# APPENDIX 28
# PUNITIVE ARTICLES APPLICABLE TO SEXUAL OFFENSES COMMITTED DURING THE PERIOD 1 OCTOBER 2007 THROUGH 27 JUNE 2012

The punitive articles contained in this appendix were replaced or superseded by Articles 120, 120b, and 120c, Uniform Code of Military Justice, as amended or established by the National Defense Authorization Act for Fiscal Year 2012. Article 120 was previously amended by the National Defense Authorization Act for Fiscal Year 2006. Each version of Article 120 is located in a different part of this Manual. For offenses committed prior to 1 October 2007, the relevant sexual offense provisions are contained in Appendix 27. For offenses committed during the period 1 October 2007 through 27 June 2012, the relevant sexual offense provisions are contained in this appendix and listed below. For offenses committed on or after 28 June 2012, the relevant sexual offense provisions are contained in Part IV of this Manual (Articles 120, 120b, and 120c).

## 45. Article 120—Rape, sexual assault, and other sexual misconduct

a. *Text of statute.*

(a) *Rape.* **Any person subject to this chapter who causes another person of any age to engage in a sexual act by—**

**(1) using force against that other person;**

**(2) causing 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) rendering another person unconscious; or**

**(5) administering to another person by force or threat of force, or without the knowledge or permission of that person, a drug, intoxicant, or other similar substance and thereby substantially impairs 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) *Rape of a child.* **Any person subject to this chapter who—**

**(1) engages in a sexual act with a child who has not attained the age of 12 years; or**

**(2) engages in a sexual act under the circumstances described in subsection (a) with a child who has attained the age of 12 years; is guilty of rape of a child and shall be punished as a court-martial may direct.**

(c) *Aggravated sexual assault.* **Any person subject to this chapter who—**

**(1) causes another person of any age to engage in a sexual act by—**

**(A) threatening or placing that other person in fear (other than by threatening or placing that other person in fear that any person will be subjected to death, grievous bodily harm, or kidnapping); or**

**(B) causing bodily harm; or**

**(2) engages in a sexual act with another person of any age if that other person is substantially incapacitated or substantially incapable of—**

**(A) appraising the nature of the sexual act;**

**(B) declining participation in the sexual act; or**

**(C) communicating unwillingness to engage in the sexual act; is guilty of aggravated sexual assault and shall be punished as a court-martial may direct.**

(d) *Aggravated sexual assault of a child.* **Any person subject to this chapter who engages in a sexual act with a child who has attained the age of 12 years is guilty of aggravated sexual assault of a child and shall be punished as a court-martial may direct.**

(e) *Aggravated sexual contact.* **Any person subject to this chapter who engages in or causes sexual contact with 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.**

(f) *Aggravated sexual abuse of a child.* **Any person subject to this chapter who engages in a lewd act with a child is guilty of aggravated sexual abuse of a child and shall be punished as a court-martial may direct.**

(g) *Aggravated sexual contact with a child.* Any person subject to this chapter who engages in or causes sexual contact with or by another person, if to do so would violate subsection (b) (rape of a child) had the sexual contact been a sexual act, is guilty of aggravated sexual contact with a child and shall be punished as a court-martial may direct.

(h) *Abusive sexual contact.* Any person subject to this chapter who engages in or causes sexual contact with or by another person, if to do so would violate subsection (c) (aggravated 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.

(i) *Abusive sexual contact with a child.* Any person subject to this chapter who engages in or causes sexual contact with or by another person, if to do so would violate subsection (d) (aggravated sexual assault of a child) had the sexual contact been a sexual act, is guilty of abusive sexual contact with a child and shall be punished as a court-martial may direct.

(j) *Indecent liberty with a child.* Any person subject to this chapter who engages in indecent liberty in the physical presence of a child—

(1) with the intent to arouse, appeal to, or gratify the sexual desire of any person; or

(2) with the intent to abuse, humiliate, or degrade any person; is guilty of indecent liberty with a child and shall be punished as a court-martial may direct.

(k) *Indecent act.* Any person subject to this chapter who engages in indecent conduct is guilty of an indecent act and shall be punished as a court-martial may direct.

(l) *Forcible pandering.* Any person subject to this chapter who compels another person to engage in an act of prostitution with another person to be directed to said person is guilty of forcible pandering and shall be punished as a court-martial may direct.

(m) *Wrongful sexual contact.* Any person subject to this chapter who, without legal justification or lawful authorization, engages in sexual contact with another person without that other person's permission is guilty of wrongful sexual contact and shall be punished as a court-martial may direct.

(n) *Indecent exposure.* Any person subject to this chapter who intentionally exposes, in an indecent manner, in any place where the conduct involved may reasonably be expected to be viewed by people other than members of the actor's family or household, the genitalia, anus, buttocks, or female areola or nipple is guilty of indecent exposure and shall be punished as a court-martial may direct.

(o) *Age of child.*

(1) *Twelve years.* In a prosecution under subsection (b) (rape of a child), subsection (g) (aggravated sexual contact with a child), or subsection (j) (indecent liberty with a child), it need not be proven that the accused knew that the other person engaging in the sexual act, contact, or liberty had not attained the age of 12 years. It is not an affirmative defense that the accused reasonably believed that the child had attained the age of 12 years.

(2) *Sixteen years.* In a prosecution under subsection (d) (aggravated sexual assault of a child), subsection (f) (aggravated sexual abuse of a child), subsection (i) (abusive sexual contact with a child), or subsection (j) (indecent liberty with a child), it need not be proven that the accused knew that the other person engaging in the sexual act, contact, or liberty had not attained the age of 16 years. Unlike in paragraph (1), however, it is an affirmative defense that the accused reasonably believed that the child had attained the age of 16 years.

(p) *Proof of threat.* In a prosecution under this section, in proving that the accused made a threat, it need not be proven that the accused actually intended to carry out the threat.

(q) *Marriage.*

(1) *In general.* In a prosecution under paragraph (2) of subsection (c) (aggravated sexual assault), or under subsection (d) (aggravated sexual assault of a child), subsection (f) (aggravated sexual abuse of a child), subsection (i) (abusive sexual contact with a child), subsection (j) (indecent liberty with a child), subsection (m) (wrongful sexual contact), or subsection (n) (indecent exposure), it is an affirmative defense that the accused and the other person when they engaged in the sexual act, sexual contact, or sexual conduct were married to each other.

(2) *Definition.* For purposes of this subsection, a marriage is a relationship, recognized by the laws of a competent State or foreign jurisdiction, between the accused and the other person as spouses. A marriage exists until it is dissolved in accordance with the laws of a competent State or foreign jurisdiction.

(3) *Exception.* Paragraph (1) shall not apply if the accused's intent at the time of the sexual conduct is to abuse, humiliate, or degrade any person.

(r) *Consent and mistake of fact as to consent.* Lack of permission is an element of the offense in subsection (m) (wrongful sexual contact). Consent and mistake of fact as to consent are not an issue, or an affirmative defense, in a prosecution under any other subsection, except they are an affirmative defense for the sexual conduct in issue in a prosecution under subsection (a) (rape), subsection (c) (aggravated sexual assault), subsection (e) (aggravated sexual contact), and subsection (h) (abusive sexual contact).

