

Implementation of International Humanitarian Law in Nepal

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ABSTRACT

This study critically examines Nepal's adherence to International Humanitarian Law (IHL) by tracing its historical evolution, assessing current enforcement mechanisms, and identifying gaps. The global imperative for accountability post-World War II needs rigorous compliance with IHL conventions. This study's objective is to evaluate Nepal's legislative and practical adherence to these conventions. The central problem identified is Nepal's absence of specific laws to repress IHL violations, despite positive judicial attitudes and training initiatives for military personnel. Methodologically, the study employs a comprehensive review of legal texts, judicial decisions, and policy documents, supplemented by interviews with legal experts and practitioners. The findings reveal a significant compliance failure, highlighting the urgent need for robust national legislation to combat impunity, ensure victim reparations, and prosecute offenders both domestically and internationally if necessary. The conclusion underscores that effective IHL implementation is crucial for upholding international legal standards and ensuring justice for victims of war crimes.

Key words: international-humanitarian-law, human-rights, civilize-crime, war-killing, conventions, treaties.

General Background

The entire history of human civilization has concerned across and unimaginable killings, wars and atrocities. Those devastating wars and upheavals in the history caused lasting adverse effect to the human being. However, a very little account of the convention of the perpetrators of such atrocities can be found for quite a long time in the history of the world, the act of mass killings extermination of certain races, enslavement, sexual slavery, etc. remained unchecked. Laws of war are of international humanitarian law had remained one of the important fields of law of war. Abraham Lincoln to the union army during American Civil War, prescribes inhuman conduct and setout sanction, including the death Penalty for pillage raping civilian abuse of prisoners those devastating wars and upheavals in history caused lasting adverse effects to the human beings. Howe and similar atrocities (Willim, 2001). It is apparent that the concept of international prosecution for the humanitarian abuse slowly beginning to emerge with the development of the law of armed conflict in the mid-19th century (Willim, 2001). In general, the atrocities perpetrated during war were almost unchecked for quite a long time.

As International Humanitarian law (IHL) is also called the law of armed conflict and previously known as the law of war is a special branch of law governing situation of armed conflict. It seeks to mitigate the effect of war first in that it limits the choice of means and method of conducting military operations and secondly in that it obliges

the belligerents to spare persons who do not or no longer participate in hostile action (Grasser, 1993).

Every law creates rights and duties to the individuals. IHL creates duties and obligations on the warning functions. The subjects of the particular law are bound to abide by the law. Mode for them failure of which leads them to the sanctions obviously, IHL is to be implemented. IHL is not only moral binding rather it is a branch of law and it is legally binding.

A crime against international law is an act committed with intent to violate a fundamental interest protected by international law or with knowledge that it will probably violate such interest and which may not be adequately punished by the exercise of the normal Jurisdiction of any state. The primary objective of criminal law is to preserve and maintain public order (Kapoor, 1998). A crime is an act deemed by law to be harmful to societies in general, even though its immediate victim is an individual. Whether it is individual criminal responsibility under municipal law or international law. The purpose and the responsibility put on the individual is to maintain law and order as well as peace in society. If the Perpetrators of the crime against humanity, war crimes including torture, and inhuman or degrading treatment perpetrated during the armed conflict are not tried and convicted. i.e. if the panel provisions of international humanitarian law are not properly given effect, there always remains a threat to humanity and international security. Consequently, the determination of the people of the United Nations to Dave to succeeding generations from the scourge of war, which twice in their lifetime has bought untold sorrow to mankind (UNO, 1945).

It proves to be merely a dream, not a determination. If atrocities are perpetrated during a time of conflict- whether of an international or non-international nature, justice shall never prevail. Given that the perpetrators of such violations are not brought to justice only what prevails is impunity plus justice. Proper implementation of IHL is necessary to bring to justice the warlords and to let the victims have perpetual trust in the justice system and their society.

Charter of the United Nations organization, Preamble

Rights are always to be justifiable i.e., there needs to be some provision providing for the remedy in case the rights are violated IHL is the question the paper revolves around. The Present study of the National Implementation of IHL' tries to focus on the available action to be taken against those who violate IHL and the available remedies for those who suffer due to armed conflict.

