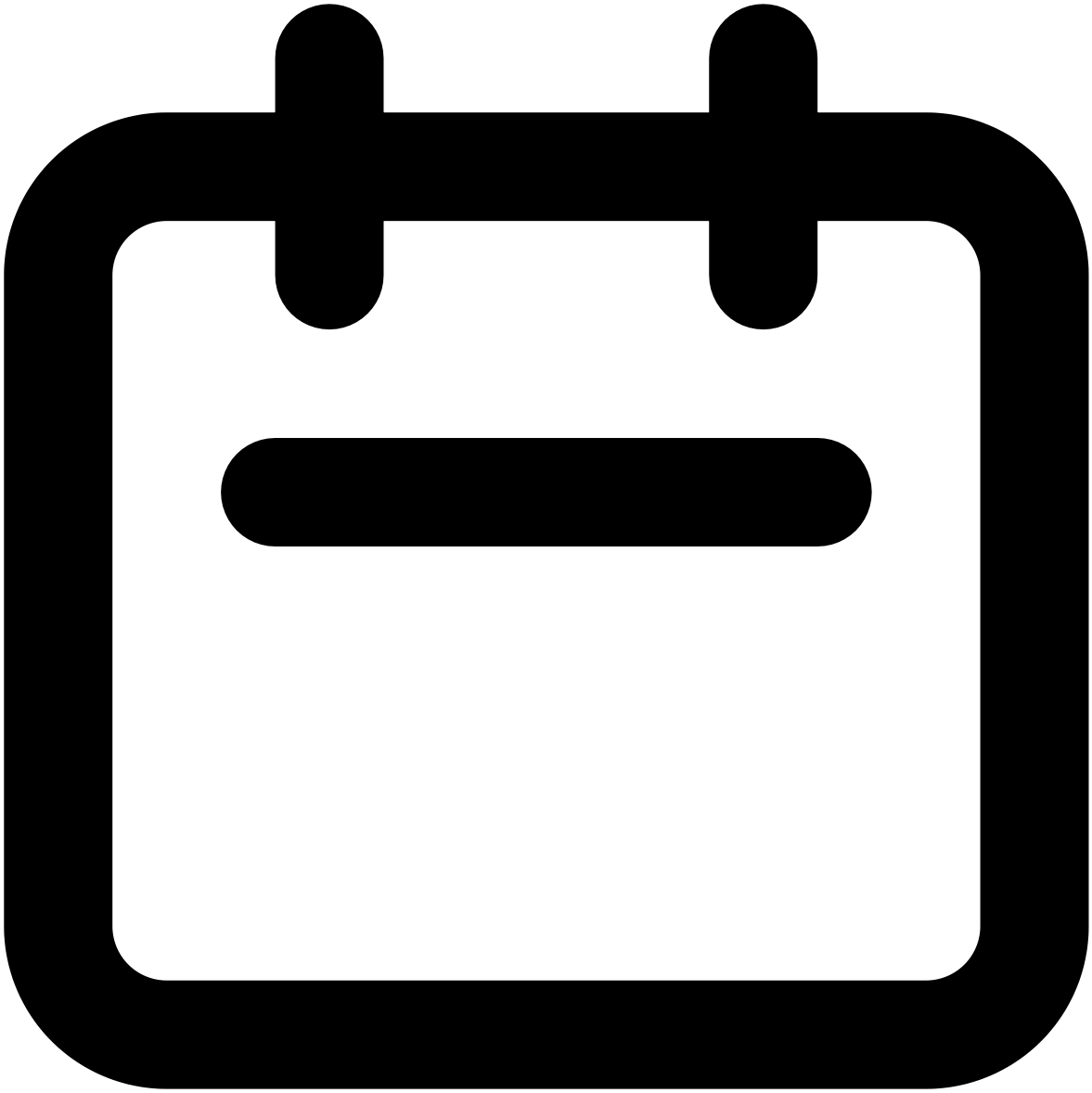
(Not) applying CRPD standards and the question of fair referencing: Toplak and Mrak v. Slovenia



February 08, 2022

By Merel Vrancken

In the case of Toplak and Mrak v. Slovenia, two persons with muscular dystrophy complained that they had been discriminated against with respect to their right to vote because their polling stations had not been made fully accessible so as to ensure that they could vote fully independently and in secret. The European Court of Human Rights (ECtHR or Court) finds no violation of their right to non-discrimination under the Convention, as the polling stations had been equipped with basic adjustments such as a ramp and the persons assisting them were bound to respect the secrecy of the vote. There is thus no right to secret or independent vote for persons with disabilities under the ECHR, as long as reasonable accommodations have been made in the form of basic adjustments. Although the Court frequently refers to the Convention on the Rights of Persons with Disabilities (CRPD) and its interpretation in its reasoning, the ECtHR's approach and conclusion are not in accordance with CRPD standards. This raises the question of fair referencing: to what extent is it fair to reference (parts of) sources to give more legitimacy to an argument, while as a whole they say something else?

Facts

The case concerned two applicants with muscular dystrophy, a disease that causes continuous loss of muscle mass, who complained about a lack of equal access to the voting procedure in two different instances, namely the 2015 referendum and the 2019 European Parliament (EP) elections. Moreover, the applicants had in the past been involved in strategic litigation at the domestic level aimed at improving the access of people with disabilities to the voting process. This lead to the Constitutional Court ruling in 2014 that within two years (i.e. by May 2016) legal provisions should be adopted ensuring the accessibility of all polling stations for people with disabilities. In response to this, the Elections Act was amended in 2017 to indicate that all polling stations were required to be accessible to people with disabilities as of 1 February 2018.

Before the 2015 referendum, both applicants made a request to have the polling station for their local electoral area made accessible for people with disabilities. In both cases a ramp was installed. The second applicant, Mrak, even visited the premises to verify its accessibility. Both applicants initiated court proceedings seeking access for people with disabilities to their local polling station and specific accessibility of their designated polling station for the upcoming referendum, which were unsuccessful. The Supreme Court held, *inter alia,* that the judicial protection provided was not intended to protect against future actions that could potentially interfere with a person's legal position, but only related to acts that had already occurred. The applicants thus could not request accessibility prior to the elections. Both applicants voted in the 2015 referendum.