(s) *Other affirmative defenses not precluded.* The enumeration in this section of some affirmative defenses shall not be construed as excluding the existence of others.

(t) *Definitions.* In this section:

(1) *Sexual act.* The term "sexual act" means—

(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.

(2) *Sexual contact.* The term "sexual contact" means 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.

(3) *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. It is the same level of injury as in section 928 (article 128) of this chapter, and a lesser degree of injury than in section 2246(4) of title 18.

(4) *Dangerous weapon or object.* The term "dangerous weapon or object" means—

(A) any firearm, loaded or not, and whether operable or not;

(B) any other weapon, device, instrument, material, or substance, whether animate or inanimate, that in the manner it is used, or is intended to be used, is known to be capable of producing death or grievous bodily harm; or

(C) any object fashioned or utilized in such a manner as to lead the victim under the circumstances to reasonably believe it to be capable of producing death or grievous bodily harm.

(5) *Force.* The term "force" means 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, strength, power, or restraint applied to another person, sufficient that the other person could not avoid or escape the sexual conduct.

(6) *Threatening or placing that other person in fear.* The term "threatening or placing that other person in fear" under paragraph (3) of subsection (a) (rape), or under subsection (e) (aggravated sexual contact), 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 death, grievous bodily harm, or kidnapping.

(7) *Threatening or placing that other person in fear.*

(A) *In general.* The term "threatening or placing that other person in fear" under paragraph (1)(A) of subsection (c) (aggravated sexual

assault), or under subsection (h) (abusive sexual contact), 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 being subjected to a lesser degree of harm than death, grievous bodily harm, or kidnapping.

(B) *Inclusions.* Such lesser degree 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.

(8) *Bodily harm.* The term "bodily harm" means any offensive touching of another, however slight.

(9) *Child.* The term "child" means any person who has not attained the age of 16 years.

(10) *Lewd act.* The term "lewd act" means—

(A) the intentional touching, not through the clothing, of the genitalia of another person, with an intent to abuse, humiliate, or degrade any person, or to arouse or gratify the sexual desire of any person; or

(B) intentionally causing another person to touch, not through the clothing, the genitalia of any person with an intent to abuse, humiliate or degrade any person, or to arouse or gratify the sexual desire of any person.

(11) *Indecent liberty.* The term "indecent liberty" means indecent conduct, but physical contact is not required. It includes one who with the requisite intent exposes one's genitalia, anus, buttocks, or female areola or nipple to a child. An indecent liberty may consist of communication of indecent language as long as the communication is made in the physical presence of the child. If words designed to excite sexual desire are spoken to a child, or a child is exposed to or involved in sexual conduct, it is an indecent liberty; the child's consent is not relevant.

(12) *Indecent conduct.* The term "indecent conduct" means that form of immorality relating to sexual impurity that is grossly vulgar, obscene, and repugnant to common propriety, and tends to excite sexual desire or deprave morals with respect to sexual relations. Indecent conduct includes observing, or making a videotape, photograph, motion picture, print, negative, slide, or other mechanically, electronically, or chemically reproduced visual material, without another person's consent, and contrary to that other person's reasonable expectation of privacy, of—

(A) that other person's genitalia, anus, or buttocks, or (if that other person is female) that person's areola or nipple; or

(B) that other person while that other person is engaged in a sexual act, sodomy (under section 925 (article 125) of this chapter), or sexual contact.

(13) *Act of prostitution.* The term "act of prostitution" means a sexual act, sexual contact, or lewd act for the purpose of receiving money or other compensation.

(14) *Consent.* The term "consent" means 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 current or previous dating relationship by itself or the manner of dress of the person involved with the accused in the sexual conduct at issue shall 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.**

(15) *Mistake of fact as to consent.* **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 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.**

(16) *Affirmative defense.* **The term "affirmative defense" means any special defense that, although not denying that the accused committed the objective acts constituting the offense charged, denies, wholly, or partially, criminal responsibility for those acts. The accused has the burden of proving the affirmative defense by a preponderance of evidence. After the defense meets this burden, the prosecution shall have the burden of proving beyond a reasonable doubt that the affirmative defense did not exist.**

b. *Elements.*

(1) *Rape.*

(a) *Rape by using force.*

(i) That the accused caused another person, who is of any age, to engage in a sexual act by using force against that other person.

(b) *Rape by causing grievous bodily harm.*

(i) That the accused caused another person, who is of any age, to engage in a sexual act by causing grievous bodily harm to any person.

(c) *Rape by using threats or placing in fear.*

(i) That the accused caused another person, who is of any age, to engage in a sexual act by threatening or placing that other person in fear that any person will be subjected to death, grievous bodily harm, or kidnapping.

(d) *Rape by rendering another unconscious.*

(i) That the accused caused another person, who is of any age, to engage in a sexual act by rendering that other person unconscious.

(e) *Rape by administration of drug, intoxicant, or other similar substance.*

(i) That the accused caused another person, who is of any age, to engage in a sexual act by administering to that other person a drug, intoxicant, or other similar substance;

(ii) That the accused administered the drug, intoxicant or other similar substance by force or threat of force or without the knowledge or permission of that other person; and

(iii) That, as a result, that other person's ability to appraise or control conduct was substantially impaired.

(2) *Rape of a child.*

(a) *Rape of a child who has not attained the age of 12 years.*

(i) That the accused engaged in a sexual act with a child; and

(ii) That at the time of the sexual act the child had not attained the age of twelve years.

(b) *Rape of a child who has attained the age of 12 years but has not attained the age of 16 years by using force.*

(i) That the accused engaged in a sexual act with a child;

(ii) That at the time of the sexual act the child had attained the age of 12 years but had not attained the age of 16 years; and

(iii) That the accused did so by using force against that child.

(c) *Rape of a child who has attained the age of 12 years but has not attained the age of 16 years by causing grievous bodily harm.*

(i) That the accused engaged in a sexual act with a child;

(ii) That at the time of the sexual act the child had attained the age of 12 years but had not attained the age of 16 years; and

(iii) That the accused did so by causing grievous bodily harm to any person.

(d) *Rape of a child who has attained the age of 12 years but has not attained the age of 16 years by using threats or placing in fear.*

(i) That the accused engaged in a sexual act with a child;

(ii) That at the time of the sexual act the child had attained the age of 12 years but had not attained the age of 16 years; and

(iii) That the accused did so by threatening or placing that child in fear that any person will be subjected to death, grievous bodily harm, or kidnapping.

(e) *Rape of a child who has attained the age of 12 years but has not attained the age of 16 years by rendering that child unconscious.*

(i) That the accused engaged in a sexual act with a child;

(ii) That at the time of the sexual act the child had attained the age of 12 years but had not attained the age of 16 years; and

(iii) That the accused did so by rendering that child unconscious.

(f) *Rape of a child who has attained the age of 12 years but has not attained the age of 16 years by administration of drug, intoxicant, or other similar substance.*

(i) That the accused engaged in a sexual act with a child;

(ii) That at the time of the sexual act the child had attained the age of 12 years but had not attained the age of 16 years; and

(iii)(a) That the accused did so by administering to that child a drug, intoxicant, or other similar substance;

(b) That the accused administered the drug, intoxicant, or other similar substance by force or threat of force or without the knowledge or permission of that child; and

(c) That, as a result, that child's ability to appraise or control conduct was substantially impaired.

