

**XIX**



**ARTICLE 19**

GLOBAL CAMPAIGN FOR FREE EXPRESSION

A photograph of several old, worn, brown leather-bound books on a wooden shelf. The spines are visible, with some text like 'SERMONS VOL. 1' and 'SESSION VOL. 2' partially legible. The lighting is warm, highlighting the texture of the leather and the gold-tooled details on the spines.

# Civil Defamation: Undermining Free Expression

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# Introduction

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## ARTICLE 19

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Defamation law protects an individual's reputation or feelings from unwarranted attacks. There is little dispute that defamation laws can serve a legitimate purpose and it is recognised internationally as a valid grounds for restricting freedom of expression. A good defamation law - one which lays the groundwork for striking a proper balance between the protection of individuals' reputation and freedom of expression - aims to protect people against false statements of fact which cause damage to their reputation. Nearly all countries have some form of protection, although it can have different names such as libel, calumny, slander, insult, desacato, lese majeste and so on.

The form and content of defamation laws differ widely. Some countries have specific defamation statutes and others have articles in more general laws. The extensive reach of the press, and now the internet, has resulted in the creation of separate laws and differing severity between spoken defamation (slander) and written defamation (libel), the latter of which usually includes radio and television too. Defamation should be limited to the protection of reputation, as it may be quantified in terms of financial damages. But in a number of countries across the world, defamation laws are also used to for the ill-defined and stifling protection of 'feelings', which are subjective and place a plaintiff in a position where they need only persuade a court that they feel offended. In some countries the ambiguous term 'honour' is used instead of, or in addition to, reputation and insult laws, and may refer to both feelings and reputation.

Broadly speaking defamation can be classified as either a civil tort or a criminal offence. Criminal defamation laws are inherently harsh and have a disproportionate chilling effect on free expression. Individuals face

the constant threat of being arrested, held in pre-trial detention, subjected to expensive criminal trials, and then saddled with a criminal record, fines and imprisonment, and the social stigma associated with this. It is common in many countries for individuals critical of the government, public bodies or big business to be charged with multiple defamation cases, or given suspended prison sentences so that they walk free but are silenced since any further conviction will lead to immediate imprisonment. Both the UN and the OSCE have recognised the damage done to free expression and are actively advocating decriminalisation of defamation.

Civil defamation laws do not involve the state's criminal justice machinery and therefore have the potential to exert less of a chilling effect on free expression. This is only true however if they are formulated in a way that prevents abuse, allows proper defences, and sets reasonable limits on compensation. As with criminal defamation patterns, motivations for claims of civil defamation often have political and economic undertones. Governments sue their opposition for political incentives, public bodies attempt to bankrupt journalists and newspapers for their investigation of corruption, and businesses sue the media and competitors to protect powerful interests. In many countries public bodies and officials are given greater protection against defamation and habitually sue journalists and activists reporting on corruption and matters of inefficiency. Some democracies however have recognised that officials, politicians and public bodies should have to tolerate more criticism in the interests of a growing public demand for transparency and accountability. In the United States, *"no court of last resort ... has ever held, or even suggested, that prosecutions for libel on government have any place in the American system of jurisprudence."*<sup>1</sup>

The Indian Supreme Court concurs that *"the Government, local authority and other organs and institutions exercising power"*<sup>2</sup> are not entitled to sue for defamation. In the interests of a responsive, efficient and functioning state it is vital therefore that defamation laws are defined as precisely and as proportionately as possible in order to stem abuse.

Without the protection of adequate and fair defences, the defendant has often lost before the case even starts. If a statement is true a defendant should never be found liable for defamation. Nobody should be held liable for repeating the words of others or for sharing an opinion, which should not be confused with a statement of fact, as there is nothing that can be proven inherently false or defamatory. There should also be a defence applicable to a statement proven false if it was a matter of public concern and due diligence was carried out in checking the content. Finally there are also certain forums such as parliament in which the ability to speak freely (providing other laws are not broken) is so vital that statements made there should never lead to liability for defamation.

