

SWITZERLAND
THE FATAL SHOOTING OF
MICHEL HERCOUËT
BY OFFICERS OF THE BASEL-STADT CANTONAL POLICE

Amnesty International (AI) has written to the relevant Swiss authorities to express concern at the fatal shooting of Michel Hercouët by two officers of the Basel-Stadt Cantonal Police on 23 August 2001 and at reports that police officers may have used their firearms against unarmed people in a situation where there was no clear danger to the officers' lives or the lives of others and thus in a manner violating the minimum standards of international human rights law.

The shooting occurred on French territory following a brief car chase which began on Swiss territory. It has been reported that Michel Hercouët, a holder of both French and Swiss citizenship, was unarmed and in the driving seat of a stolen car while his partner, Lætitia Gugenberger, also unarmed, and carrying their 11-week-old son in her arms, was in the front passenger seat when two Basel-Stadt police officers fired 18 bullets in their direction from a distance of several metres. Subsequent autopsy and forensic tests established that Michel Hercouët was hit by three bullets: one entering the back of his head and causing his death, one lodging itself in his left thigh and one grazing his head. All the bullets struck him either from the side or behind, with the fatal shot to his head apparently fired from a position behind and to the left of him.

Under the terms of a joint agreement on police and judicial cooperation, signed by the French and Swiss governments in May 1998, Swiss law enforcement officers apparently have the right to pursue suspected criminals across the border in connection with certain specified offences but have no right to stop and detain them: these duties are assigned to the French police. Swiss and French officers may use firearms in the neighbouring country only in cases of legitimate defence.

Under Article 122-5¹ of the French Penal Code it is legitimate to act to defend oneself or others against an unjustified attack if the action is both necessary for legitimate defence and simultaneous with attack, and as long as there is no disproportion between the means of defence used and the gravity of the attack. Article 122-7 makes further reference to the state of necessity and establishes three criteria which, if met, mean there is no penal responsibility: the existence of an actual or imminent danger threatening a person or property; the need to break the law in order to safeguard the person or property; the existence of proportion between the means used and the seriousness of the threat.

¹Art. 122-5 : « *N'est pas pénalement responsable la personne qui, devant une atteinte injustifiée envers elle-même ou autrui, accomplit, dans le même temps, un acte commandé par la nécessité de la légitime défense d'elle-même ou d'autrui, sauf s'il y a disproportion entre les moyens de défense employés et la gravité de l'atteinte.* »

According to the reports received by AI, the Basel-Stadt police officers have stated that, because of the darkness of the hour, they did not realize that they had crossed into French territory and that they got out of their vehicle, driven by a third officer, after Michel Hercouët lost control of his car and then reversed, hitting an obstacle. They have maintained that Michel Hercouët failed to obey an order to stop and drove his car at an officer standing in front of it and that it was at that point that they first fired. They have argued that they were acting in accordance with the law on legitimate defence because Michel Hercouët was about to run over the officer.

However, a different version of events has been given by Lætitia Gugenberger who has alleged that the officers opened fire while both vehicles were still in motion, that she saw no officers standing in front of the car and that they were not acting in legitimate defence.

According to an interview published in the French regional newspaper *L'Alsace* on 26 August 2001, Lætitia Gugenberger, said that on 23 August 2001 she and Michel Hercouët, together with their 11-week-old son, had travelled on foot from France across the border to Basel where Michel Hercouët intended to make inquiries about work. Having missed the last bus back to France, Michel Hercouët, who had a criminal record for car theft, decided to steal a car in order for the three of them to make the short journey across the border to his hometown of Blotzheim.

Experiencing problems with the steering mechanism of the stolen car, a VW Golf, he attempted to break into a second car but in the process of doing so was spotted by a passer-by who alerted the police. On realizing that they had been seen, Michel Hercouët, his partner and their baby quickly returned to the Golf and drove off in the direction of the border, pursued by a police vehicle with three officers of the Basel-Stadt police on board. Lætitia Gugenberger said that she was holding the baby in her arms. She also indicated that, as they approached the Saint-Louis - Bourgfelden border crossing, Michel Hercouët deviated off the main road so as to avoid being intercepted by border guards.

At around 11.30pm a car chase of about six minutes came to an end in Saint-Louis, some 100 metres into French territory, when Michel Hercouët lost control of the car, stalled, then started to reverse the car at the same time as the police car was reversing: he then advanced a few metres in the car. Lætitia Gugenberger claimed that by then shots were already being fired at them by the police and that when the car came to a halt the officers continued to fire. She then realized that Michel Hercouët had been hit in the head and the police approached the vehicle. Lætitia Gugenberger claimed there was some delay in the officers calling in the emergency medical services - an allegation which has been strongly denied by the police. When the emergency services subsequently arrived on the scene they reportedly found Michel Hercouët still breathing but already clinically dead.