(3) *Aggravated sexual assault.*

(a) *Aggravated sexual assault by using threats or placing in fear.*

(i) That the accused caused another person, who is of any age, to engage in a sexual act; and

(ii) That the accused did so by threatening or placing that other person in fear that any person would be subjected to bodily harm or other harm (other than by threatening or placing that other person in fear that any person would be subjected to death, grievous bodily harm, or kidnapping).

(b) *Aggravated sexual assault by causing bodily harm.*

(i) That the accused caused another person, who is of any age, to engage in a sexual act; and

(ii) That the accused did so by causing bodily harm to another person.

(c) *Aggravated sexual assault upon a person substantially incapacitated or substantially incapable of appraising the act, declining participation, or communicating unwillingness.*

(i) That the accused engaged in a sexual act with another person, who is of any age; and

(Note: add one of the following elements)

(ii) That the other person was substantially incapacitated;

(iii) That the other person was substantially incapable of appraising the nature of the sexual act;

(iv) That the other person was substantially incapable of declining participation in the sexual act; or

(v) That the other person was substantially incapable of communicating unwillingness to engage in the sexual act.

(4) *Aggravated sexual assault of a child who has attained the age of 12 years but has not attained the age of 16 years.*

(a) That the accused engaged in a sexual act with a child; and

(b) That at the time of the sexual act the child had attained the age of 12 years but had not attained the age of 16 years.

(5) *Aggravated sexual contact.*

(a) *Aggravated sexual contact by using force.*

(i)(a) That the accused engaged in sexual contact with another person; or

(b) That the accused caused sexual contact with or by another person; and

(ii) That the accused did so by using force against that other person.

(b) *Aggravated sexual contact by causing grievous bodily harm.*

(i)(a) That the accused engaged in sexual contact with another person; or

(b) That the accused caused sexual contact with or by another person; and

(ii) That the accused did so by causing grievous bodily harm to any person.

(c) *Aggravated sexual contact by using threats or placing in fear.*

(i)(a) That the accused engaged in sexual contact with another person; or

(b) That the accused caused sexual contact with or by another person; and

(ii) That the accused did so by threatening or placing that other person in fear that any person will be subjected to death, grievous bodily harm, or kidnapping.

(d) *Aggravated sexual contact by rendering another unconscious.*

(i)(a) That the accused engaged in sexual contact with another person; or

(b) That the accused caused sexual contact with or by another person; and

(ii) That the accused did so by rendering that other person unconscious.

(e) *Aggravated sexual contact by administration of drug, intoxicant, or other similar substance.*

(i)(a) That the accused engaged in sexual contact with another person; or

(b) That the accused caused sexual contact with or by another person; and

(ii)(a) That the accused did so by administering to that other person a drug, intoxicant, or other similar substance;

(b) That the accused administered the drug, intoxicant, or other similar substance by force or threat of force or without the knowledge or permission of that other person; and

(c) That, as a result, that other person's ability to appraise or control conduct was substantially impaired.

(6) *Aggravated sexual abuse of a child.*

(a) That the accused engaged in a lewd act; and

(b) That the act was committed with a child who has not attained the age of 16 years.

(7) *Aggravated Sexual Contact with a Child.*

(a) *Aggravated sexual contact with a child who has not attained the age of 12 years.*

(i)(a) That the accused engaged in sexual contact with a child; or

(b) That the accused caused sexual contact with or by a child or by another person with a child; and

(ii) That at the time of the sexual contact the child had not attained the age of twelve years.

(b) *Aggravated sexual contact with a child who has attained the age of 12 years but has not attained the age of 16 years by using force.*

(i)(a) That the accused engaged in sexual contact with a child; or

(b) That the accused caused sexual contact with or by a child or by another person with a child; and

(ii) That at the time of the sexual contact the child had attained the age of 12 years but had not attained the age of 16 years; and

(iii) That the accused did so by using force against that child.

(c) *Aggravated sexual contact with a child who has attained the age of 12 years but has not attained the age of 16 years by causing grievous bodily harm.*

(i)(a) That the accused engaged in sexual contact with a child; or

(b) That the accused caused sexual contact with or by a child or by another person with a child; and

(ii) That at the time of the sexual contact the child had attained the age of 12 years but had not attained the age of 16 years; and

(iii) That the accused did so by causing grievous bodily harm to any person.

(d) *Aggravated sexual contact with a child who has attained the age of 12 years but has not attained the age of 16 years by using threats or placing in fear.*

(i)(a) That the accused engaged in sexual contact with a child; or

(b) That the accused caused sexual contact with or by a child or by another person with a child; and

(ii) That at the time of the sexual contact the child had attained the age of 12 years but had not attained the age of 16 years; and

(iii) That the accused did so by threatening or placing that child or that other person in fear that any person will be subjected to death, grievous bodily harm, or kidnapping.

(e) *Aggravated sexual contact with a child who has attained the age of 12 years but has not attained the age of 16 years by rendering another or that child unconscious.*

(i)(a) That the accused engaged in sexual contact with a child; or

(b) That the accused caused sexual contact with or by a child or by another person with a child; and

(ii) That at the time of the sexual contact the child had attained the age of 12 years but had not attained the age of 16 years; and

(iii) That the accused did so by rendering that child or that other person unconscious.

(f) *Aggravated sexual contact with a child who has attained the age of 12 years but has not attained the age of 16 years by administration of drug, intoxicant, or other similar substance.*

(i)(a) That the accused engaged in sexual contact with a child; or

(b) That the accused caused sexual contact with or by a child or by another person with a child; and

(ii) That at the time of the sexual contact the child had attained the age of 12 years but had not attained the age of 16 years; and

(iii)(a) That the accused did so by administering to that child or that other person a drug, intoxicant, or other similar substance;

(b) That the accused administered the drug, intoxicant, or other similar substance by force or threat of force or without the knowledge or permission of that child or that other person; and

(c) That, as a result, that child's or that other person's ability to appraise or control conduct was substantially impaired.

(8) *Abusive sexual contact.*

(a) *Abusive sexual contact by using threats or placing in fear.*

(i)(a) That the accused engaged in sexual contact with another person; or

(b) That the accused caused sexual contact with or by another person; and

(ii) That the accused did so by threatening or placing that other person in fear that any person would be subjected to bodily harm or other harm (other than by threatening or placing that other person in fear that any person would be subjected to death, grievous bodily harm, or kidnapping).

(b) *Abusive sexual contact by causing bodily harm.*

(i)(a) That the accused engaged in sexual contact with another person; or

(b) That the accused caused sexual contact with or by another person; and

(ii) That the accused did so by causing bodily harm to another person.

(c) *Abusive sexual contact upon a person substantially incapacitated or substantially incapable of appraising the act, declining participation, or communicating unwillingness.*

(i)(a) That the accused engaged in sexual contact with another person; or

(b) That the accused caused sexual contact with or by another person; and

(Note: add one of the following elements)

(ii) That the other person was substantially incapacitated;

(iii) That the other person was substantially incapable of appraising the nature of the sexual contact;

(iv) That the other person was substantially incapable of declining participation in the sexual contact; or

(v) That the other person was substantially incapable of communicating unwillingness to engage in the sexual contact.