The cost of fighting a defamation claim and the possibility of the court awarding vast and disproportionate damages may force a defendant to settle at the start of the claim, regardless of its genuineness, rather than face bankruptcy. In order to protect free, vibrant and warranted debate and comment it is necessary to create proportionate remedies and sanctions and limit the possible compensation for defamation. In many cases the most proportionate sanction is simply an apology, reply or correction, printed or otherwise. If financial compensation or a full court case is necessary, then costs and awards should have a ceiling to prevent abuse.

<sup>1</sup> *New York Times v. Sullivan* (1964) quoting *City of Chicago v. Tribune Co.* (1923) <sup>2</sup> *Rajagopal v. State of Tamil Nadu*, 6 S.C.C. 632 (1994).

# Key findings and case studies

For the period 2007-2008

## 1. Damages are disproportionate

### Indonesia

Time magazine was ordered to pay Indonesia's former president Suharto 1 trillion Indonesian Rupiahs (US\$106 million) in damages for defamation. Time published a cover story alleging that Suharto had amassed a fortune of US\$15 billion during his tenure, including US\$9 billion which was placed in an Austrian bank account.

## 2. Cases are politically motivated

### South Korea

The South Korean Presidential Office filed a libel suit against the opposition party's presidential candidate, Lee Myung-bak, just three months before the general election. The opposition leader was sued for trying to tarnish the government's reputation after he made claims that the government was trying to politicise the national security and tax branches of the civil service. Lee is now the president of South Korea.

### Russia

The Kommersant daily newspaper was ordered by a Russian judge to pay US\$34,274 to Andrei Lugovoy for offending his honour and business reputation. The newspaper had reported the UK's attempts at extraditing Lugovoy for the murder of Alexander Litvinenko who was poisoned with radioactive polonium in London.

### Singapore

Civil defamation is exploited to bankrupt opposition politicians such as Chee Soon Juan, who are consequently banned from running for office in Singapore. Prime minister Lee Hsien Loong even sued the Far Eastern Economic Review for defamation after it called the opposition leader a 'martyr' for facing so many defamation suits brought by the governing party.

## 3. Defamation is used to impede investigation of corruption

### Philippines

President Gloria Macapagal-Arroyo's husband Jose Arroyo announced that he would drop 17 defamation suits against 46 journalists after surviving open-heart surgery, stating that he wanted to "stay in touch with God for giving him a new lease on life". Arroyo had filed multiple defamation cases totalling US\$3.2 million over reports linking him to corruption, smuggling and other scandals. During one courtroom appearance, Arroyo allegedly challenged one lawyer to a fistfight.

## 4. Defendants are bankrupted and consequently publishers self-censor or apologise automatically when faced with a claim

### Spain

The Popular Party's general secretary Carlos Sáiz sued Spanish newspaper La Realidad for defamation. After La Realidad filed for bankruptcy, a judge

ordered the former editor to pay 12 per cent of his disability pension to Sáiz. Unable to pay the damages and suffering from Parkinson's disease, the former editor could no longer afford legal representation. After his lawyer stopped turning up to court, the judge froze the former editor's bank account.

### *Morocco*

The publisher of the weekly magazine *Le Journal Hebdomadaire* resigned in order to stop defamation damages from bankrupting his publication. Publisher Jamaï and former reporter Fahd al-Iraqi were ordered to pay US\$354,000 in damages to Claude Moniquet, head of the Brussels-based European Strategic Intelligence and Security Center.

## ***5. Defamation defence is often skewed in favour of the rich and powerful***

### *USA*

Two employees of the Kane County Chronicle newspaper counter-sued the entire Illinois Supreme Court for violating their constitutional rights. The Illinois Chief Justice had been awarded a huge US\$7 million after winning a defamation case. The two Chronicle staff claimed that the case was unfair as the Chief justice himself headed the hearing, and the witnesses called were his fellow Supreme Court colleagues.

## ***6. Defamation claims for content on the internet are growing***

### *United Kingdom*

Parenting website mumsnet.com paid defamation costs to celebrity parenting advisor Gina Ford for comments that appeared on the website's forum. Ford sued after members of the public posted sarcastic comments on the forum accusing her of "strapping babies to rockets and firing them into South Lebanon".