By the 2019 EP elections, all polling stations were required to be accessible to people with disabilities as a result of the 2014 Constitutional Court ruling and the amended Elections Act. It is unclear what, other than entry to the polling station, the required level of accessibility involved. Neither applicant contacted the National Commission before the elections with a request for accessibility. The first applicant, Toplak, did not vote in this election. His condition had deteriorated to the extent that he could no longer hold a pen and he had not wished to be assisted by another person. The applicants argued that, aside from the installation of a ramp, their polling stations had not been rendered accessible. They submitted that they had been unable to 'enter a little polling room with a wheelchair [owing] to a narrow door entry [and that] the ballot box and the desk [had been] too high and inaccessible, and no accessible voting methods or equipment [had been] available' (§29). In 2020 the Constitutional Court rejected a claim arguing that the Constitutional Court's 2014 decision had only been partially implemented by the amendments to the Elections Act, as it only concerned the physical accessibility of polling stations and not the use of voting machines.

The applicants complained before the ECtHR that they lacked effective judicial means to request an accessible polling station in advance and of a discriminatory lack of access to the voting procedure.

Judgment

The Court first considers the right to an effective remedy under Article 13 ECHR, taken together with Article 1 of Protocol No. 12 for the 2015 referendum and read in conjunction with Article 3 of Protocol No. 1 for the 2019 EP elections. Under the 2015 referendum, the ECtHR holds that it was clear that no effective remedy was available to ensure the accessibility of the local polling stations in advance. For this reason, it finds a violation of Article 13 ECHR, taken together with Article 1 of Protocol No. 12 (§§88-91). In contrast, it finds no violation of Article 13 under the 2019 EP elections, as the first applicant had already used an effective remedy in challenging the 2017 Amendment to the Elections Act before the Constitutional Court and for the second applicant a remedy affording compensation after the elections would satisfy the criteria of Article 13 (§§93-95).

The ECtHR then turns to the complaints of discrimination based on disability, caused by a lack of (equal) access to the voting procedure, under Article 1 of Protocol No. 12 for the 2015 referendum and under Article 14 ECHR cj. Article 3 of Protocol No. 1 for the 2019 EP elections. However, given the earlier finding that an effective remedy had been available, the Court finds Mrak's complaint concerning the 2019 EP elections inadmissible for failure to exhaust domestic remedies (§98).

In its assessment of the other complaints, the ECtHR establishes that the national authorities were under a positive obligation to take appropriate measures to enable the applicants to exercise their right to vote on an equal basis with others. While it 'observes that a general and complete adaptation of polling stations in order to fully accommodate wheelchair users would no doubt facilitate their participation in the voting process', it

points to the states' margin of appreciation in ensuring adequate access to polling stations within the context of the allocation of limited state resources (§119). It moreover states that '[w]hile adaptations to the voting facilities (such as tables, voting booth and ballot box) were not made in advance, assistance could be provided to the applicants on the spot by means of a reasonable accommodation of their needs' (*ibid.*).

Underlining that both applicants had in effect been able to vote independently in the 2015 Referendum, the Court holds that the problems that occurred do not appear to have produced a particularly prejudicial impact on them and have therefore not reached the threshold of discrimination. Coming to this conclusion, it holds that the improvement of accessibility in the built environment takes time and that the authorities had responded promptly and constructively to the applicants' request that their respective polling stations be rendered accessible (§121). The applicants' rights have therefore not been violated in respect of the 2015 referendum.

Regarding the 2019 EP elections, the Court first recalls that Toplak had not voted. Due to his medical condition, he was unable to mark the ballot paper by himself and he would have had to disclose his electoral choice to the person assisting him, which he refused (§124). In respect of Toplak's argument that voting machines had been a necessary instrument to ensure the right to vote in secrecy without discrimination, the Court takes into account various considerations. Firstly, the use of assistive technologies is only one means to ensure the inclusion of people with disabilities in political life. Not even the CRPD Committee's decision in Fiona Given of 16 February 2018 held that the use of assistive technologies was a necessary requirement that would need to be immediately implemented. Secondly, the use of assistive technologies requires significant financial investment and no consensus between the CoE member states exists as to the use of voting machines as a requirement for the effective exercise of the voting rights by people with disabilities. The choice of whether to use voting machines thus lies with the national authorities (§§127-129). In holding that the voting machines had been costly, had only been used by a very small number of people and could not assist people with all types of disabilities, the respondent state's Constitutional Court cannot be said to have failed to strike a fair balance between the protection of the interests of the community and respect for the applicant's Convention rights (§131). The applicant's right to non-discrimination is therefore not violated.

Commentary: referencing, but not applying CRPD standards

The unanimous judgment in Toplak and Mrak v. Slovenia is noteworthy for several reasons. Firstly, it establishes that the right to an effective remedy requires that voters have a legal remedy to request accessible polling stations in advance of elections. Secondly, while the scope Article 3 of Protocol No. 1 does not include referenda, the Court applies Article 1 of Protocol No. 12 to afford the same protection under the right to non-discrimination with respect to referenda. Thirdly, the judgment gives rise to some questions about the interpretation of the ECHR and the role of the CRPD in this when it concerns persons with disabilities. The remainder of this post will go into this issue, discussing the application of CRPD standards by the ECtHR and the question of fair referencing.

In the case at hand, when reiterating the ECHR's general principles, the Court states:

'the Convention should, as far as possible, be interpreted in harmony with other rules of international law, of which it forms a part. Therefore, the provisions regarding the rights of people with disabilities set out

in the CRPD should, along with other relevant material, be taken into consideration.'

Toplak and mrak v. Slovenia, §112

The approach where the ECtHR brings the ECHR standards in line with the CRPD can be cheered upon. The CRPD has been ratified by all Council of Europe member states and its standards can be considered the guiding standards for ensuring the rights of persons with disabilities. In the current judgment, the Court also recalls that it has read a duty of reasonable accommodation for persons with disabilities into Article 14 ECHR, in accordance with Article 2 CRPD. It furthermore reiterates that Article 29 CRPD guarantees equal enjoyment of political rights and accessible voting procedures for persons with disabilities (§114).

Of course, the ECHR is not the CRPD and the Strasbourg Court is under no obligation whatsoever to interpret the ECHR in accordance with CRPD standards. In the case at hand, however, by referring to these standards under the general principles and in making certain statements (see §119, §121 and §§125-126), the impression arises that it does take this approach in the current case. This can be contrasted to the judgment in Caamaño Valle v. Spain, where it explicitly chose to apply a standard which was different from the CRPD (see also this blogpost). However, while the frequent referencing gives rise to this impression, on further analysis it becomes clear that the Court in the current case does not actually apply the CRPD standards, but instead cherry-picks paragraphs and sentences that are in line with its statements. Two examples can make this clear.