(9) *Abusive sexual contact with a child.*

(i)(a) That the accused engaged in sexual contact with a child; or

(b) That the accused caused sexual contact with or by a child or by another person with a child; and

(ii) That at the time of the sexual contact the child had attained the age of 12 years but had not attained the age of 16 years.

(10) *Indecent liberty with a child.*

(a) That the accused committed a certain act or communication;

(b) That the act or communication was indecent;

(c) That the accused committed the act or communication in the physical presence of a certain child;

(d) That the child was under 16 years of age; and

(e) That the accused committed the act or communication with the intent to:

(i) arouse, appeal to, or gratify the sexual desires of any person; or

(ii) abuse, humiliate, or degrade any person.

(11) *Indecent act.*

(a) That the accused engaged in certain conduct; and

(b) That the conduct was indecent conduct.

(12) *Forcible pandering.*

(a) That the accused compelled a certain person to engage in an act of prostitution; and

(b) That the accused directed another person to said person, who then engaged in an act of prostitution.

(13) *Wrongful sexual contact.*

(a) That the accused had sexual contact with another person;

(b) That the accused did so without that other person's permission; and

(c) That the accused had no legal justification or lawful authorization for that sexual contact.

(14) *Indecent exposure.*

(a) That the accused exposed his or her genitalia, anus, buttocks, or female areola or nipple;

(b) That the accused's exposure was in an indecent manner;

(c) That the exposure occurred in a place where the conduct involved could reasonably be expected to be viewed by people other than the accused's family or household; and

(d) That the exposure was intentional.

c. *Explanation.*

(1) *Definitions.* The terms are defined in Paragraph 45a.(t), supra.

(2) *Character of victim.* See Mil. R. Evid. 412 concerning rules of evidence relating to the character of the victim of an alleged sexual offense.

(3) *Indecent.* In conduct cases, "indecent" generally signifies that form of immorality relating to sexual impurity that is not only grossly vulgar, obscene, and repugnant to common propriety, but also tends to excite lust and deprave the morals with respect to sexual relations. Language is indecent if it tends reasonably to corrupt morals or incite libidinous thoughts. The language must violate community standards.

d. *Lesser included offenses.* The following lesser included offenses are based on internal cross-references provided in the statutory text of Article 120. See subsection (e) for a further listing of possible lesser included offenses.

(1) *Rape.*

(a) Article 120—Aggravated sexual contact

(b) Article 134—Assault with intent to commit rape

(c) Article 128—Aggravated assault; Assault; Assault consummated by a battery

(d) Article 80—Attempts

(2) *Rape of a child.*

(a) Article 120—Aggravated sexual contact with a child; Indecent act

(b) Article 134—Assault with intent to commit rape

(c) Article 128—Aggravated assault; Assault; Assault consummated by a battery; Assault consummated by a battery upon a child under 16

(d) Article 80—Attempts

(3) *Aggravated sexual assault.*

(a) Article 120—Abusive sexual contact

(b) Article 128—Aggravated assault; Assault; Assault consummated by a battery

(c) Article 80—Attempts

(4) *Aggravated sexual assault of a child.*

(a) Article 120—Abusive sexual contact with a child; Indecent act

(b) Article 128—Aggravated assault; Assault; Assault consummated by a battery; Assault consummated by a battery upon a child under 16

(c) Article 80—Attempts

(5) *Aggravated sexual contact.*

(a) Article 128—Aggravated assault; Assault; Assault consummated by a battery

(b) Article 80—Attempts

(6) *Aggravated sexual abuse of a child.*

(a) Article 120—Indecent act

(b) Article 128—Assault; Assault consummated by a battery; Assault consummated by a battery upon a child under 16

(c) Article 80—Attempts

(7) *Aggravated sexual contact with a child.*

(a) Article 120—Indecent act

(b) Article 128—Assault; Assault consummated by a battery; Assault consummated by a battery upon a child under 16

(c) Article 80—Attempts

(8) *Abusive sexual contact.*

(a) Article 128—Assault; Assault consummated by a battery

(b) Article 80—Attempts

(9) *Abusive sexual contact with a child.*

(a) Article 120—Indecent act

(b) Article 128—Assault; Assault consummated by a battery; Assault consummated by a battery upon a child under 16

(c) Article 80—Attempts

(10) *Indecent liberty with a child.*

(a) Article 120—Indecent act

(b) Article 80—Attempts

(11) *Indecent act.* Article 80—Attempts

(12) *Forcible pandering.* Article 80—Attempts

(13) *Wrongful sexual contact* Article 80—Attempts

(14) *Indecent exposure.* Article 80—Attempts

e. *Additional lesser included offenses.* Depending on the factual circumstances in each case, to include the type of act and level of force involved, the following offenses may be considered lesser included in addition to those offenses listed in subsection d. (See subsection (d) for a listing of the offenses that are specifically cross-referenced within the statutory text of Article 120.) The elements of the proposed lesser included offense should be compared with the elements of the greater offense to determine if the elements of the lesser offense are derivative of the greater offense and vice versa. See Appendix 23 for further explanation of lesser included offenses.

(1)(a) *Rape by using force.* Article 120—Indecent act; Wrongful sexual contact

(1)(b) *Rape by causing grievous bodily harm.* Article 120—Aggravated sexual assault by causing bodily harm; Abusive sexual contact by causing bodily harm; Indecent act; Wrongful sexual contact

(1)(c) *Rape by using threats or placing in fear.* Article 120—Aggravated sexual assault by using threats or placing in fear; Abusive sexual contact by using threats or placing in fear; Indecent act; Wrongful sexual contact

(1)(d) *Rape by rendering another unconscious.* Article 120—Aggravated sexual assault upon a person substantially incapacitated; Abusive sexual contact upon a person substantially incapacitated; Indecent act; Wrongful sexual contact

(1)(e) *Rape by administration of drug, intoxicant, or other similar substance.* Article 120—Aggravated sexual assault upon a person substantially incapacitated; Abusive sexual contact upon a person substantially incapacitated; Indecent act; Wrongful sexual contact

(2)(a) - (f) *Rape of a child who has not attained 12 years; Rape of a child who has attained the age of 12 years but has not attained the age of 16 years.* Article 120—Aggravated sexual assault of a child; Aggravated sexual abuse of a child; Abusive sexual contact with a child; Indecent liberty with a child; Wrongful sexual contact

(3) *Aggravated sexual assault.* Article 120—Wrongful sexual contact; Indecent act

(4) *Aggravated sexual assault of a child.* Article 120—Aggravated sexual abuse of a child; Indecent liberty with a child; Wrongful sexual contact

(5)(a) *Aggravated sexual contact by force.* Article 120—Indecent act; Wrongful sexual contact

(5)(b) *Aggravated sexual contact by causing grievous bodily harm.* Article 120—Abusive sexual contact by causing bodily harm; Indecent act; Wrongful sexual contact

(5)(c) *Aggravated sexual contact by using threats or placing in fear.* Article 120—Abusive sexual contact by using threats or placing in fear; Indecent act; Wrongful sexual contact

(5)(d) *Aggravated sexual contact by rendering another unconscious.* Article 120—Abusive sexual contact upon a person substantially incapacitated; Indecent act; Wrongful sexual contact

(5)(e) *Aggravated sexual contact by administration of drug, intoxicant, or other similar substance.* Article 120—Abusive sexual contact upon a person substantially incapacitated; Indecent act; Wrongful sexual contact

(6) *Aggravated sexual abuse of a child.* Article 120—Aggravated sexual contact with a child; Aggravated sexual abuse of a child; Indecent liberty with a child; Wrongful sexual contact

(7) *Aggravated sexual contact with a child.* Article 120—Abusive sexual contact with a child; Indecent liberty with a child; Wrongful sexual contact

(8) *Abusive sexual contact.* Article 120—Wrongful sexual contact; Indecent act

(9) *Abusive sexual contact with a child.* Article 120—Indecent liberty with a child; Wrongful sexual contact

(10) *Indecent liberty with a child.* Article 120—Wrongful sexual contact

f. *Maximum punishment.*

(1) *Rape and rape of a child.* Death or such other punishment as a court martial may direct.

