s, but also of their application to the facts, is appropriate. See Point I.A., infra. However, regardless of whether the Court considers the issues to be pure questions of law or mixed questions of fact and law, the result should be reversal of the district court's decision, as it contravenes the purposes of the Hague Convention and the specific direction of this Court. Instead of following this Court's mandate to seek to facilitate return, and in contravention of its own finding that the French authorities could protect the children from future abuse upon their return, the district court adopted testimony to the effect that the children's "best interests" and long-term psychological well-being counseled against their return to the country of France (as distinguished from return to the custody of their father). On that basis, the district court again incorrectly applied Article 13(b) and refused to order the children returned to France. See Point I.B., infra. Moreover, the district court included in its Article 13(b) analysis an erroneous interpretation of the separate Convention provision allowing a court to refuse return based on an explicit objection to return by a child of "appropriate age and maturity." That provision does not make a child's objection part of a "grave risk" analysis, but provides a separate basis to deny return if the requirements of the "objection" provision are met. Those requirements were not met here, as the child did not state an objection to return to France distinct from return to her father's custody. Moreover, the child was not of sufficient age and maturity independently to interpret her own interests and make the sort of determinative decision to which a court might give conclusive effect under Article 13. See Point I.C., infra.

**ARGUMENT**

**THE DISTRICT COURT’S FINDINGS REGARDING THE**

**FRENCH SYSTEM'S ABILITY TO PROTECT THE CHILDREN**

**FROM FUTURE ABUSE SHOULD HAVE LED TO AN ORDER OF RETURN**

**A.Standard of Review**

In Blondin II, this Court did not address the standard of review to be applied in a case such as this, brought under the Hague Convention. In the United States' view, the appropriate standard of review is that applied by the Third Circuit in such cases: "plenary review of the [district] court's choice of legal precepts and its application of those precepts to the facts," with the clearly erroneous standard applied only to "the district court's historical or narrative facts." Feder, 63 F.3d at 222 n.9. Application of this standard would comport with this Circuit's practice in other types of cases raising mixed questions of fact and law.

Ordinarily, this Court reviews the factual findings of the district court under the "clearly erroneous" standard, see Fed. R. Civ. P. 52(a), while legal conclusions are reviewed de novo, see United States v. McCombs, 30 F.3d 310, 316-17 (2d Cir. 1994). This has been the approach of all the courts of appeals to address the standard of review in Hague Convention cases, other than the Third Circuit. See Shalit v. Coppe, 182 F.3d 1124, 1127 (9th Cir. 1999); Lops v. Lops, 140 F.3d 927, 935 n.6 (11th Cir. 1998); Friedrich II, 78 F.3d at 1064.\* However, "[i]n a bench trial, . . . 'where the functions of fact-finding and exposition of law are performed by the same person, the line between the functions is not always distinct.'" McCombs, 30 F.3d at 317 (quoting American Society of Composers, Authors and Publishers v. Showtime/The Movie Channel, 912 F.2d 563, 569 (2d Cir. 1990)). Moreover, "'findings made in the context of a bench trial might be derived from legally impermissible factors, the failure to consider legally relevant factors, the application of incorrect legal standards, or the misapplication of correct legal standards.'" Id. (quoting American Society of Composers, Authors and Publishers, 912 F.2d at 569). Thus, while the reviewing court "'must respect findings of the trial judge as to what in fact happened and in addition . . . give due weight to his superior opportunity to acquire the true feel of the case,'" id. (quoting In re Hygrade Envelope Corp., 366 F.2d 584, 588 (2d Cir. 1966) (emphasis added in McCombs)), "'when the issue is [the trial court's] application of a legal standard to facts undisputed or reasonably found,'" id. (quoting In re Hygrade, 366 F.2d at 588 (brackets added in McCombs)), the reviewing court "will not shy away from plenary review" to ensure that the result is consistent with the applicable rule of law, id.; see also Muller v. Committee on Special Educ., 145 F.3d 95, 102 (2d Cir. 1998) (application of statutory and regulatory definitions to particular facts of case is mixed question warranting de novo review).