### *India*

Businesses in India are becoming increasingly more aware of staff venting their frustrations on the internet. The Hindu newspaper has found that companies are increasingly resorting to legal action and claiming defamation damages from their employees. Managers have now been tasked with discovering who is talking.

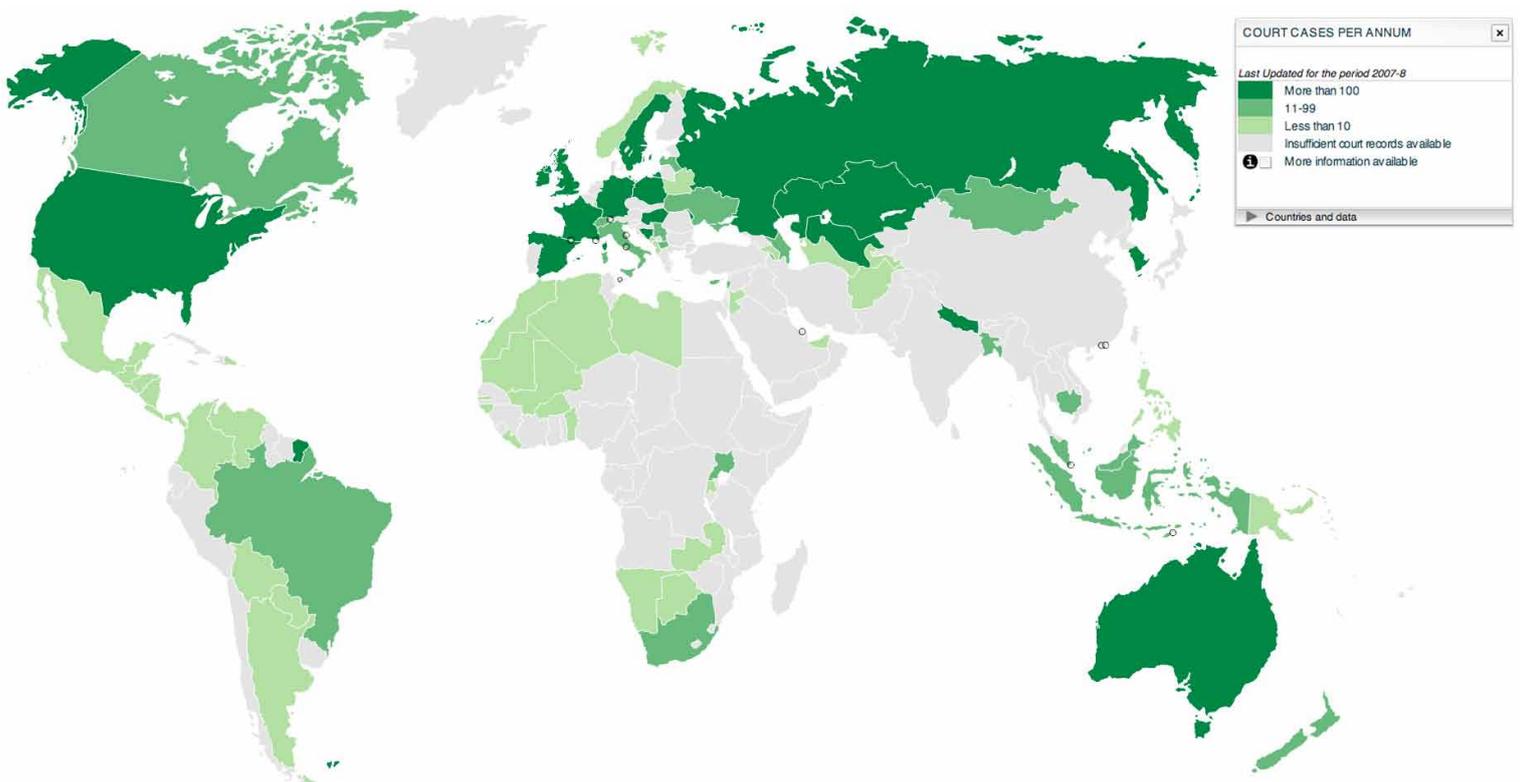
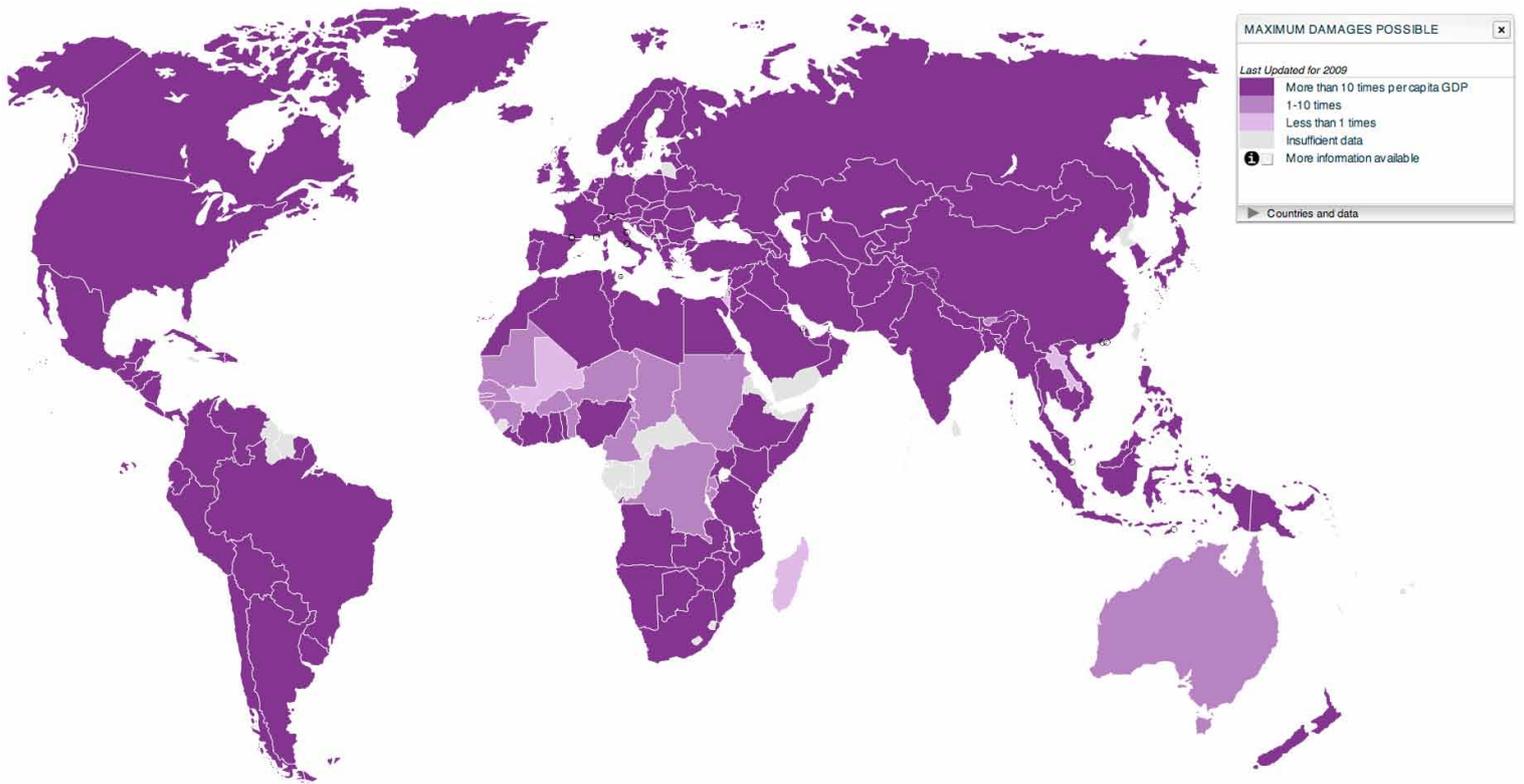
## ***7. Plaintiffs sue in jurisdictions that are more plaintiff-friendly, even if the link to the jurisdiction is tenuous at most (commonly known as libel-tourism)***

