C) 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.

Comment [GH13]: This is [issue #8](#) and is addressed on page 12 of Tab 17 in your April read ahead materials. Professor Schulhofer and other presenters have noted the definition is too narrow and also unclear.

Comment [GH14]: As stated above in comment 1, this is part of [issue #8](#) and was the subject of much comment at the April meeting; the prevailing question was, “what does this mean?” It seems to indicate that a sex act can be committed if done with “lawful” force. It’s possible this concept was adopted from the assault/battery statute (Art. 128) and is misplaced in 120. It likely appears in the assault/battery statute to protect law enforcement or similar types of actors when they have to execute force in order to apprehend a suspect.

Comment [GH15]: As stated in comment 3, this is [issue #6](#). It is addressed on page 10 of Tab 17 in your April materials. Some presenters believe it needs clarification and other presenters believe it is sufficient as written to cover the types of scenarios that arise in the military justice system.

Comment [GH16]: This is [issue #7](#), and is addressed on page 11 of Tab 17 in your April read ahead materials. Some presenters argued this definition should be clarified to remove the requirement that the fear be “reasonable” and the standard should be modified to a more subjective standard of actual or honest fear.

Comment [GH17]: This is [issue #1](#) and is addressed on pages 1-3 of Tab 17 in your April read ahead materials. Presenters before the JPP have argued the definition needs clarification, while others have argued it doesn’t need to be amended. This concept was the subject of much discussion at the April meeting, with the panel of judges agreeing that if evidence of consent is raised by the evidence, the judge must instruct the panel (jury) accordingly. The judges agreed the note to the trial judge in the Bench Book is a better explanation of the concept than the actual jury instruction itself.