(2) *Aggravated sexual assault.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 30 years.

(3) *Aggravated sexual assault of a child who has attained the age of 12 years but has not attained the age of 16 years, aggravated sexual abuse of a child, aggravated sexual contact, and aggravated sexual contact with a child.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 20 years.

(4) *Abusive sexual contact with a child and indecent liberty with a child.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 15 years.

(5) *Abusive sexual contact.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 7 years.

(6) *Indecent act or forcible pandering.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 5 years.

(7) *Wrongful sexual contact or indecent exposure.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 1 year.

g. *Sample specifications.*

(1) *Rape.*

(a) *Rape by using force.*

(i) *Rape by use or display of dangerous weapon or object.* In that _____ (personal jurisdiction data), did (at/on board-location) (subject-matter jurisdiction data, if required), on or about _____20 ____, cause _____to engage in a sexual act, to wit: _____, by the (using a dangerous weapon or object, to wit: _____ against (him)(her)) (displaying a dangerous weapon or object, to wit: _____ to (him)(her)).

(ii) *Rape by suggestion of possession of dangerous weapon or object.* In that _____ (personal jurisdiction data), did (at/on board-location) (subject-matter jurisdiction data, if required), on or about _____20 ___, cause _____to engage in a sexual act, to wit: _____, by the suggestion of possession of a dangerous weapon or an object that was used in a manner to cause (him) (her) to believe it was a dangerous weapon or object.

(iii) *Rape by using physical violence, strength, power, or restraint to any person.* In that _____ (personal jurisdiction data), did (at/on board-location) (subject-matter jurisdiction data, if required), on or about _____20 _____, cause _____to engage in a sexual act, to wit: _____, by using (physical violence) (strength) (power) (restraint applied to _____), sufficient that (he) (she) could not avoid or escape the sexual conduct.

(b) *Rape by causing grievous bodily harm.* In that _____ (personal jurisdiction data), did (at/on board-location) (subject-matter jurisdiction data, if required), on or about _____20 _____, cause _____to engage in a sexual act, to wit: _____, by causing grievous bodily harm upon (him)(her)( _____), to wit: a (broken leg)(deep cut)(fractured skull)( _____).

(c) *Rape by using threats or placing in fear.* In that _____ (personal jurisdiction data), did (at/on board-location) (subject-matter jurisdiction data, if required), on or about _____20 _____, cause _____to engage in a sexual act, to wit: _____, by [threatening] [placing (him)(her) in fear] that (he)(she) ( _____) will be subjected to (death)(grievous bodily harm) (kidnapping) by _____.

(d) *Rape by rendering another unconscious.* In that _____ (personal jurisdiction data), did (at/on board-location) (subject-matter jurisdiction data, if required), on or about _____20 _____, cause _____to engage in a sexual act, to wit: _____, by rendering (him)(her) unconscious.

(e) *Rape by administration of drug, intoxicant, or other similar substance.* In that _____ (personal jurisdiction data), did (at/on board-location) (subject-

matter jurisdiction data, if required), on or about _____20 _____, cause _____to engage in a sexual act, to wit: _____, by administering to (him)(her) a drug, intoxicant, or other similar substance, (by force) (by threat of force) (without (his)(her) knowledge or permission), and thereby substantially impaired (his)(her) ability to [(appraise) (control)][(his) (her)] conduct.

(2) *Rape of a child.*

(a) *Rape of a child who has not attained the age of 12 years.* In that _____ (personal jurisdiction data), did (at/on board-location) (subject-matter jurisdiction data, if required), on or about _____ 20 _____, engage in a sexual act, to wit: _____ with _____, a child who had not attained the age of 12 years.

(b) *Rape of a child who has attained the age of 12 years but has not attained the age of 16 years by using force.*

(i) *Rape of a child who has attained the age of 12 years but has not attained the age of 16 years by use or display of dangerous weapon or object.* In that _____ (personal jurisdiction data), did (at/on board-location) (subject-matter jurisdiction data, if required), on or about _____20 _____, engage in a sexual act, to wit: _____, with _____, a child who had attained the age of 12 years, but had not attained the age of 16 years, by (using a dangerous weapon or object, to wit: _____against (him)(her)) (displaying a dangerous weapon or object, to wit: _____to (him)(her)).

(ii) *Rape of a child who has attained the age of 12 years but has not attained the age of 16 years by suggestion of possession of dangerous weapon or object.* In that _____ (personal jurisdiction data), did (at/on board-location) (subject-matter jurisdiction data, if required), on or about _____20 _____, engage in a sexual act, to wit: _____, with _____, a child who had attained the age of 12 years, but had not attained the age of 16 years, by the suggestion of possession of a dangerous weapon or an object that was used in a manner to cause (him)(her) to believe it was a dangerous weapon or object.

(iii) *Rape of a child who has attained the age of 12 years but has not attained the age of 16 years by using physical violence, strength, power, or restraint to any person.* In that _____ (personal jurisdiction data), did (at/on board-location) (subject-matter jurisdiction data, if required), on or about _____ 20 _____, engage in a sexual act, to wit: _____with _____, a child who had attained the age of 12 years, but had not attained the age of 16 years, by using (physical violence) (strength) (power) (restraint applied to _____) sufficient that (he)(she) could not avoid or escape the sexual conduct.

(c) *Rape of a child who has attained the age of 12 years but has not attained the age of 16 years by causing grievous bodily harm.* In that _____(personal jurisdiction data), did (at/on board-location) (subject-matter jurisdiction data, if required), on or about _____ 20 _____, engage in a sexual act, to wit: _____, with _____, a child who had attained the age of 12 years, but had not attained the age of 16 years, by causing grievous bodily harm upon (him)(her)( _____), to wit: a (broken leg)(deep cut)(fractured skull)( _____).

(d) *Rape of a child who has attained the age of 12 years but has not attained the age of 16 years by using threats or placing in fear.* In that _____(personal jurisdiction data), did (at/on board-location) (subject-matter jurisdiction data, if required), on or about _____ 20 _____, engage in a sexual act, to wit: _____, with _____, a child who had attained the age of 12 years, but had not attained the age of 16 years, by [threatening] [placing (him)(her) in fear] that (he)(she) ( _____) would be subjected to (death)(grievous bodily harm) (kidnapping) by _____.