Accessibility vs. reasonable accommodation

In assessing the allegations of discrimination in the voting procedure for the 2015 referendum, the Court holds that the question in the present case is 'not one of direct discrimination by way of unjustified differentiation, but rather of the compliance of the national authorities with their positive obligation to take appropriate measures to enable the applicants, whose mobility was impaired due to disability, to exercise their right to vote on an equal basis with others' (§117). Under the CRPD, this sentence would then be interpreted as requiring the state to comply with its duty of *accessibility*. As is stated in General Comment No. 2 on Accessibility of the CRPD Committee, states are required to develop and achieve accessibility standards. The facts of the case show that Slovenia also recognises this: the 2014 Constitutional Court decision required all polling stations to be accessible and the Elections Act was amended accordingly in 2017 (§42-43). While accessibility is something to be realised over time, through the Constitutional Court decision and the subsequent amendment of the Elections Act, Slovenia recognised that it was possible and necessary to ensure accessibility of the polling stations by 1 February 2018. According to the CRPD Committee, 'the entity obliged to provide accessibility may not excuse the omission to do so by referring to the burden of providing access for persons with disabilities' (§55). After accessibility has been achieved, in case of rare impairments, the duty of reasonable accommodation may apply. In the current case, Slovenia failed to fulfil its duty of accessibility, a situation that could not be remedied by applying the concept of reasonable accommodation.

The ECtHR, however, takes a different approach. It holds that while the general and complete adaptation of polling stations in order to fully accommodate wheelchair users would facilitate their participation in the voting process, no duty of any sort exists in this respect. The Court points to the margin of appreciation that is granted to the state and adds that an alternative to adaptations was that 'assistance could be provided to the applicants on the spot by means of a reasonable accommodation of their needs' (§119). It makes this last statement referring to General Comment No. 2 of the CRPD Committee. This same General Comment was analysed above to entail not simply a duty of reasonable accommodation, but a duty of accessibility, which was to be supplemented with the duty of reasonable accommodation in exceptional circumstances where general accessibility did not suffice. While the General Comment thus provides the option of reasonable

accommodation, it goes against its spirit to refer to it in considering reasonable accommodation as an equivalent alternative to accessibility.

Interpretation of Fiona Given

A second example can be taken from the Court's assessment of discrimination in the voting procedure for the 2019 EP elections. The applicants argue that the use of voting machines is necessary to ensure the right to secrecy of the voting procedure and the right to vote individually on the same level as non-disabled persons (§122). Until the 2017 amendment of the Elections Act, voting machines had been available for people with disabilities in certain adapted polling stations. In amending the Elections Act to include the requirement of accessibility of all polling stations for persons with disabilities, the possibility to use voting machines was removed and replaced by other options, such as voting by post. In essence, Slovenian legislation had thus recently been changed and now did not foresee the use of voting machines anymore. The question the Court goes into, however, was whether the introduction of voting machines was a necessary requirement that would need to be immediately implemented (§126-129). It holds that the CRPD Committee's decision in the case of Fiona Given did not contain this requirement. By asking this question, the ECtHR overlooks the fact that they had been used in the past, an element which is also very relevant for correctly interpreting the implications stemming from the Fiona Given decision.

In the case of Fiona Given, the applicant did not have the option to vote using a voting machine, while people with visual impairments did. The CRPD Committee found that 'the failure to provide the author with access to an electronic voting platform already available in the State party, without providing her with an alternative that would have enabled her to cast her vote without having to reveal her voting intention to another person, resulted in a denial of her rights' (CRPD decision, §8.10; see also Toplak and Mrak at §57). Depending on how 'already available' is interpreted, the Fiona Given decision thus could have direct implications for the current situation. While it is true that it is not possible to interpret Fiona Given as implying a general 'right to vote by voting machine', if the ECtHR was analysing the current claim according to the CRPD principles, it should have gone into the question whether voting machines were 'already available' in the member State. In Fiona Given, the CRPD Committee did hold that where voting machines are already available, they are a necessary requirement, unless another option is available that would enable the applicant to cast a vote without having to reveal their voting intention to another person – an option that, undisputedly, did not exist in the present case.

Conclusion

The current analysis leads to a plain truth: as long as the ECtHR does not acknowledge concepts like inclusion and accessibility, its case law will not be in line with CRPD standards. At the same time, this finding does not imply that the Court has no business in engaging with the CRPD. As was stated earlier, an interpretation of the ECHR which brings it in line with (parts of) the CRPD, thereby enriching the Court's case law with a disability-sensitive approach, can only be cheered upon. This naturally involves references to the CRPD and its interpretative documents. Nevertheless, the current case raises the question of fair referencing: to what extent is it fair to reference fragments of CRPD standards to give more legitimacy to an argument, while read as a whole these instruments contain different principles?

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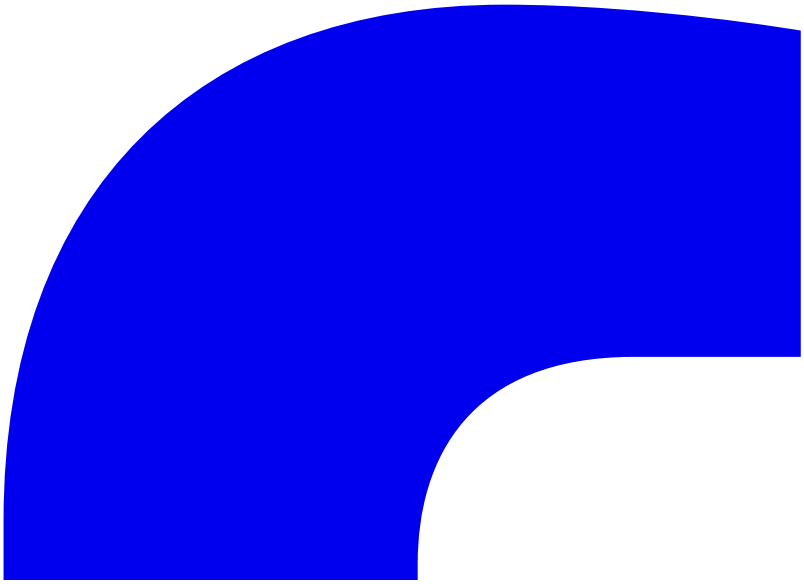

