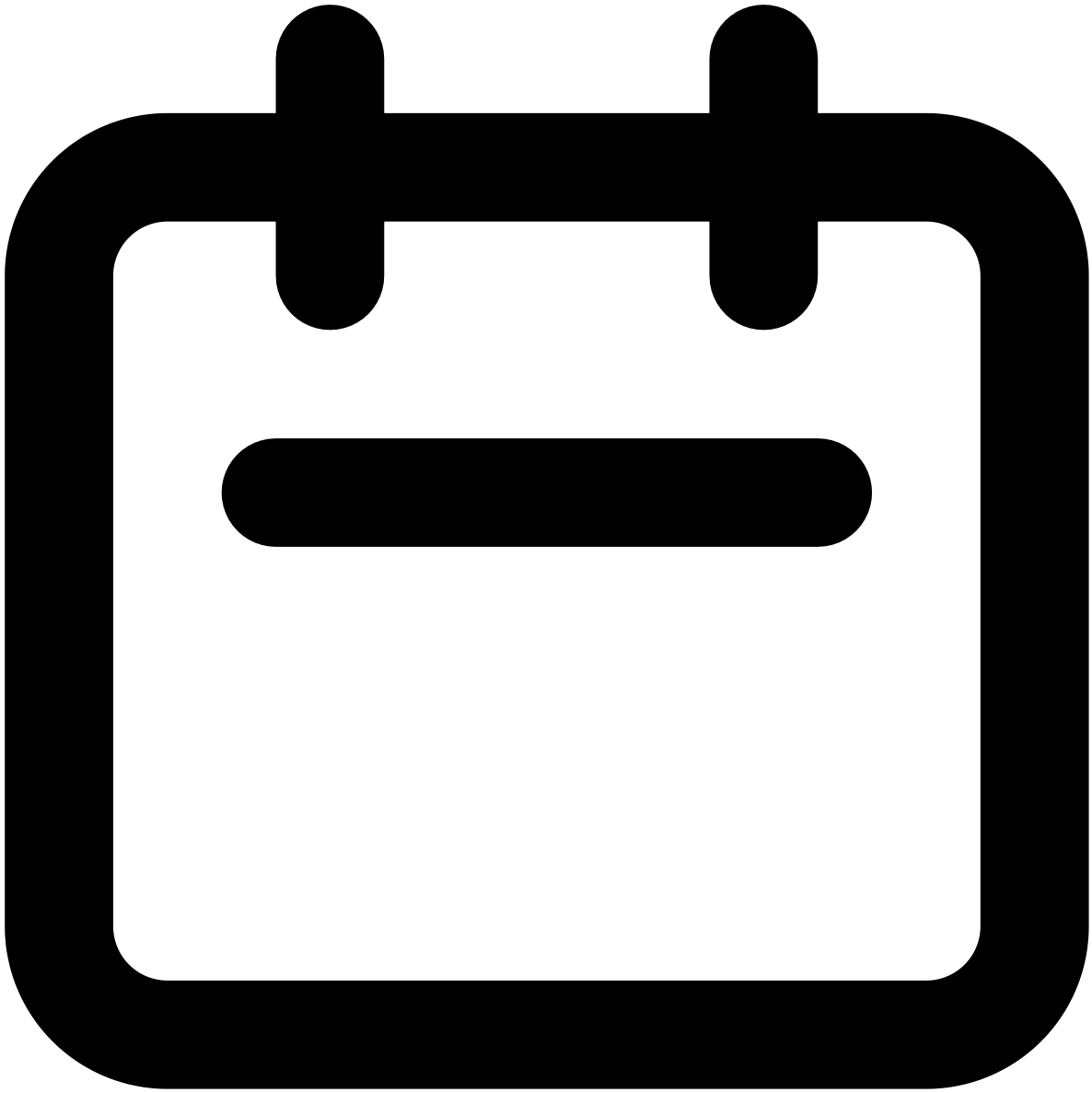
Breaking the ‘circle of marginalisation’ through desegregation measures: X and Others v. Albania



July 01, 2022

By Merel Vrancken

In the recent case of *X and Others v. Albania* on the segregation of Roma and Egyptian pupils in education, the ECtHR speaks up strongly against the wrongs of segregation, fifteen years after the Grand Chamber had first done so in the case of *D.H. and Others v. the Czech Republic*. The Court once more emphasises the importance of ensuring the equality of these vulnerable minorities, especially for children in the early stages of their lives.

With this judgment, the issue of segregation in education that still persists in many countries across Europe has once more been brought to the Court’s attention. Aside from reaffirming already well-known principles on segregation, the Court strengthens its earlier case law by formulating a more powerful positive obligation to act against segregation and subtly lowers the threshold for finding a situation of segregation to be discriminatory under the European Convention of Human Rights.

Facts

The Naim Frashëri elementary school, which the applicants attended, had a school consisting almost exclusively of children of the Roma and Egyptian minorities. Since 2012, they have accounted for 89 to 100% of the school’s pupils. In 2015, a complaint was lodged with the Commissioner against Discrimination, alleging that the overrepresentation of Roma/Egyptian pupils in the school amounted to segregation. In a binding decision, the Commissioner held that the Roma and Egyptian children of the Naim Frashëri school were indeed suffering indirect discrimination on account of their overrepresentation in

concerned an already existing policy providing free school meals to Roma and Egyptian pupils. This policy was extended to all pupils attending the school, but the elaboration had limited to no effect on school segregation rates. In the course of these events, another segregated school in the country had been closed in order to solve the problem of discrimination.

The applicants complained to the Court under Article 1 of Protocol No. 12 to the ECHR that they were discriminated against on the basis of their ethnicity in their right to an inclusive education as a result of the authorities' failure to implement desegregating measures to address the over-representation of Roma and Egyptian pupils in the Naim Frashëri school.