Moreover, plenary, or de novo, review of mixed questions is particularly appropriate in cases brought under the Hague Convention, because of the need for uniform interpretation, see 42 U.S.C. § 11601(b)(2)(B), and the importance of properly applying the Convention in the spirit of trust and cooperation between States necessary for the Convention's proper functioning, see Blondin II, 198 F.3d at 248 n.7. Where, as here, a court of appeals is as well positioned as the district court to assess whether the facts satisfy the standards of the Convention, and the Court's decision on these issues may have value in clarifying the law, plenary review of mixed questions should be applied. See Ornelas v. United States, 517 U.S. 690, 696-97 (1996) (independent appellate review necessary where appellate court in at least as good position as district court and decision may clarify law).

**B. Article 13(b) Was Not Appropriately**

**Invoked to Deny Return**

Article 13(b) of the Convention permits, but does not require, non-return where “there is a grave risk that [a child’s] return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.” Hague Convention, art. 13(b). This exception is to beconstrued narrowly, and must be harmonized with the Convention’s central purpose of, wherever possible, deterring abductions by returning abducted children promptly, and honoring the treaty commitment to allow custodial determinations to be made by the court of the child’s habitual residence. Blondin II, 189 F.3d at 248. Thus, it is important that a court consider not only whether return would subject the child to a grave risk of harm, but also whether the State to which the child would be returned can and will take steps to ameliorate any potential harms. Id. at 248-49.

Consistent with the above, this Court explicitly directed the district court to consider on remand whether the abducted children could be reasonably protected from the "grave risk" posed by Blondin's abusive behavior "while still honoring the important treaty commitment to allow custodial determinations to be made -- if at all possible -- by the court of the child's home country." Blondin II, 189 F.3d at 248. Because the district court on remand found that the children would not have to stay with their father pending the new determination, that the French system could support Marie-Eline and Francois pending the adjudication of the custody case, and that the French system could protect the children from further abuse, Blondin III, 78 F. Supp. 2d at 288-89, 299, the type of "grave risk" contemplated by the Convention was ameliorated, and return to France should have been ordered, see Blondin II, 189 F.3d at 249-50.

Instead of following this mandate, the district court refused return on the ground that France could not "protect [the children] from the trauma of being separated from their home and family and returned to a place where they were seriously abused, amidst the uncertainties of court proceedings and being on public assistance." Id. at 298. This conclusion was based on testimony from a psychiatrist that any return of the children to France, even for a one-to-three-month period during which a French court would determine custody, would cause them to experience post-traumatic stress disorder due to the prior abuse. Id. at 295. The psychiatrist was of the opinion that psychological harm would be caused by "return[ing] them to the scene of their original trauma" and by placing them in an insecure position based on the uncertainties surrounding a custody proceeding in France. Id.\*

As this Court held in Blondin II, issues of past abuse should not constitute a grave risk of future harm under Article 13(b) without the additional finding that there is a likelihood of, and no adequate option to prevent, future abuse upon return. Blondin II, 189 F.3d at 248-49; see also Tabacchi v. Harrison, No. 99 C 4130, 2000 WL 190576, at \*12-13 (N.D. Ill. Feb. 10, 2000) (return ordered where Italy can protect child from alleged abuse); Croll v. Croll, 66 F. Supp. 2d 554, 561 (S.D.N.Y. 1999) (same with respect to Hong Kong), appeal pending, No. 99-9341 (2d Cir.); In re Walsh, 31 F. Supp. 2d 200, 206-07 (D. Mass. 1998) (same with respect to Ireland); compare Turner v. Frowein, FA 970084450, 1998 Conn. Super. LEXIS 3781, at \*17-21 (Sup. Ct. Conn. June 25, 1998) (refusing return where court found sexual abuse of child by father, and Dutch authorities were not responsive to mother).

The district court criticized this Court's interpretation of Article 13(b) as "unduly narrow" and "unwarranted." Blondin III, 78 F. Supp. 2d at 298. In support of this criticism, the district court analogized this case to a portion of a State Department legal analysis that was published when the Convention was first adopted here. Id. at 298 (citing 51 Fed. Reg. 10,494, 10,510 (1986)). Under that analysis, sexual abuse of a child by one parent is an example of an "intolerable situation" permitting a court to deny a petition for return. This analogy was flawed. The Department of State has confirmed to us that the example assumes (as did the district court in its initial ruling in this case, 19 F. Supp. 2d at 127-29) that the return would be to the custody of the abusive "custodial parent." 51 Fed. Reg. at 10,510.