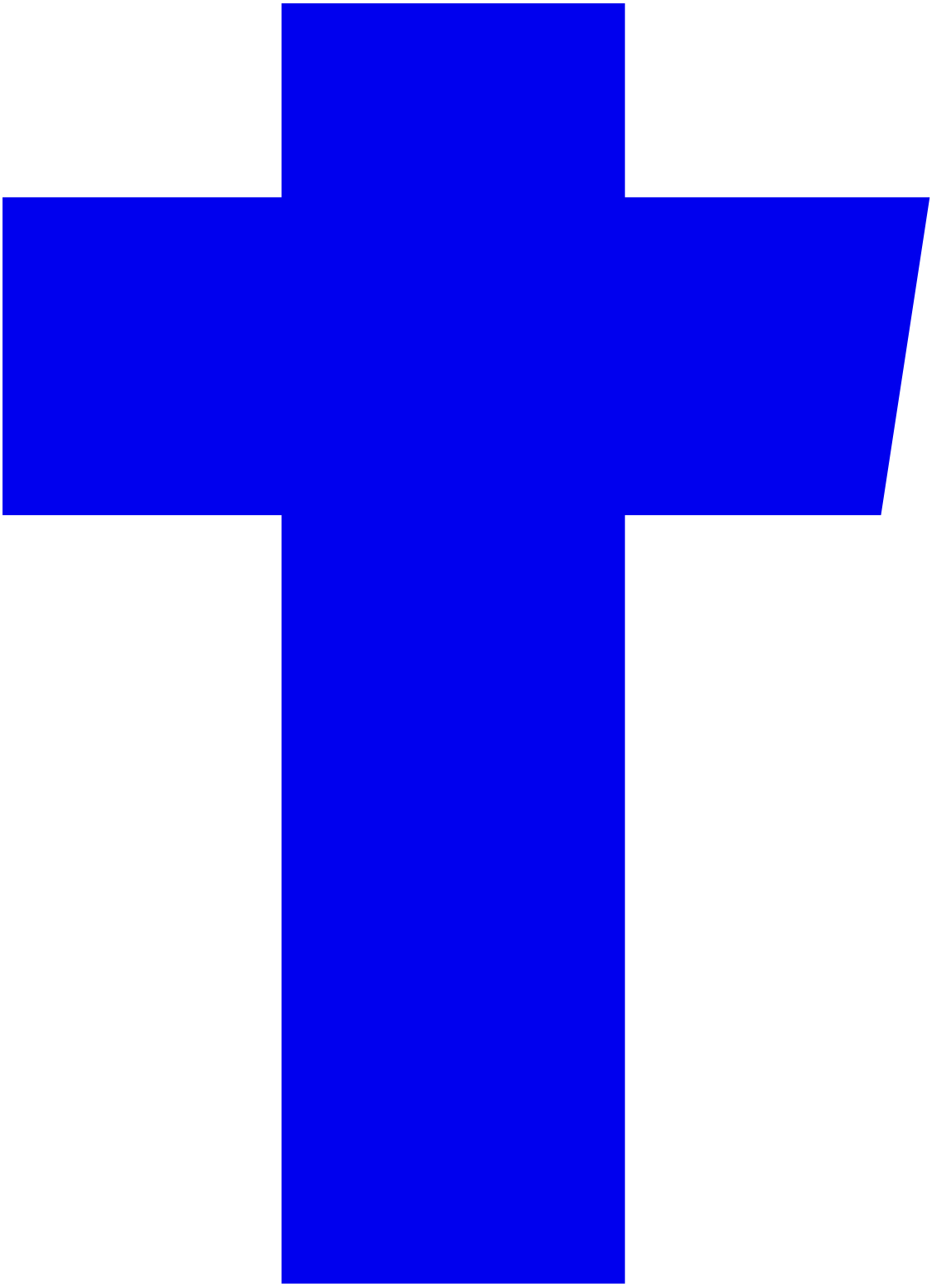

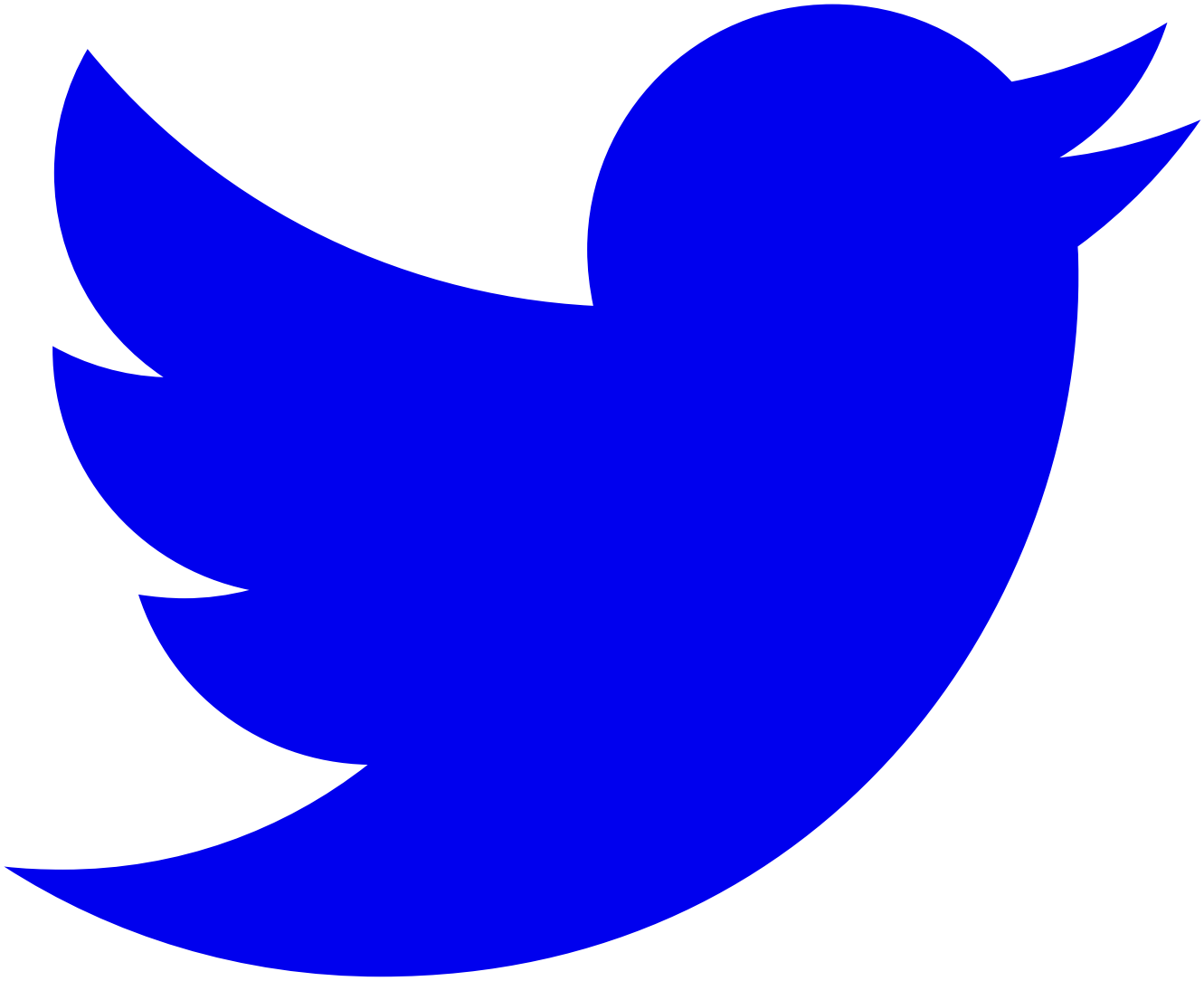

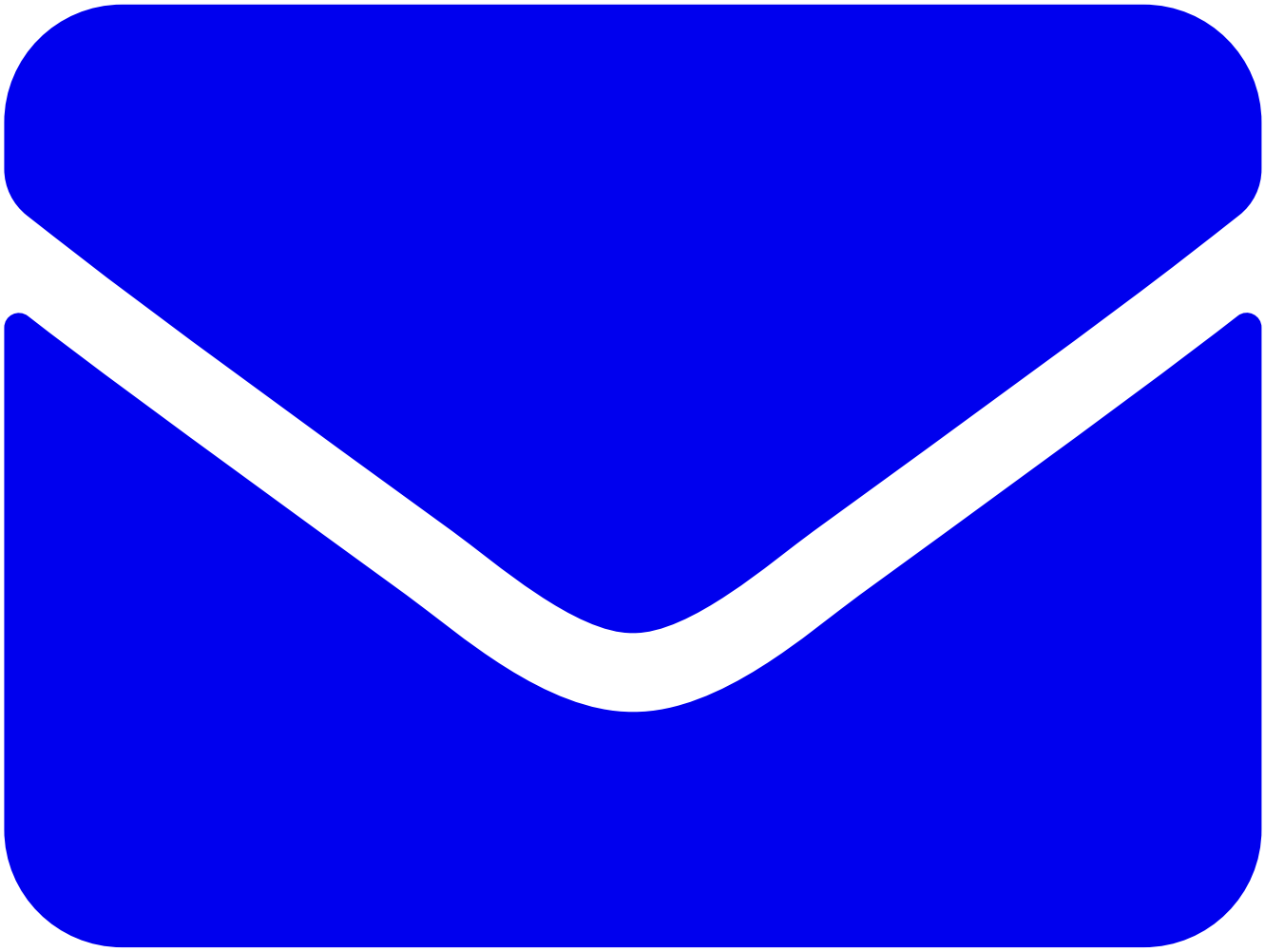

BY Merel Vrancken

Merel Vrancken is a PhD student and assistant in