Roma segregation cases

Before turning to the judgment in the case at hand, it might be useful to remind the reader of the previous case law of the Court on Roma segregation in education. The ECtHR has handed down six judgments on this issue between 2007 and 2013: *D.H. and Others v. the Czech Republic* (GC), *Sampanis and Others v. Greece*, *Oršuš and Others v. Croatia* (GC),*Sampani and Others v. Greece*, *Horváth and Kiss v. Hungary* and *Lavida and Others v. Greece*. In each of these cases, the Court found the situation whereby the Roma children had been overrepresented in special education (*D.H.* and *Horváth and Kiss*), or had been separated into different -allegedly preparatory- classes (*Sampanis* and *Oršuš*) and schools (*Sampani* and *Lavida*) indirectly discriminatory under Article 14 ECHR read in conjunction with Article 2 of Protocol No. 1.

In these cases, the Court developed some principles regarding the separation of pupils on the basis of their Roma ethnicity. It found the prohibition of discrimination in education of Roma pupils to give rise to a number of positive obligations. According to the Court, 'structural deficiencies' call for the implementation of particularly stringent positive obligations, as these groups had suffered past discrimination in education with continuing effects. More specifically, these pupils should be assisted with any difficulties they encounter in following the school curriculum (*Horváth and Kiss*, para. 104). A high dropout rate of a specific category of pupils may trigger this positive obligation (*Oršuš*, para. 177). Moreover, states that have encountered bias in past placement procedures for pupils with disabilities, have a positive obligation to avoid the perpetuation of past discrimination through these tests, in addition to positive obligations 'to undo a history of racial segregation in special schools' (*Horváth and Kiss*, paras. 116 and 127). When a state decides to segregate children on the basis of a specific criterion, such as language, it takes on an obligation to take appropriate positive measures to assist these children in acquiring the necessary skills in the shortest time possible, so that they can be quickly integrated into mixed classes (*Oršuš*, para. 165). In the elaboration of its case law in the Roma segregation cases, the Court has extensively engaged with binding and non-binding international materials, which have enriched its understanding of the issue at hand and have aided at broadening the scope of ECHR (positive) obligations. Also in the case at hand, the Court cites a number of instruments on segregation in education before delivering the actual judgment.

Judgment

In X and Others v. Albania, the ECtHR further elaborates the above-mentioned case law, considering that the lack of action by the government to resolve the situation of segregation is discriminatory. It holds that the delays and the non-implementation of appropriate desegregating measures cannot be considered objectively and reasonably justified. Even though the segregation was not intentional, the government failed to comply with its

> 'positive obligation to take steps to correct the applicants' factual inequality and avoid the perpetuation of the discrimination that resulted from their over-representation in the school, thereby breaking their circle of marginalization and allowing them to live as equal citizens from the early stages of their life' (para. 84).

In the judgment's reasoning, the Court reiterates that the same standards afforded by Article 14 are applicable to cases brought under Article 1 of Protocol No. 12. Referring to the earlier cases on Roma segregation in education, it underlines some basic principles of discrimination and recalls the situations of segregation that it has condemned in the past (paras. 76-80). Turning to the case at hand, the Court takes account of the fact that the right to inclusive education is a right provided by domestic law. It recalls that the Naim Frashëri school was not created exclusively for Roma and Egyptian children. In addition, it does not dispute that the national authorities did not prevent the applicants from attending a different school or the other pupils from attending the Naim Frashëri school. The Court moreover agrees with the Government that there has been no discriminatory intent or action by them. At the same time, it recalls that discrimination potentially contrary to the convention may result from a *de facto* situation and does not necessarily require discriminatory intent (paras. 81-83).

The Government, however, delayed taking action against the segregation. These delays are incompatible with the time sensitivity of a situation where children are segregated and with the Commissioner's decision that measures be taken 'immediately' (para. 84). There is no justification for the delay in the implementation of the measures, two important ones of which were likely to have an immediate beneficiary effect on the Roma and Egyptian children (namely the merger of the school and the extension of the food support scheme to neighbouring schools). Even though the segregation may have been caused by the concentration of the Roma/Egyptian population in particular neighbourhoods near the segregated school, as the Government alleges, the solution to merge the school with non-segregated schools in the city appears pertinent to the Court. 'Such a merger could have contributed to the creation of schools where the ratio between Roma/Egyptian and other pupils was reasonably proportional to the city-wide ratio for elementary schools' (para. 86). This solution had already been implemented elsewhere in addition to the provision of transportation. Drawing a parallel with the case of *Lavida and others v. Greece*, the Court concludes that the delays and the non-implementation of appropriate desegregating measures cannot be considered to have had an objective and reasonable justification. There had therefore been a violation of Article 1 of Protocol No. 12 to the Convention (paras. 87-88).

Segregation in education: still an issue

While the clear stance the Court takes against segregation in the current judgment can be applauded, it is sad to realise that, fifteen years after the first judgment condemning the practice, the segregation of Roma pupils in education is still widespread. Roma children and other vulnerable minorities are still being set back at the outset of their lives and do not receive the same educational opportunities as children of the majority community. The current case is only one of many instances of persisting segregation of vulnerable minorities across numerous countries (see the CoE position paper on Fighting school segregation in Europe through inclusive education, p. 7-10). The 'circle of marginalisation' has, sadly, not yet been broken.

Roma segregation in education: the sequel

The judgment largely reaffirms already well-known principles and applies them in finding a violation of the Convention. The positive obligation to correct factual inequality, which the Court strongly formulates, to avoid the perpetuation of discrimination and to break the circle of marginalisation in favour of equality (para. 84) can be seen as a more clearly and compellingly formulated reiteration of the above-mentioned positive obligation of the state to assist with any difficulties encountered in the school curriculum, called for by structural deficiencies (*Horváth and Kiss*, para. 104, see above). To the more concrete

whether these suggested measures are evidence-based or had been subject to research at the national level. It is moreover unclear whether (and if so, how) the Court has any way of assessing the appropriateness of the measures suggested. For now, it seems that the Court just accepts any measure that was proposed by the government and had not already been proven inadequate (e.g. the elaboration of the food support scheme to all children within the Naim Frashëri school).