(e) *Rape of a child who has attained the age of 12 years but has not attained the age of 16 years by rendering that child unconscious.* In that _____(personal jurisdiction data), did (at/on board-location) (subject-matter jurisdiction data, if required), on or about _____ 20 _____, engage in a sexual act, to wit: _____, with _____, a child who had attained the age of 12 years, but had not attained the age of 16 years, by rendering (him)(her) unconscious.

(f) *Rape of a child who has attained the age of 12 years but has not attained the age of 16 years by administration of drug, intoxicant, or other similar substance.* In that _____ (personal jurisdiction data), did (at/on board-location) (subject-matter jurisdiction data, if required), on or about _____ 20 _____, engage in a sexual act, to wit: _____,with _____, a child who had attained the age of 12 years, but had not attained the age of 16 years, by administering to (him)(her) a drug, intoxicant, or other similar substance (by force) (by threat of force) (without (his)(her) knowledge or permission), and

thereby substantially impaired (his)(her) ability to [(appraise)(control)][(his)(her)] conduct.

(3) *Aggravated sexual assault.*

(a) *Aggravated sexual assault by using threats or placing in fear.* In that _____ (personal jurisdiction data), did (at/on board-location) (subject-matter jurisdiction data, if required), on or about _____ 20 _____, cause _____ to engage in a sexual act, to wit: _____, by [threatening] [placing(him)(her) in fear of] [(physical injury to _____) (injury to _____'s property)(accusation of crime)(exposition of secret)(abuse of military position)( _____)].

(b) *Aggravated sexual assault by causing bodily harm.* In that _____ (personal jurisdiction data), did (at/on board-location) (subject-matter jurisdiction data, if required), on or about _____20 _____, cause _____to engage in a sexual act, to wit: _____, by causing bodily harm upon (him)(her)( _____), to wit: _____.

(c) *Aggravated sexual assault upon a person substantially incapacitated or substantially incapable of appraising the act, declining participation, or communicating unwillingness.* In that _____ (personal jurisdiction data), did (at/on board-location) (subject-matter jurisdiction data, if required), on or about _____ 20 _____, engage in a sexual act, to wit: _____ with _____, who was (substantially incapacitated) [substantially incapable of (appraising the nature of the sexual act)(declining participation in the sexual act) (communicating unwillingness to engage in the sexual act)].

(4) *Aggravated sexual assault of a child who has attained the age of 12 years but has not attained the age of 16 years.* In that _____ (personal jurisdiction data), did (at/on board-location) (subject-matter jurisdiction data, if required), on or about _____ 20 _____, engage in a sexual act, to wit: _____ with _____, who had attained the age of 12 years, but had not attained the age of 16 years.

(5) *Aggravated sexual contact.*

(a) *Aggravated sexual contact by using force.*

(i) *Aggravated sexual contact by use or display of dangerous weapon or object.* In that _____ (personal jurisdiction data), did (at/on board-location) (subject-matter jurisdiction data, if required), on or about _____ 20 _____, [(engage in sexual contact, to wit: _____with _____) (cause _____to engage in sexual contact, to wit: _____, with _____) (cause sexual contact with or by _____, to wit: _____ )] by (using a dangerous weapon or object, to wit: _____ against (him)(her)) (displaying a dangerous weapon or object, to wit: _____ to (him)(her)).

(ii) *Aggravated sexual contact by suggestion of possession of dangerous weapon or object.* In that _____ (personal jurisdiction data), did (at/on board-location) (subject-matter jurisdiction data, if required), on or about _____ 20 _____, [(engage in sexual contact, to wit: _____with _____)(cause _____ to engage in sexual contact, to wit: _____, with _____) (cause sexual contact with or by _____, to wit: _____)] by the suggestion of possession of a dangerous weapon or an object that was used in a manner to cause (him)(her)( _____) to believe it was a dangerous weapon or object.

(iii) *Aggravated sexual contact by using physical violence, strength, power, or restraint to any person.* In that _____ (personal jurisdiction data), did (at/on board-location) (subject-matter jurisdiction data, if required), on or about _____ 20 _____, [(engage in sexual contact, to wit: _____with _____)(cause _____ to engage in sexual contact, to wit: _____, with _____) (cause sexual contact with or by _____, to wit: _____ )] by using (physical violence) (strength) (power) (restraint applied to _____ ), sufficient that (he)(she)( _____) could not avoid or escape the sexual conduct.

(b) *Aggravated sexual contact by causing grievous bodily harm.* In that _____ (personal jurisdiction data), did (at/on board-location) (subject-matter jurisdiction data, if required), on or about _____ 20 _____, [(engage in sexual contact, to wit: _____with _____)(cause _____to engage in sexual contact, to wit: _____, with _____) (cause sexual contact with or by _____, to wit: _____)] by causing grievous bodily harm upon (him)(her)( _____), to wit: a (broken leg)(deep cut)(fractured skull)( _____).

(c) *Aggravated sexual contact by using threats or placing in fear.* In that _____ (personal jurisdiction data), did (at/on board-location) (subject-matter jurisdiction data, if required), on or about _____ 20 _____, [(engage in sexual contact, to wit: _____ with _____)(cause _____ to engage in sexual contact, to wit: _____, with _____) (cause sexual contact with or by _____, to wit: _____)] by [(threatening (him)(her)( _____)] [(placing(him)(her) ( _____) in fear] that (he)(she)(

_____) will be subjected to (death)(grievous bodily harm)(kidnapping) by _____.

(d) *Aggravated sexual contact by rendering another unconscious.* In that _____ (personal jurisdiction data), did (at/on board-location) (subject-matter jurisdiction data, if required), on or about _____ 20 _____, [(engage in sexual contact, to wit: _____ with _____)(cause _____ to engage in sexual contact, to wit: _____, with _____) (cause sexual contact with or by _____, to wit: _____)] by rendering (him)(her)( _____) unconscious.

(e) *Aggravated sexual contact by administration of drug, intoxicant, or other similar substance.* In that _____(personal jurisdiction data), did (at/on board-location) (subject-matter jurisdiction data, if required), on or about _____ 20 _____, [(engage in sexual contact, to wit: _____with _____) (cause _____ to engage in sexual contact, to wit: _____, with _____) (cause sexual contact with or by _____, to wit: _____)] by administering to (him)(her)( _____) a drug, intoxicant, or other similar substance, (by force) (by threat of force) (without (his)(her)( _____) knowledge or permission), and thereby substantially impaired (his)(her)( _____) ability to [(appraise) (control)] [(his) (her)] conduct.

(6) *Aggravated sexual abuse of a child.* In that _____ (personal jurisdiction data), did (at/on board-location) (subject-matter jurisdiction data, if required), on or about _____ 20 _____, engage in a lewd act, to wit: _____ with _____, a child who had not attained the age of 16 years.

(7) *Aggravated sexual contact with a child.*

(a) *Aggravated sexual contact with a child who has not attained the —age of 12 years.* In that _____(personal jurisdiction data), did (at/on board-location) (subject-matter jurisdiction data, if required), on or about _____ 20 _____, [(engage in sexual contact, to wit: _____ with _____, a child who had not attained the age of 12 years)(cause _____ to engage in sexual contact, to wit: _____, with _____, a child who had not attained the age of 12 years) (cause sexual contact with or by _____, a child who had not attained the age of 12 years, to wit: _____)].