constitutional law at UHasselt. She is working on a PhD on human rights and segregation in education.

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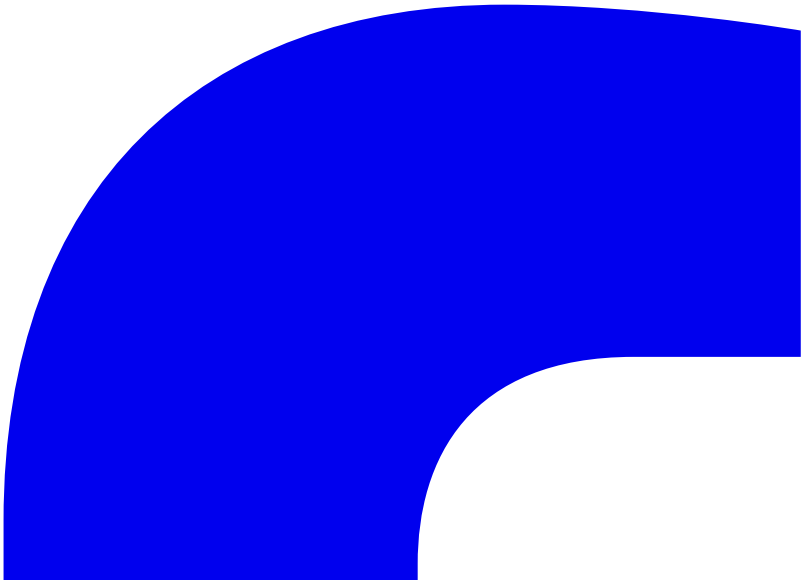