What's new?

Even though at first sight *X and Others v. Albania* mainly reaffirms and further elaborates earlier case law, some aspects are novel. The current case is the first case on Roma segregation in education to have been brought under the alone-standing prohibition of discrimination of Article 1 of Protocol No. 12. This made it possible for the Court to rely on the principle of inclusive education laid down in national law and a binding decision at the national level that held that the state was under a duty to desegregate. The Court thus directly focused on the obligations following from this situation of discrimination and assessed whether the state had complied with its positive obligation to desegregate.

A clear difference between the current and past cases is the fact that all the previous cases had concerned only Roma pupils and the current case is concerned with the overrepresentation of Roma *and Egyptian* children. While there was no doubt from the previous case law that segregation on the basis of ethnicity of *any* group would amount to discrimination, it was not entirely clear whether the same positive obligations would apply to other groups, as the Court had very clearly emphasised some specificities of the Roma population when pointing to the positive obligations (i.e. the history of direct discrimination, their marginalisation and their vulnerability). It now seems that the positive obligations, at least the very strongly formulated positive obligation of the current case, will apply to the segregation of all 'vulnerable minority groups'. This statement might need to be abated, however. While it is unclear whether the Court took this into account, and no explicit reference to this was made anywhere in the judgment, Egyptians in Albania are considered to be a 'subgroup' of Roma (H. De Soto, S. Beddies and I. Gedeshi, *Roma and Egyptians in Albania: From Social Exclusion to Social Inclusion*, World Bank Working Paper no. 53, 8). Against this background, the Roma segregation case law might not (yet) have been extended to any other ethnic groups after all.

A last novelty to be highlighted is the ease with which the Court accepts the situation at hand to constitute segregation. In the judgment, the ECtHR holds that the discrimination of the applicants 'resulted from their over-representation in the school' (para. 84). Overrepresentation of a certain vulnerable minority in a school thus undoubtedly amounts to discrimination. When compared to the previous case law, mentioned above, overrepresentation had so far only constituted discrimination where this overrepresentation had been in special education, which was of a lower quality than mainstream education (*D.H.*, para. 207 and *Horváth and Kiss*, para. 127). In effect, until the case of *Lavida*, the Court had consistently required proof of another negative consequence aside from the (even full) separation of the pupils (e.g. a reduced curriculum in *Oršuš*, paras. 163-164; stigmatisation in *Sampanis*, para. 92; inferior material conditions of the school in *Sampani*, paras. 94-97). Both *Lavida* and the current case do not require this additional negative consequence, considering the simple fact of overrepresentation to be discriminatory. In *Lavida*, one could still consider that this might have been explained by the majority children's parents' clearly discriminatory action and the national authorities' acquiescence to them (para. 69), but in the current case nothing of this sort is present. A subtle shift thus seems to have taken place, lowering the threshold that needs to be reached in order to prove that a situation of segregation is discriminatory under the Convention.

Conclusion

Although it can be regretted that a judgment of this kind is still necessary fifteen years after the first judgment condemning Roma segregation in education, the judgment in itself should be welcomed. The Court very clearly speaks out against ethnic segregation in education, even where this segregation was unintentional, and does not require negative consequences in addition to the harm that the simple fact of separation already brings with it for the disadvantaged pupils. This judgment moreover shows the potential that Article 1 of Protocol No. 12 has for facilitating the proof of discrimination under the Convention and is the first to consider segregation of an additional vulnerable group than Roma, namely the Albanian Egyptians. It (re)establishes a clear and strong obligation of states to take action against segregation, regardless of its origin, and swiftly implement appropriate desegregation measures. Only in this way can the perpetuation of discrimination of vulnerable groups in society be halted and can they be granted equal opportunities from the early stages of their life. Only in this way can the circle of marginalisation be broken.