(b) *Aggravated sexual contact with a child who has attained the age of 12 years but has not attained the age of 16 years by using force.*

(i) *Aggravated sexual contact with a child who has attained the age of 12 years but has not attained the age of 16 years by use or display of dangerous weapon or object.* In that _____(personal jurisdiction data), did (at/on board-location) (subject-matter jurisdiction data, if required), on or about _____ 20 _____, [(engage in sexual contact, to wit: _____ with _____, a child who had attained the age of 12 years, but had not attained the age of 16 years)(cause _____ to engage in sexual contact, to wit: _____, with _____, a child who had attained the age of 12 years, but had not attained the age of 16 years) (cause sexual contact with or by _____, a child who had attained the age of 12 years, but had not attained the age of 16 years, to wit: _____)] by (using a dangerous weapon or object, to wit: _____ against (him)(her)( _____)) (displaying a dangerous weapon or object, to wit: _____ to (him)(her)( _____)).

(ii) *Aggravated sexual contact with a child who has attained the age of 12 years but has not attained the age of 16 years by suggestion of possession of dangerous weapon or object.* In that _____(personal jurisdiction data), did (at/on board-location) (subject-matter jurisdiction data, if required), on or about _____ 20 _____, [(engage in sexual contact, to wit: _____ with _____, a child who had attained the age of 12 years, but had not attained the age of 16 years)(cause _____ to engage in sexual contact, to wit: _____, with _____, a child who had attained the age of 12 years, but had not attained the age of 16 years) (cause sexual contact with or by _____, a child who had attained the age of 12 years, but had not attained the age of 16 years, to wit: _____)] by the suggestion of possession of a dangerous weapon or an object that was used in a manner to cause (him)(her)( _____) to believe it was a dangerous weapon or object.

(iii) *Aggravated sexual contact with a child who has attained the age of 12 years but has not attained the age of 16 years by using physical violence, strength, power, or restraint to any person.* In that _____ (personal jurisdiction data), did (at/on board-location) (subject-matter jurisdiction data, if required), on or about _____ 20 _____, [(engage in sexual contact, to wit: _____ with _____, a child who had attained the age of 12 years, but had not attained the age of 16 years)(cause _____ to engage in sexual contact, to wit: _____, with _____, a child who had attained the age of 12 years, but had not attained the age of 16 years) (cause sexual contact with or by _____, a child who had not

attained the age of 12 years, but had not attained the age of 16 years, to wit: _____)] by using (physical violence) (strength) (power) (restraint applied to _____) sufficient that (he)(she)( _____) could not avoid or escape the sexual conduct.

(c) *Aggravated sexual contact with a child who has attained the age of 12 years but has not attained the age of 16 years by causing grievous bodily harm.* In that _____ (personal jurisdiction data), did (at/on board-location) (subject-matter jurisdiction data, if required), on or about _____ 20 _____, [(engage in sexual contact, to wit: _____ with _____, a child who had attained the age of 12 years, but had not attained the age of 16 years)(cause _____ to engage in sexual contact, to wit: _____, with _____, a child who had attained the age of 12 years, but had not attained the age of 16 years) (cause sexual contact with or by _____, a child who had attained the age of 12 years, but had not attained the age of 16 years, to wit: _____)] by causing grievous bodily harm upon (him)(her)( _____), to wit: a (broken leg)(deep cut)(fractured skull)( _____).

(d) *Aggravated sexual contact with a child who has attained the age of 12 years but has not attained the age of 16 years by using threats or placing in fear.* In that _____ (personal jurisdiction data), did (at/on board-location) (subject-matter jurisdiction data, if required), on or about _____20 _____, [(engage in sexual contact, to wit: _____with _____, a child who had attained the age of 12 years, but had not attained the age of 16 years)(cause _____ to engage in sexual contact, to wit: _____, with _____, a child who had attained the age of 12 years, but had not attained the age of 16 years) (cause sexual contact with or by _____, a child who had attained the age of 12 years, but had not attained the age of 16 years, to wit: _____)] by [threatening] [placing (him)(her)( _____) in fear] that (he)(she)( _____) will be subjected to (death) (grievous bodily harm)(kidnapping) by _____.

(e) *Aggravated sexual contact with a child who has attained the age of 12 years but has not attained the age of 16 years by rendering that child or another unconscious.* In that _____ (personal jurisdiction data), did (at/on board-location) (subject-matter jurisdiction data, if required), on or about _____ 20 _____, [(engage in sexual contact, to wit: _____ with _____, a child who had attained the age of 12 years, but had not attained the age of 16 years)(cause _____ to engage in sexual contact, to wit: _____, with _____, a child who had attained the age of 12 years, but had not attained the age of 16 years) (cause sexual contact with or by _____, a child who had attained the age of 12 years, but had not attained the age of 16 years, to wit: _____)] by rendering (him)(her)( _____) unconscious.

(f) *Aggravated sexual contact with a child who has attained the age of 12 years but has not attained the age of 16 years by administration of drug, intoxicant, or other similar substance.* In that _____(personal jurisdiction data), did (at/on board-location) (subject-matter jurisdiction data, if required), on or about _____ 20 _____, [(engage in sexual contact, to wit: _____ with _____, a child who had attained the age of 12 years but had not attained the age of 16 years)(cause _____to engage in sexual contact, to wit: _____, with _____, a child who had attained the age of 12 years but had not attained the age of 16 years) (cause sexual contact with or by _____, a child who had attained the age of 12 years but had not attained the age of 16 years, to wit: _____)] by administering to (him)(her)( _____) a drug, intoxicant, or other similar substance (by force) (by threat of force) (without (his)(her)( _____) knowledge or permission), and thereby substantially impaired (his)(her)( _____) ability to [(appraise) (control)][(his) (her)] conduct.

(8) *Abusive sexual contact.*

(a) *Abusive sexual contact by using threats or placing in fear.* In that _____ (personal jurisdiction data), did (at/on board-location) (subject-matter jurisdiction data, if required), on or about _____ 20 _____, [(engage in sexual contact, to wit: _____ with _____) (cause _____ to engage in sexual contact, to wit: _____, with _____) (cause sexual contact with or by _____, to wit: _____)] by [(threatening) (placing (him)(her)( _____) in fear of)] [(physical injury to _____)(injury to _____'s property)(accusation of crime)(exposition of secret)(abuse of military position)( _____)].

(b) *Abusive sexual contact by causing bodily harm.* In that _____ (personal jurisdiction data), did (at/on board-location) (subject-matter jurisdiction data, if required), on or about _____ 20 _____, [(engage in sexual contact, to wit: _____with _____) (cause _____to engage in sexual contact, to wit: _____, with _____) (cause sexual contact with or by

_____, to wit: _____)] by causing bodily harm upon (him)(her)( _____), to wit: ( _____).

(c) *Abusive sexual contact by engaging in a sexual act with a person substantially incapacitated or substantially incapable of appraising the act, declining participation, or substantially incapable of communicating unwillingness.* In that _____ (personal jurisdiction data), did (at/on board-location) (subject-matter jurisdiction data, if required), on or about _____ 20 _____, [(engage in sexual contact, to wit: _____ with _____) (cause _____ to engage in sexual contact, to wit: _____, with _____) (cause sexual contact with or by _____, to wit: _____ )] while (he)(she)( _____) was [substantially incapacitated] [substantially incapable of (appraising the nature of the sexual contact) (declining participation in the sexual contact) (communicating unwillingness to engage in the sexual contact)].