Statement of the problems

The present study stands on the following problem. The study, at the end, tries to find an answer to the statement of the problem.

1. Hans Peter Grasser, International Humanitarian Law, An International Herry, Dunant Institution Haupt, 1993, P. 3
2. Dr. SK Kapoor, (12th ed.) International Law Central Law Agency, India 1998, P. 360
3. Charter of the United Nations Organization, Preamble

- What are the measures that have already been applied and that are being applied for the implementation of IHL, especially in post-conflict societies?
- What are the available means of implementation of IHL in Nepal including legal and institutional?
- What are the mechanisms that have been employed in Nepal for the implementation of IHL in the post-conflict transition?
- Has Nepal complied with its international treaty Obligation in terms of the implementation of IHL?

Objective of the study

This study primarily focuses on the Implementation of penal and compensation provisions of IHL keeps the following objectives:

- To study about the IHL with a primary focus on its implementation
- To find out legal as well as institutional measures available in Nepal for the implementation of IHL.
- To find out and make a study on the measure being applied in Nepal's post-conflict transition so as to comply with IHL provision and to meet the interest of justice.
- To analyze how far Nepal complied with its treaty obligation in terms of implementation of IHL.

Limitation of the study

The study is strictly confined with the implementation of IHL, especially to how those who violate IHL are made accountable and how those who suffer due to the breach of IHL get remedies. Although the study makes a survey of different legal instruments, it is confined to provisions concerned to the subject matter.

Methodology of the study.

The study is purely on a doctrinal method of the research. The data have been collected from both primary and secondary sources, so far as the primary sources of data are concerned, they are the charters, conventions, protocols, treaties and statutes of the international documents. And the secondary data were collected from various books, journals, experts' writings and official website

Review of Literature

Pursuing the study demanded the review of different literature. The researcher has reviewed various literatures. The following are the various documents extensively reviewed in the course of the study. The literature was found helpful for pursuing the study to meet the objectives of the study set:

- a) Kapoor S.K. (1998) International Law (12th ed.) central law agency Allahabad, this work of S.K. Kapoor presents in briefly criminal law and the establishment of the International Criminal Court. It further deals with the criminal prosecution of the Vietnam War. This piece of work helped to make this study because international criminal law emerges from international humanitarian law. Whenever the IHL is violated, there are crimes prosecuted under international criminal counts.

- b) Schabas, William A. (2001) *An Introduction to International Criminal Court*, Cambridge University Press. This very work of Schabas presents how criminal prosecution began under international law. It further deals with the crimes that can be prosecuted before the International Criminal Court, the jurisdiction of the ICC complementary jurisdiction between national and international courts. It further describes the basic principles of International Criminal court law and prosecution. The researcher of this report found it useful because ICC itself is introduced for prosecuting gave violation of human right i.e. obviously the result of the breach of IHL
- c) Dr. Ananda Mohan Bhattarai, *The treaty of Rome and the issue of ratification by Nepal*. This is a paper presented for the discussion in a program held by INSEC in 2002. It presents some basic facts about ICC and further highlights the relevance to the ratification. This was helpful for the study in the sense that it dealt with Nepal and ICC.

Development in law: International Criminal law Harvard law review vol.144 No 7 p.1943. This editorial note highlights how the development of International criminal law occurred and how persons are responsible for the international crimes.

Rajeev Kumar Jha, *historical Evolution, organization structure and operation of the International Criminal Court*, Nepal Law Review vol.18 number 1 and 2 at 299 (2005) This very article is worth considering because of the International criminal court.

Hans Peter Grasser, *International Humanitarian law, AN Introduction* Henry Dunant Institute, Haupt 1993. This book talks about international humanitarian law. It focuses on the basics on the IHL.

Common Issues of IHL and implementation of international law. It also discusses on the criminal proceedings for the violations of IHL both before the national and international courts.

Manoj Kumar Sinha. *Hinduism and International Humanitarian Law*. International Review of Red Cross. 2005. vol. 87, No 8 58. This article has discussed on the relation between Hinduism and IHL. It traces the origin of IHL to the Hindu scriptures. It has explained what sort of rules of combat have been prescribed in memory treaties of Hinduism.