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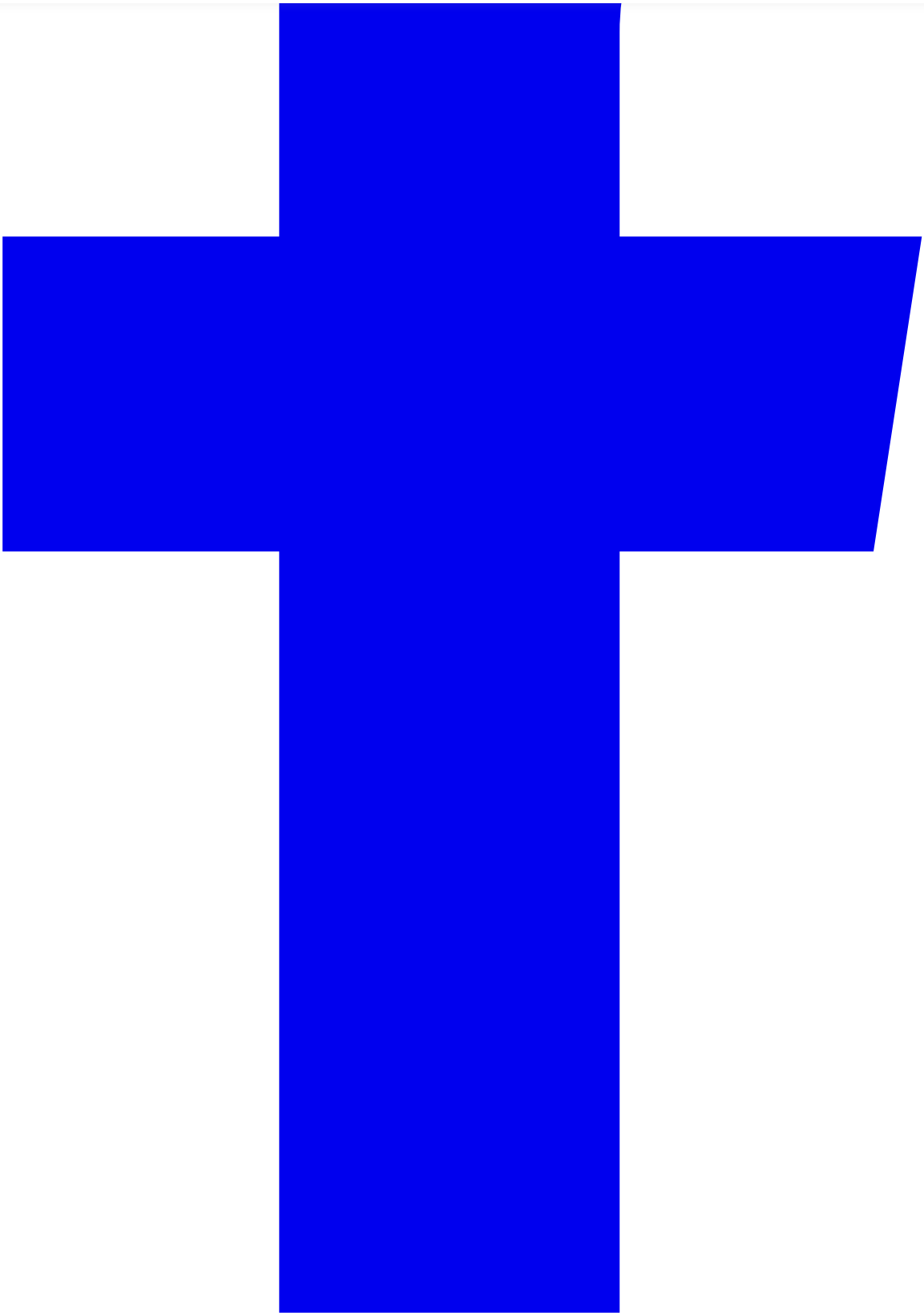