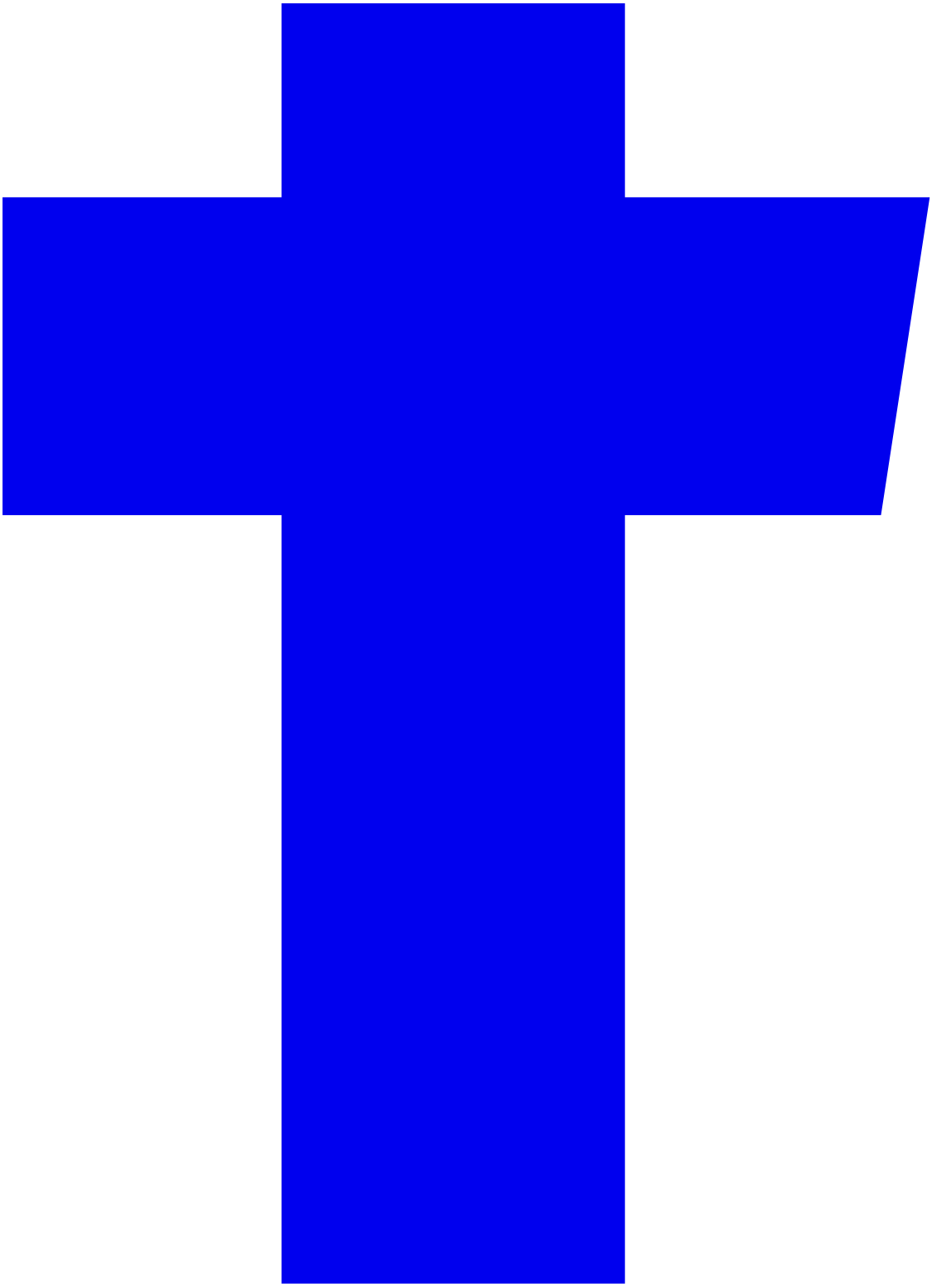

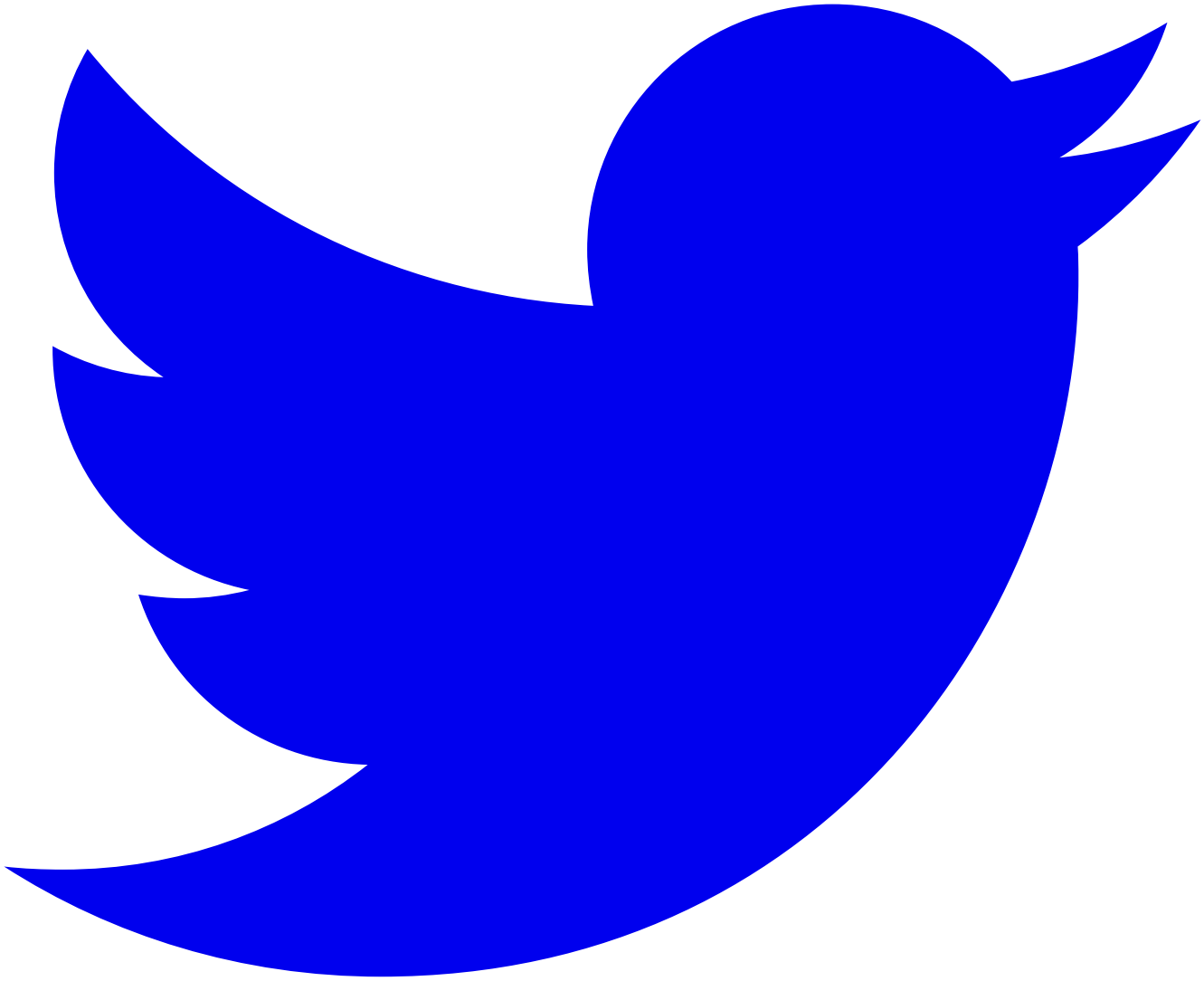

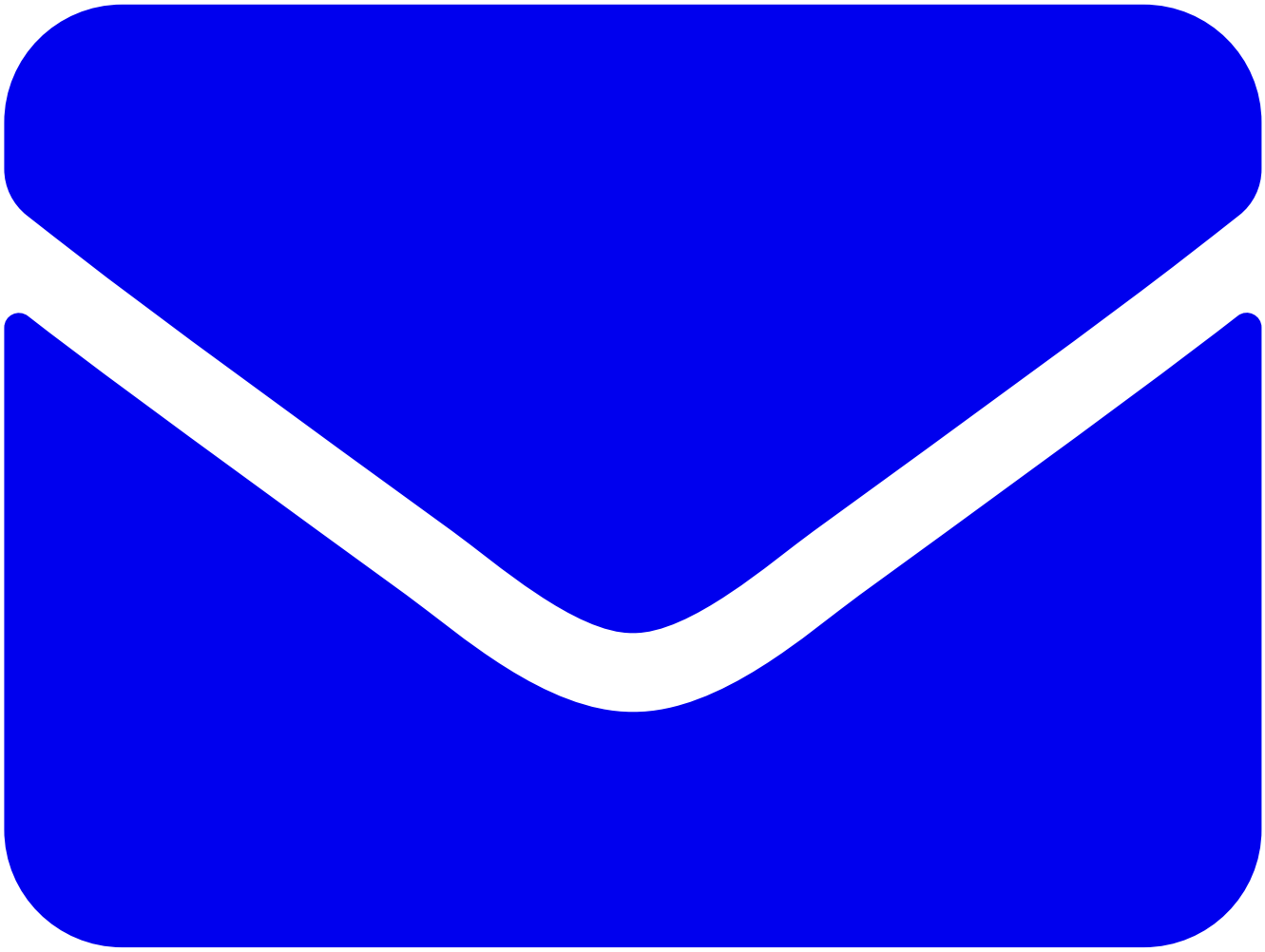

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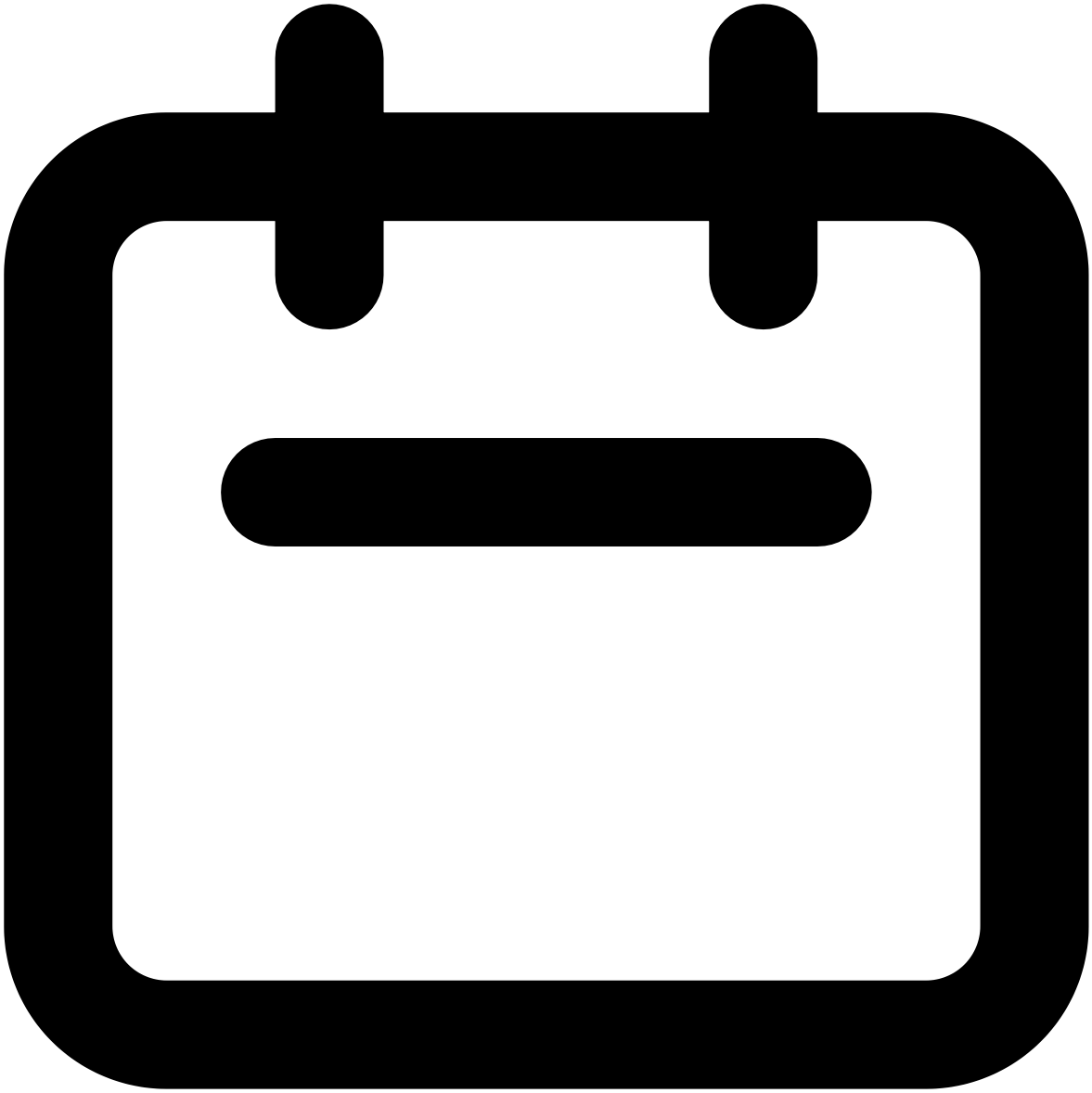

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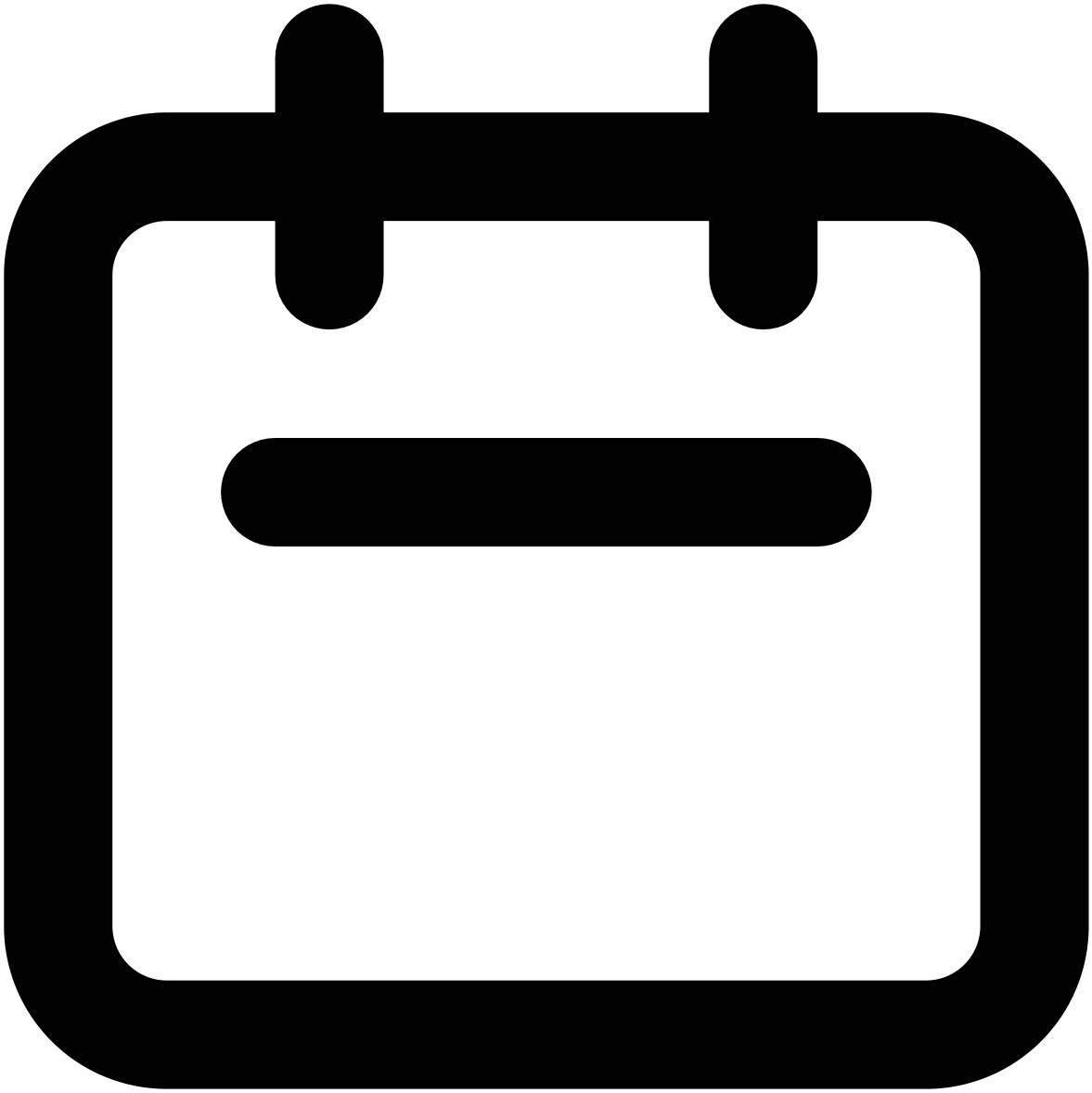

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- *David Cohn* says:
  February 8, 2022 at 2:46 pm

  Thanks for this fantastic post. However, you write that the court "establishes that the right to an effective remedy requires that voters have a legal remedy to request accessible polling stations in advance of elections." Unfortunately the court ruled differently. The court ruled that a post-election remedy in a form of small compensation is sufficient, and found no violation of Article 13 regarding the 2019 elections. How is a possibility to sue for compensation considered "effective" when it comes to voting? The judgment is disappointing. It is ripe for the Grand Chamber review.

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Universiteitstraat 4
9000 Gent, Belgium

Martelarenlaan 42
3500 Hasselt, Belgium
strasbourgobservers@gmail.com