Nepal law reporter (Nepal kanoon Patrika Vol. 2,2007, Issue No 2 Decision 7817 (Rabindra Prasad Dhakal on behalf of an advocate Rajendra Prasad Dhakal vs. Government. of Nepal, Ministry of Home Affairs and others). This particular judgment of the Supreme Court is of importance for this research because disappearance is a form of crime against humanity as defined by the convention on in forced disappearance and the Rome statute of International Criminal Court. The judgment was made in relation to the incidences of disappearances allegedly perpetrated during the armed conflict in Nepal.

As the International Committee of Red Cross (ICRC) is one of the Prominent International organizations working for the cause of humanity and which is given a role even by the IHL convention namely the Geneva Convention and the protocols thereto, its role in the development of IHL as well as for the development of this particular

branch of law is outstanding. The International Review of the Red Cross gives spaces to various scholarly research articles on IHL. Implementation of IHL forms a part of the publication. The researcher has reviewed various issues that are prevalent in the national implementation of IHL

Implementation of IHL

There are some major provisions of the Implementation part of IHL in Nepal.

Legal measures

Legal measures are below:

Interim Constitution, 2007

The Interim Constitution of Nepal the first time made National Human Rights Commission a constitutional organ. Previously it used to be governed by an act. Part 15 of the Interim Constitution provides. There shall be a National Human Rights Commission in Nepal (MOLJPA, 2007). The commission is to ensure the respect, protection, and promotion of human rights and its effective implementation (MOLJPA, 2007).

The Constitution of Nepal, 2072

The Constitution of Nepal, 2072 has also the provision of National Human Rights Commission. Part of 25 of The Constitution of Nepal 2072 Article 248 (1) provides” There shall be a National Human Rights Commission in Nepal (MOLJPA, 2015). The commission consists of four members and a chairperson. The commission must ensure the respect, protection, and promotion of human rights and its effective implementation (MOLJPA, 2015). In order to perform the duty, the commission is authorized to conduct inquiries into investigation and recommendations for action against the perpetrator on the matter of violation or abatement of the Human Rights of a person or a group of persons, upon a petition or complaint presented to the commission by the victim himself or herself or any person on his or her behalf of upon information received from any source or on its initiative (MOLJPA, 2015). And it may forward a recommendation to the concerned authority for talking departmental action against the authority, who has the duty and responsibility to prevent the violation of the human rights, failed to perform such duty or responsibility or show recklessness.

4. Interim Constitution of Nepal, 2007, Article 131.

5. Ibid, Article 123(1)

6. Constitution of Nepal 2072, Article 248 (1).

7. Ibid, Article, 249 (1)

8. Ibid, Article, 249 (2)

In performing his/her duties (MOLJPA, 2015).

It is further authorized to review prevailing laws relating to human rights in a periodic basis and to recommend the Government of Nepal for necessary reforms and amendments thereto and recommended with reasons to the Government, of Nepal to become a party, to any international treaties and instruments on human rights, if it is required to do so and to monitor the implementation of the international treaties and instrument of human rights to which Nepal is a party and if found not being implemented,

forward recommendation to the government of Nepal for effective implementation such instruments(MOLJPA, 2015).

Articles, 22 The Constitution of Nepal, 2072 states. (1) No person who is detained during investigation. for enquiry of for trial or for any reason shall be subjected to physical or mental torture, nor shall be given any cruel, inhuman or degrading treatment (2) Actions in pursuant to clause (1) shall be punishable by the law and any person to treated shall be compensated in accordance to the decision determined by law (MOLJPA, 2015).

Comprehensive Peace Agreement

After different difficult negotiations, the Comprehensive Peace Agreement (CPA) between Nepal's Government and the CPN-Maoist was signed consolidated a sense of commitment to human rights made on November 21, 2006. The CPA consolidated a sense of a series of commitments of human rights in the previous agreement and included many of Nepal's international obligations to respect, promote, and ensure human rights. In its preamble, the CPA commits all signatories to create an atmosphere where the Nepali people can enjoy their civil, political, economic, social cultural rights and to ensure that such rights are not violated under any circumstances in the future. This includes ending discrimination, arbitrary detention, torture, killings, and disappearances. The CPA separately mandated the Office of the United Nations High Commission for Human Rights (OHCHR) and the National Human Rights Commission (NHRC) to monitor the implementation of human rights provisions of the CPA.