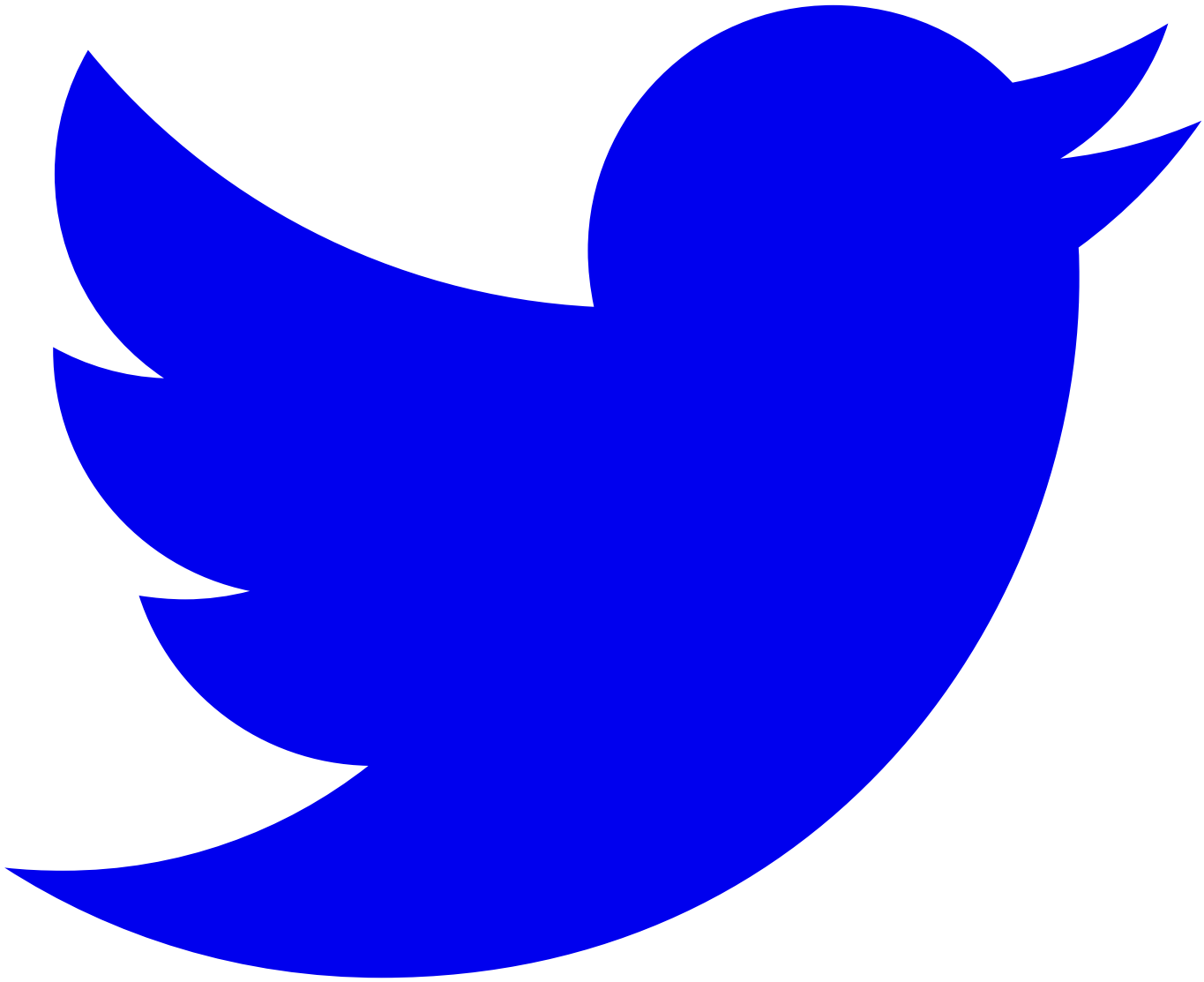

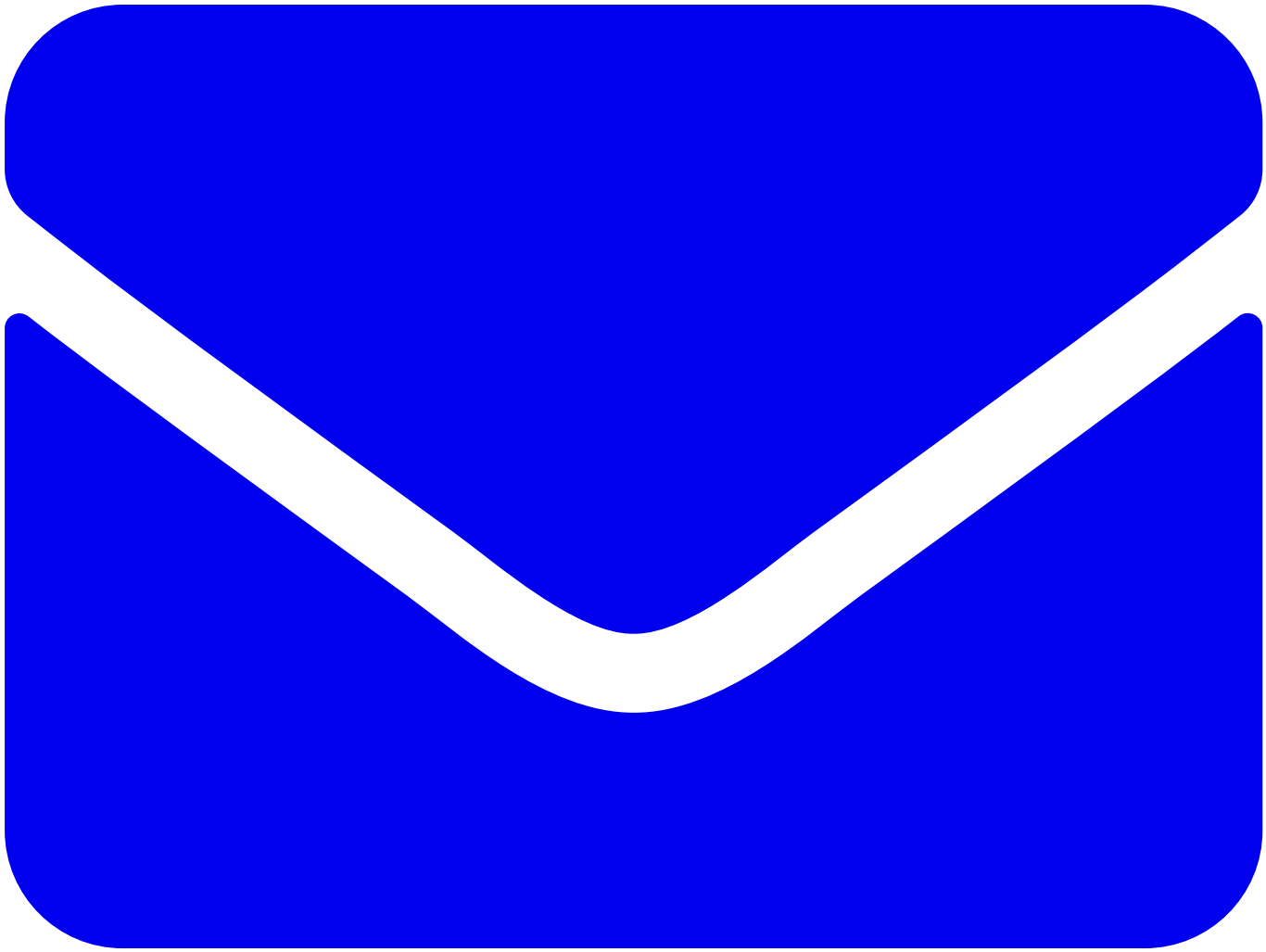

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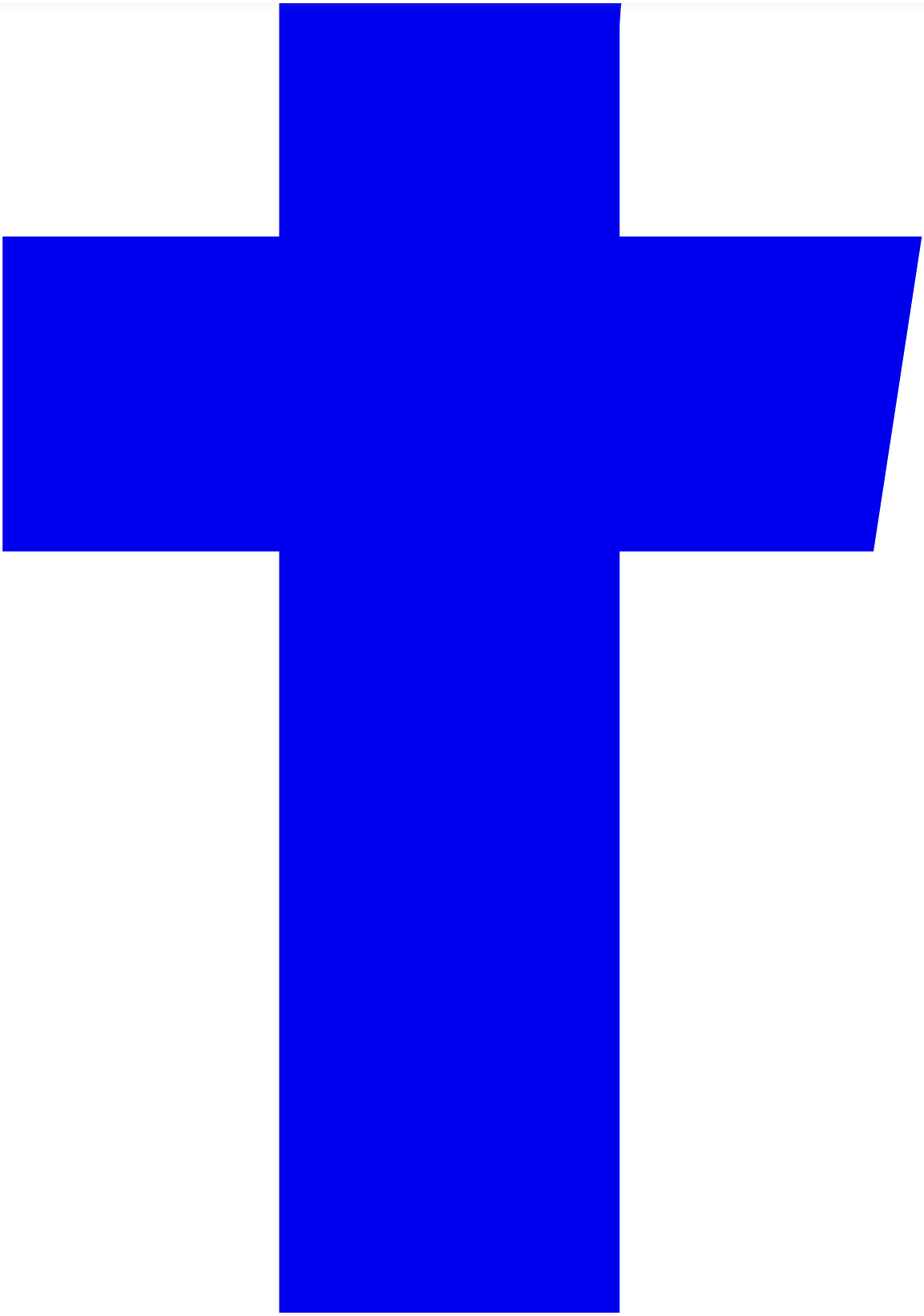