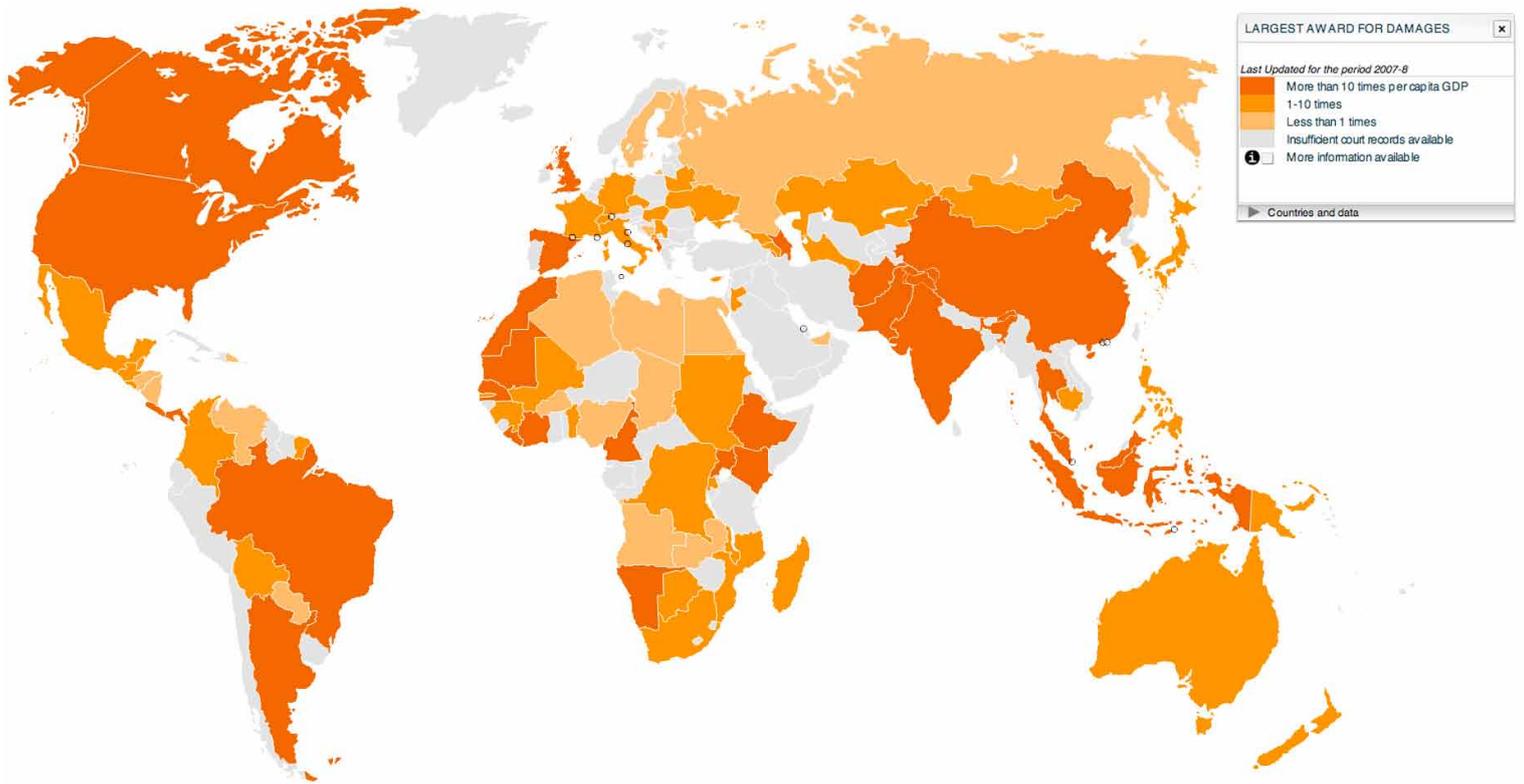
### *United Kingdom*

American actress Cameron Diaz won substantial damages for defamation in London's High Court. Diaz had sued American Media Incorporated for a story in the *National Enquirer* that alleged that she was having an affair. As the story never appeared in the UK edition of the newspaper, Mr Justice Eady awarded the damages on the basis that the story was briefly published on an American website which was potentially accessed by visitors from the UK.