(9) *Abusive sexual contact with a child.* In that _____ (personal jurisdiction data), did (at/on board-location) (subject-matter jurisdiction data, if required), on or about _____ 20 _____, [(engage in sexual contact, to wit: _____ with _____, a child who had attained the age of 12 years but had not attained the age of 16 years)(cause _____ to engage in sexual contact, to wit: _____, with _____, a child who had attained the age of 12 years but had not attained the age of 16 years) (cause sexual contact with or by _____, a child who had attained the age of 12 years but had not attained the age of 16 years, to wit: _____)].

(10) *Indecent liberties with a child.* In that _____ (personal jurisdiction data), did, (at/on board-location) (subject-matter jurisdiction data, if required), on or about _____ 20 _____,(take indecent liberties) (engage in indecent conduct) in the physical presence of _____, a (female) (male) under 16 years of age, by (communicating the words: to wit: _____) (exposing one's private parts, to wit: _____) ( _____), with the intent to [(arouse) (appeal to) (gratify) the (sexual desire) of the _____(or _____)] [(abuse)(humiliate)(degrade) _____].

(11) *Indecent act.* In that _____ (personal jurisdiction data), did (at/on board-location) (subject-matter jurisdiction data, if required), on or about _____ 20 _____,wrongfully commit indecent conduct, to wit _____.

(12) *Forcible pandering.* In that _____ (personal jurisdiction data), did (at/on board-location), (subject-matter jurisdiction data, if required), on or about _____ 20 _____, compel _____ to engage in [(a sexual act)(sexual contact) (lewd act), to wit: _____] for the purpose of receiving money or other compensation with _____ (a) person(s) to be directed to (him)(her) by the said _____.

(13) *Wrongful sexual contact.* In that _____ (personal jurisdiction data), did (at/on board-location), (subject-matter jurisdiction data, if required), on or about _____ 20 _____, engage in sexual contact with _____, to wit: _____, and such sexual contact was without legal justification or lawful authorization and without the permission of _____.

(14) *Indecent exposure.* In that _____ (personal jurisdiction data), did (at/on board-location), (subject-matter jurisdiction data, if required), on or about _____ 20 _____, intentionally (expose in an indecent manner (his) (her) ( _____) ( _____) while (at the barracks window) (in a public place) ( _____)."

## Appendix 23 Analysis Follows:

[Note: The analysis below was removed from Appendix 23 and pertains to the 2007 Amendment of Article 120. The analysis was inserted into this appendix to accompany the version of Article 120 applicable to offenses committed during the period 1 October 2007 through 27 June 2012. For offenses committed prior to 1 October 2007, analysis related to Article 120 and other punitive articles applicable to sexual offenses is contained in Appendix 27. For offenses committed on or after 28 June 2012, analysis related to Article 120, 120b, and 120c is contained in Appendix 23.]

## 45. Article 120—Rape, sexual assault, and other sexual misconduct

*2007 Amendment:* Changes to this paragraph are contained in Div. A. Title V. Subtitle E, Section 552(a)(1) of the National Defense Authorization Act for Fiscal Year 2006, P.L. 109-163, 119 Stat. 3257 (6 January 2006), which supersedes the previous paragraph 45, Rape and Carnal Knowledge, in its entirety and replaces paragraph 45 with Rape, sexual assault and other sexual misconduct. In accordance with Section 552(c) of that Act, the amendment to

the Article applies only with respect to offenses committed on or after 1 October 2007.

Nothing in these amendments invalidates any nonjudicial punishment proceeding, restraint, investigation, referral of charges, trial in which arraignment occurred, or other action begun prior to 1 October 2007. Any such nonjudical punishment proceeding, restraint, investigation, referral of charges, trial in which arraignment occurred, or other action may proceed in the same manner and with the same effect as if these amendments had not been prescribed.

This new Article 120 consolidates several sexual misconduct offenses and is generally based on the Sexual Abuse Act of 1986, 18 U.S.C. Sections 2241-2245. The following is a list of offenses that have been replaced by this new paragraph 45:

(1) Paragraph 63, 134 Assault - Indecent, has been replaced in its entirety by three new offenses under paragraph 45. *See* subsections (e) Aggravated Sexual Contact, (h) Abusive Sexual Contact, and (m) Wrongful Sexual Contact.

(2) Paragraph 87, 134 Indecent Acts or Liberties with a Child, has been replaced in its entirety by three new offenses under paragraph 45. *See* subsections (g) Aggravated Sexual Contact with a Child, (i) Abusive Sexual Contact with a Child, and (j) Indecent Liberty with a Child.

(3) Paragraph 88, Article 134 Indecent Exposure, has been replaced in its entirety by a new offense under paragraph 45. *See* subsection (n) Indecent Exposure.

(4) Paragraph 90, Article 134 Indecent Acts with Another, has been replaced in its entirety by a new offense under paragraph 45. *See* subsection (k) Indecent Act.

(5) Paragraph 97, Article 134 Pandering and Prostitution, has been amended. The act of compelling another person to engage in an act of prostitution with another person will no longer be an offense under paragraph 97 and has been replaced by a new offense under paragraph 45. *See* subsection (l), Forcible Pandering.

c. *Explanation.* Subparagraph (3), definition of "indecent," is taken from paragraphs 89.c and 90.c of the Manual (2005 ed.) and is intended to consolidate the definitions of "indecent," as used in the former offenses under Article 134 of "Indecent acts or liberties with a child," "Indecent exposure," and "Indecent acts with another," formerly at paragraphs 87, 88, and 90 of the 2005 Manual, and "Indecent language," at paragraph 89. The application of this single definition of "indecent" to the offenses of "Indecent liberty with a child," "Indecent act," and "Indecent exposure" under Article 120 is consistent with the construction given to the former Article 134 offenses in the 2005 Manual that were consolidated into Article 120. *See e.g. United States v. Negron*, 60 M.J. 136 (C.A.A.F. 2004).

d. *Additional Lesser Included Offenses.* The test to determine whether an offense is factually the same as another offense, and therefore lesser-included to that offense, is the "elements" test. *United States v. Foster*, 40 M.J. 140, 142 (C.M.A. 1994). Under this test, the court considers "whether each provision requires proof of a fact which the other does not." *Blockburger*, 284 U.S. 299 at 304 (1932). Rather than adopting a literal application of the elements test, the Court stated that resolution of lesser-included claims "can only be resolved by lining up elements realistically and determining whether each element of the supposed 'lesser' offense is rationally derivative of one or more elements of the other offense - and vice versa." *Foster*, 40 M.J. at 146. Whether an offense is a lesser-included offense is a matter of law that the Court will consider de novo. *United States v. Palagar*, 56 M.J. 294, 296 (C.A.A.F. 2002).

e. *Maximum punishment. See 1995 Amendment* regarding maximum punishment of death.