Given the contradictory versions of events, AI welcomed the prompt opening of a criminal investigation into the full circumstances surrounding Michel Hercouët's death by the Public Prosecutor's office in Mulhouse, France, and the referral of the dossier to an investigating magistrate. It has been reported that on 25 August 2001, the investigating magistrate in Mulhouse placed two Basel-Stadt police officers under formal investigation in connection with a possible charge of "deliberate force causing unintentional death, committed by public officers in the performance of their duty"¹. AI understands that Michel Hercouët's parents and his partner have constituted themselves a civil party to the judicial proceedings.

¹ « *Violences volontaires ayant entraîné la mort sans intention de la donner, commises par des fonctionnaires de l'autorité publique dans l'exercice de leurs fonctions* ».

According to media reports, the French judicial authorities, as well as ordering autopsy and forensic examinations, seized the stolen car, the officers' vehicle, from which events were filmed by a camera attached to the roof, and the officers' automatic pistols. An official reconstruction of events took place on 14 September 2001, organized by the Mulhouse investigating magistrate and attended by investigators of the Saint-Louis police and the Mulhouse Judiciary Police, the Mulhouse Public Prosecutor and Deputy Public Prosecutor responsible for criminal matters, a ballistics' expert, the Basel-Stadt Cantonal police officers involved in the 23 August incidents, Michel Hercouët's parents and partner, as well as lawyers representing the various parties to the proceedings.

After appearing before the French investigating magistrate, the three officers were allowed to return to Switzerland where, on 25 August, the acting Basel-Stadt Police Commander directed them to take one week's leave. AI welcomed the news that on 27 August, on the orders of the head of the Basel-Stadt Canton's Police and Military Department, they were barred from patrol duty pending further notice.

AI is seeking the cooperation of the Basel-Stadt authorities in informing the organization of the eventual outcome of the French criminal investigation and of any further criminal proceedings arising from it, as well as in supplying information with regard to any eventual disciplinary measures they might undertake themselves.

AI is also seeking details regarding current legislation and regulations governing the use of firearms by the Basel-Stadt Cantonal Police and confirmation that they are in full conformity with the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials adopted by the Eighth UN Congress on the Prevention of Crime and the Treatment of Offenders on 7 September 1990. According to these principles, law enforcement officials shall only use firearms if other means remain ineffective or without any promise of achieving the intended result. Firearms may be used against people only after giving warning, in order to prevent death or serious injuries, where less extreme means are insufficient to achieve such objectives. In doing so, law enforcement officials must respect and preserve human life, and minimize damage and injury. The principles underscore that intentional lethal use of firearms may be made only when it is strictly unavoidable in order to protect life. Principles 4, 5, 9 and 10 state the following:

"Principle 4 - Law enforcement officials, in carrying out their duty, shall as far as possible apply non-violent means before resorting to the use of force and firearms. They may use force and firearms only if other means remain ineffective or without any promise of achieving the intended result."

"Principle 5 - Whenever the lawful use of force and firearms is unavoidable, law enforcement officials shall:

a) Exercise restraint in such use and act in proportion to the seriousness of the offence and the legitimate objective to be achieved;

b) Minimize damage and injury, and respect and preserve human life;

c) Ensure that assistance and medical aid are rendered to any injured or affected persons at the earliest possible moment;

d) Ensure that relatives or close friends of the injured or affected person are notified at the earliest possible moment."

"Principle 9 - Law enforcement officials shall not use firearms against persons except in self-defence or defence of others against the imminent threat of death or serious injury, to prevent the perpetration of a particularly serious crime involving grave threat to life, to arrest a person presenting such a danger and resisting their authority, or to prevent his or her escape, and only when less extreme means are insufficient to achieve these objectives. In any event, intentional lethal use of firearms may only be made when strictly unavoidable in order to protect life".

"Principle 10 - In the circumstances provided for under principle 9, law enforcement officials shall identify themselves as such and give a clear warning of their intent to use firearms, with sufficient time for the warning to be observed, unless to do so would unduly place the law enforcement officials at risk or would create a risk of death or serious harm to other persons, or would be clearly inappropriate or pointless in the circumstances of the incident."

AI has indicated that it would welcome confirmation that the above principles are already included in the training program for Basel-Stadt police, as well as information on any reviews of, or changes in training courses or operational procedures for Basel-Stadt police officers on the use of minimum force in approaching or arresting suspects and on the use of firearms which might be envisaged in the light of the incidents of 23 August 2001.

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