# Civil defamation maps

Possible damages, court cases, largest awards





Number of countries surveyed	176
Average per capita GDP in countries surveyed	US\$ 12,713
Average population size in countries surveyed	38,723,000
Average number of cases in each country per annum	160
Highest damages awarded (average)	US\$ 471,221
Highest number of cases	Germany, Poland, Sweden, USA
Highest number of cases comparative to population	Sweden, Moldova, Cyprus
Lowest number of cases comparative to population	Algeria, Colombia, Philippines, Mexico
Largest damages awarded	Canada, Pakistan, Panama, USA
Largest damages awarded comparative to per capita GDP	India, Pakistan
Smallest damages awarded comparative to per capita GDP	Burkina Faso, Angola, Hungary, Finland, Zambia, Nigeria, Sweden

# Regional analysis

For the period 2007-2008

## Africa

*Countries surveyed: 46*

*Average per capita GDP: US\$3,030*

*Average number of cases: 6*

*Highest number of cases: South Africa*

*Largest damages (average): US\$167,000*

*Largest damages: Mauritania*

As illustrated in ARTICLE 19's criminal defamation map, African countries are amongst the most prolific in using criminal legislation to fine and imprison journalists.

Because of this, most African countries have comparatively reasonable civil defamation jurisprudence in contrast to other regions. Half the African countries surveyed have fixed legal limits on the amount of damages that can be awarded and the number of cases is small. The average number of civil defamation cases in each country is six per annum, and the average across the region for the highest damages awarded during the research period is a middling US\$167,000, or 55 times the average per capita GDP.

Of the countries surveyed, Angola, Burkino Faso, Gambia, Mali, Nigeria and Zambia have the smallest number of civil defamation cases and the smallest damages awarded. The worst countries in the region by far are Mauritania, Cote d'Ivoire and Namibia. Courts in all three countries awarded damages over US\$1 million during the period. The awards were particularly horrendous in Mauritania and Cote d'Ivoire which awarded damages in excess of 730 and 580 times the per capita GDP respectively.

## Americas

*Countries surveyed: 28*

*Average per capita GDP: US\$10,946*

*Average number of cases: 47*

*Highest number of cases: USA*

*Largest damages (average): US\$734,000*

*Largest damages: USA*

Many countries in the Americas do not have standalone civil defamation legislation. Instead damages are awarded as part of a criminal process whereby the courts will decide fines, imprisonment and damages as one. In those countries surveyed the maximum damages were therefore unlimited by statute. They had high limits for awards, a comparatively middling average of 47 civil defamation cases per country per year, and an average of US\$734,000 for each country's largest award, or 67 times the average per capita GDP.

The highest award and the highest number of civil defamation cases out of the countries surveyed were in the USA with a maximum award of US\$7 million during the period of research. The largest award in comparison to per capita GDP was in Panama, with awards of US\$2 million that reached over 185 times the per capita GDP. On the other end of the scale Paraguay, Dominican Republic and Venezuela had maximum damages awarded that were less than per capita GDP.

## Asia and Australasia

*Countries surveyed: 30*

*Average per capita GDP: US\$12,653*

*Average number of cases: 41*

*Highest number of cases: South Korea*

*Largest damages (average): US\$1,312,000*

*Largest damages: Pakistan*

During the period researched Asia was the most variable in terms of legislation and jurisprudence. Many countries retain laws left behind by colonial powers which have no fixed limitations on civil defamation. In larger countries the number of cases is very high, but less prolific in comparison with population size than in Africa and Latin America.

The most noticeable countries in the region in terms of the number and size of civil defamation cases were India and Pakistan.

During the period of research a large Indian automotive company sued a competitor for US\$52 million over remarks that technology was copied. The case is still in court. In Pakistan a government amendment to the Anti-National Activities Act resulted in the possibility of libel being tried in a military court without representation. In comparison to India and Pakistan, the largest damages awarded during the period in Australia, Japan and South Korea were fairly small at around US\$80,000. Afghanistan is one of the only countries in the world not to have civil defamation legislation in place.