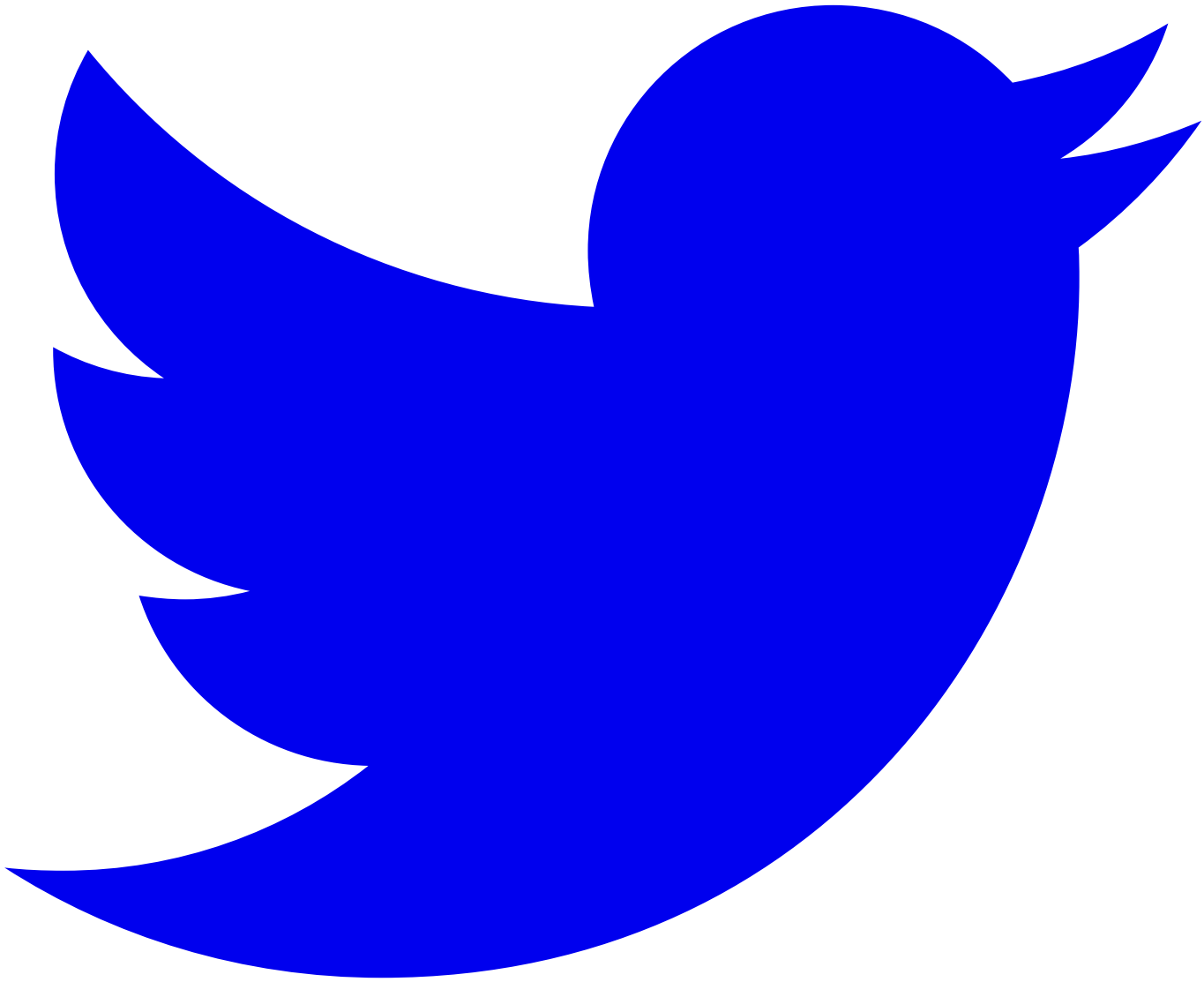

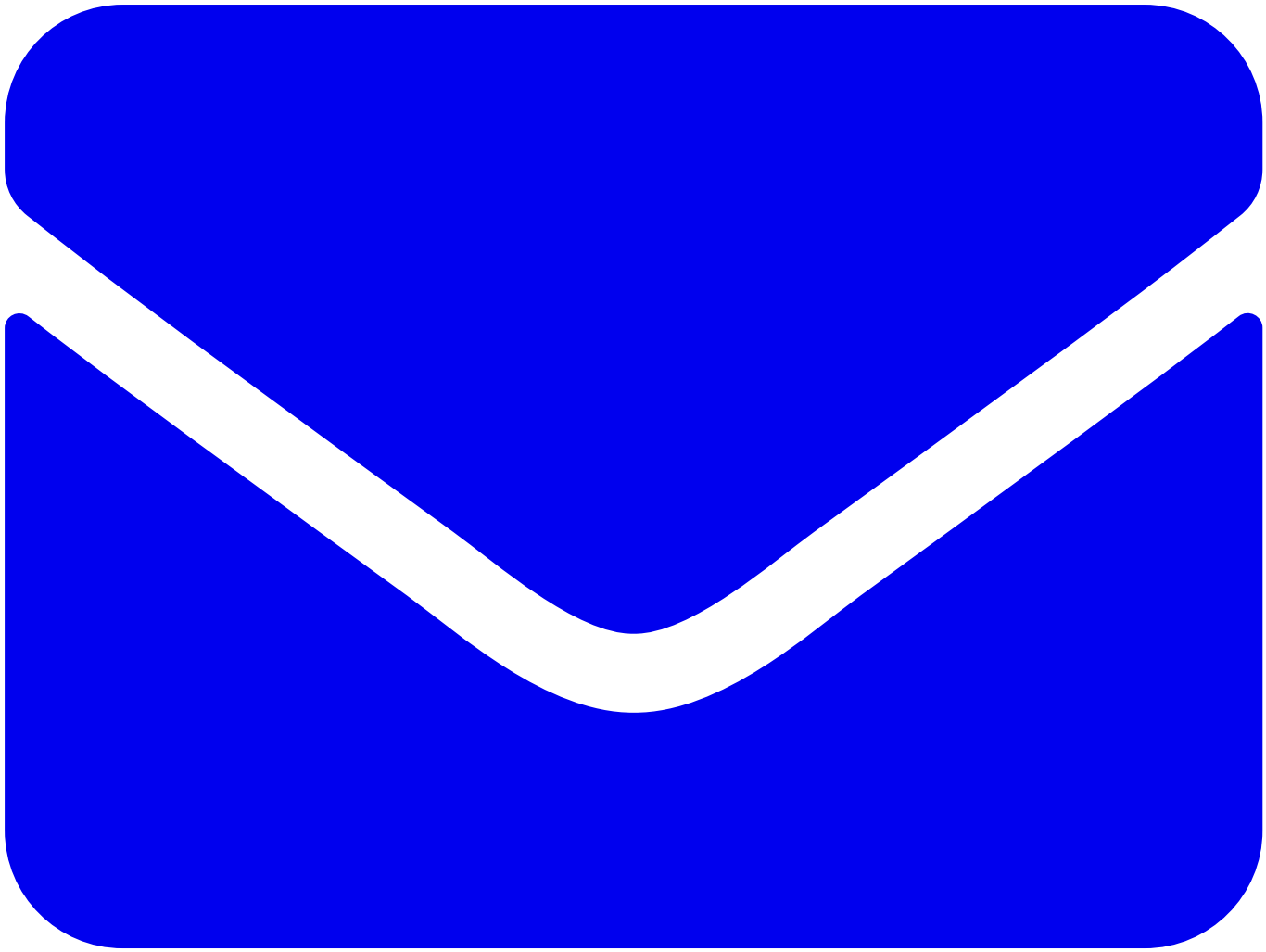

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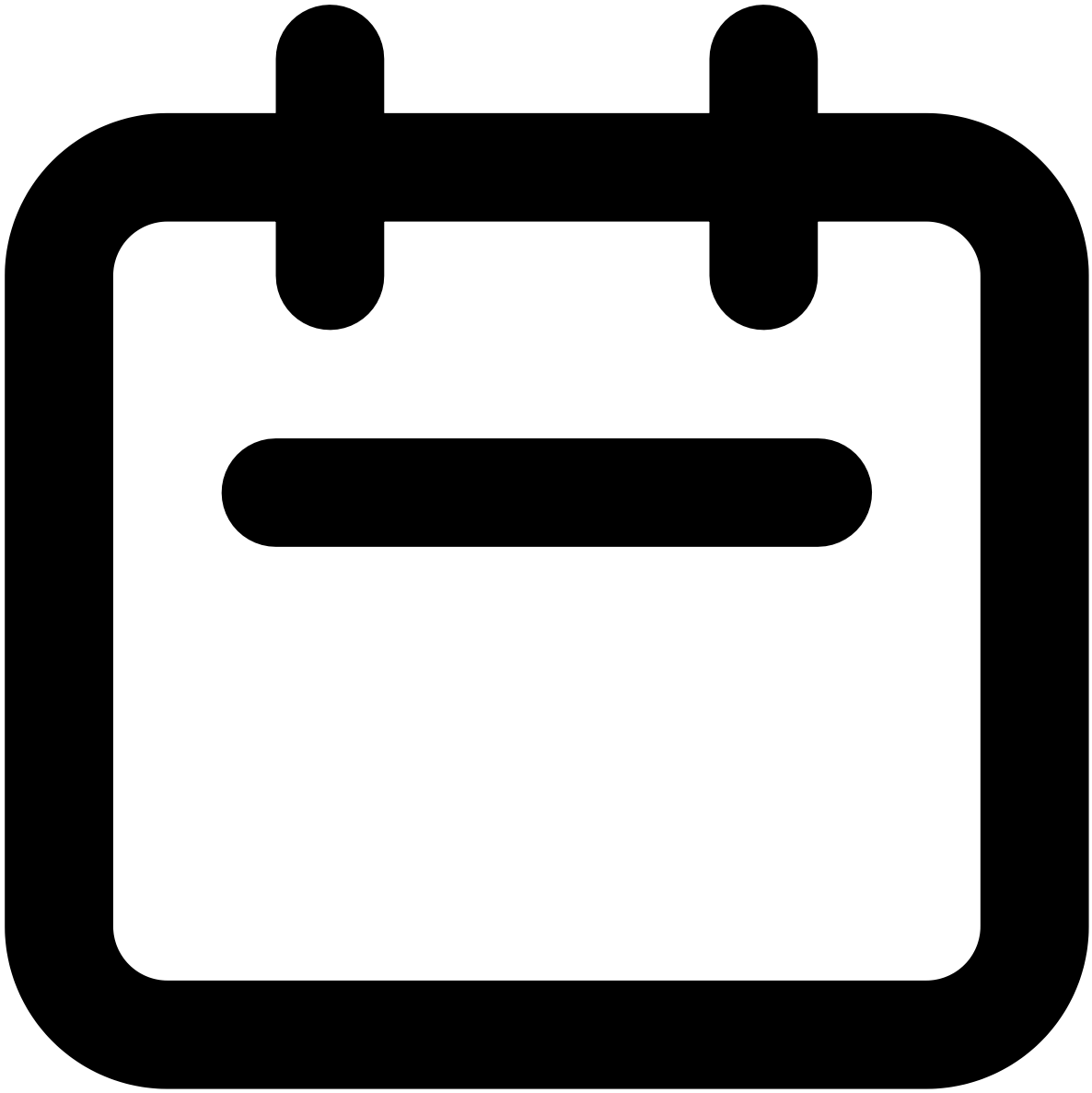