## Europe and Central Asia

*Countries surveyed: 53*  
*Average per capita GDP: US\$21,434*  
*Average number of cases: 700*  
*Highest no of cases: Sweden / Germany*  
*Largest damages (average): US\$80,980*  
*Largest damages: Spain*

European courts process far more civil defamation cases than any other region, an average in each country of 700 cases per annum. The maximum damages awarded in each country during the period averaged US\$81,000. None of the countries surveyed had a statutory cap on possible damages, with the exception of Greece's limit of US\$438,000.

Moldova was the worst country in Europe for civil defamation with a high number of court cases compared to the size of the population and damages awarded to the tune of 80 times the per capita GDP. Apart from Moldova, the largest comparative awards for damages were in Spain, Ireland and Italy. The smallest were in Sweden, Finland, Serbia, Montenegro, Bosnia and Herzegovina, and Hungary. The highest number of civil defamation cases during the period were in Sweden, Russia, Germany and Poland, and countries with fewer than 10 cases included Luxemburg, Tajikistan, Albania, Belarus, Montenegro, Norway, Armenia, South Ossetia and Turkmenistan.

Libel tourism is also becoming big business in Europe. Plaintiffs are increasingly exploiting European courts to sue for defamation. Celebrities such as Cameron Diaz, David Hasselhoff, Kate Winslet have all won substantial damages from the US media in the UK High Court. During the research period Jennifer Lopez attempted to sue US newspaper The National Enquirer in multiple European courts for the same story.

## Middle East and North Africa

*Countries surveyed: 19*  
*Average per capita GDP: US\$18,616*  
*Average number of cases: 5*  
*Highest no of cases: Lebanon*  
*Largest damages (average): US\$60,880*  
*Largest damages: Morocco*

Out of the countries surveyed in the Middle East and North Africa none have standalone civil defamation legislation. Instead defamation is punished under a range of legislation. Some countries in the region have additional defamation legislation relating to speech and writings regarding sexual chastity too. Because of the multiple routes to sue for damages around defamation, there is no statutory limit on applications for damages in any of the countries surveyed. The region has the lowest average number of cases relating to civil defamation, and the largest damages awarded are the lowest comparatively US\$61,000 on average.

Bahrain and Lebanon have the highest number of civil defamation cases out of all the countries surveyed. Cases in Bahrain are particularly high comparative to the small size of the population. Moroccan courts awarded the largest damages during the period, with its highest compensation of US\$354,000 or almost 100 times the per capita GDP. The lowest damages awarded were in Egypt, Libya and Algeria.

## *Methodology*

The ARTICLE 19 Civil Defamation Maps chart the extent to which free expression is undermined by civil defamation proceedings in countries around the world. The Maps have been commissioned to complement ARTICLE 19's Criminal Defamation Maps.

To compile the Maps, three questions were asked that would assess the extent to which civil defamation is used in each country. The questions are: what are the maximum damages provided for under civil defamation law; how many civil defamation cases are there per year; and what was the maximum award in the year.

ARTICLE 19 collated the data from a range of sources, including primary research, partner organisations, and an international network of approximately 800 lawyers, journalists, activists and academics. This data was then compared to local variables and each country was assigned a category of comparatively high, medium, or low on the Maps.

The Maps' categorisation reflects the civil defamation situation during a specific period. The first map, which shows the maximum damages allowable under each country's domestic legislation is updated to 2009. The other two maps showing number of cases and largest damages awarded are annual figures based on the last fully reported year of 2007.

The extent of civil defamation and its use in a country, particularly against the media, should not be understood as an indicator for the quality of the media. In many countries, the use of civil defamation is abusive and an unjustified restriction to freedom of expression.

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The ARTICLE 19 Civil Defamation Maps chart the extent to which free expression is undermined by civil defamation proceedings in countries around the world.

The maps complement ARTICLE 19's Criminal Defamation Maps in reflecting how the protection of reputation is often disproportionately exploited to restrict freedom of expression.