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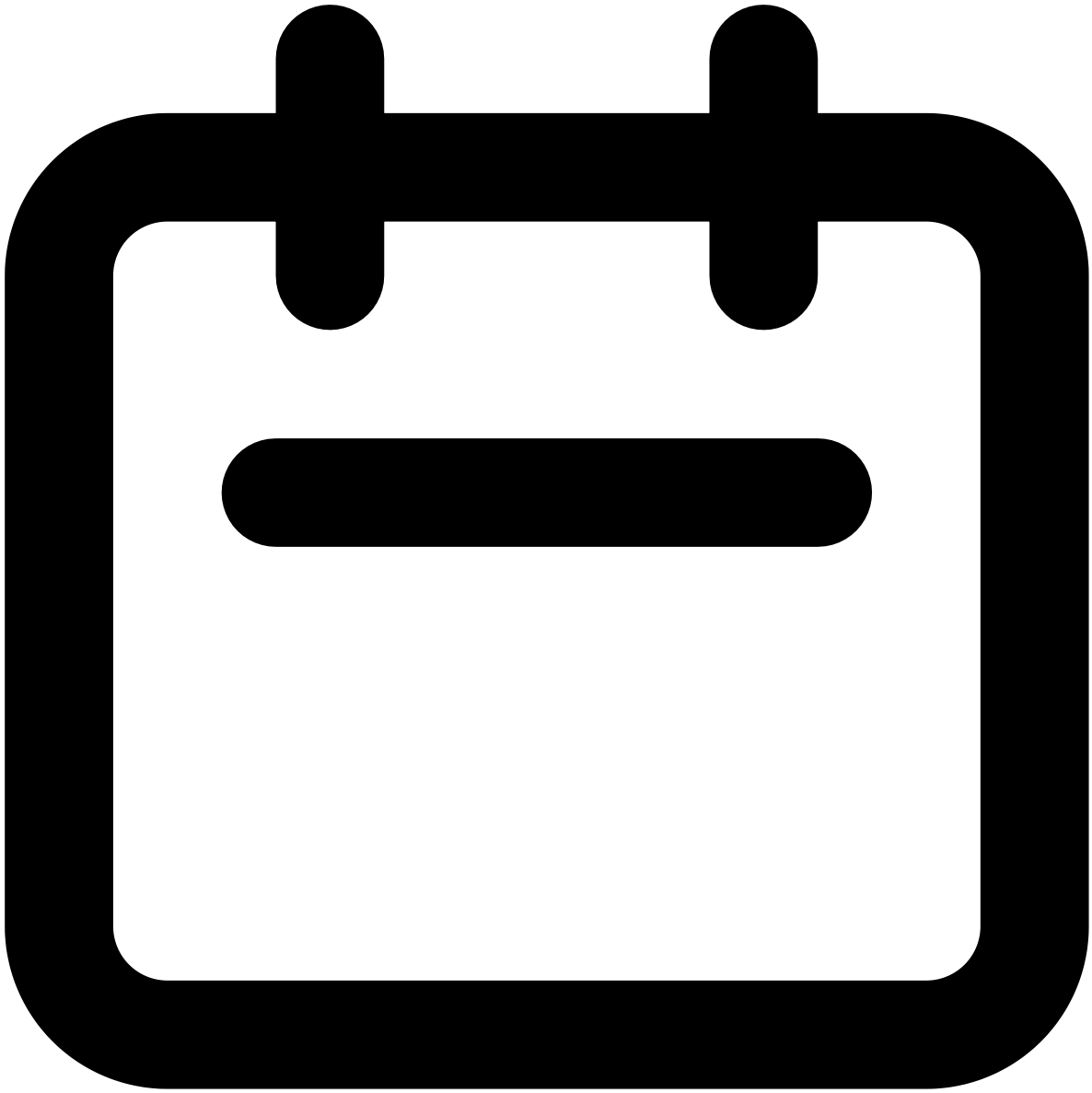

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-  *Andreas Moser* says:
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  One correction:
  In the first line under “What’s new?”, it should read Albania instead of Romania.

  But thank you very much for the excellent summary!

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