Elsewhere, mainly in the hills and mountains. regions of Nepal since 2007, members of the Young Communist League (YCL), the youth wing of the CPN-Maoist, took on the public security role. In doing so they were responsible for various abuses including extortion, then and intimidation, physical assault, ill-treatment sometimes amounting to torture, forced labor, disruption of rallies and meetings, and destruction of property (OSCRC, 2007).

In a meeting with the Chief of OHCHR Nepal on April 22, 2008, CPN Nepal Communist Party Moist leader Prachanda reaffirmed the party's commitment to the establishment of a truth and Reconciliation commission and commission of inquiry into the disappearance (MOLJPA, 2068). As of late April, 2008 Prachanda had not made any comments regarding the need to ensure accountability for past human rights abuses.

National Human Rights Acts, 2068

The Human Rights Commission Act. 2068 (2012) was enacted as it was to establish an independent and autonomous. National Human Rights Commission for the effective enforcement as well as protection and promotion of human rights are conferred by the constitution and other prevailing laws.

The commission is authorized to conduct an inquiry on the violation of human and abetment thereof and carelessness or negligence in the prevention of human rights by any person, organization, or authority concerned (MOLJPA, 2068). Besides inspecting and observing any authority, jail, or organization undergoing and submitting necessary recommendations to the government on the reform to be made on the functions, procedures, and physical facilities which may be necessary and appropriate recommendations to the government for effective implementation of the related provisions (MOLJPA, 2068).

Most importantly, the commission had power to hear the complaints and recommend the necessary nature of the compensation to the victim (MOLJPA, 2068).

Army Act

Since the downfall of King's autocratic regime on 24 April 2006, the government had to act on many fronts including beginning a formal peace process to end Nepal's ten-year armed conflict and re-establish democratic institutions. One of its first priorities was to remove the king to bring greater democratic and civilian control and accountability to the former Royal Nepal Army now the Nepal Army. Carefully drafting and adopting a new Army Act was the very first step in this process, for which the Act complies with Nepal's international human rights.

Now the official website of Nepal Army mentions the following as the silent features of the Army Act: any person shall be deemed ineligible for service and humanitarian law obligations and international standard relating to impunity and military justice that reflect the current international consensus and decades for experience with similar situations around the world is important to analyze whether or not the act is a good act that can amount to the protection of the rights of civilians guaranteed by international human rights and international humanitarian law. In the Nepalese army who was convicted of human rights violation (MOLJPA, 2068).

Nepal Army personnel shall be provided training in military education, ethics, physical education, human rights, and international humanitarian law (MOLJPA, 2068). Section 22 is the most problematic and objectionable provision of the Bill. It provides a statutory bar or blanket immunity, from legal proceedings in any court, for acts carried out in good faith by a member of the Nepal Army in the "course of discharging his duties" that result in the death of or loss to any person (MOLJPA, 2068). There remains the possibility for this provision to entrench impunity if wrongly interpreted. But the Act still leaves hope by making certain serious offences like tortures and disappearances (MOLJPA, 2068), murder and rape (MOLJPA, 2068). At the same time, murder and rape are provisioned in such a way that general civilian courts have jurisdiction over them.

According to section 70 of the Army Act, no double jeopardy: Any person under the jurisdiction of this act after being subjected to trial, hearing and adjudication of a case from the court martial or from another court or after being subjected to departmental action, shall not be subjected to action again.

Same offense. The rules against double jeopardy are well established in international law and are important principles of fair trial (UNO, 1966). The act rightly puts that the courts other than military courts shall have the jurisdiction over the dispute regarding the jurisdiction of the military court over the offense that falls under the act."

Nepal Police Act

The existing Police Act 2012 makes no mention of the human and humanitarian law. Rather similar to the provision contained in sec, 22 of the Army Act 2006, the Police Act in its section 37 states: "immunity of police employee for acts committed by him in good faith while discharging his duties, the chief district officer of or any police employee shall not be liable to any penalty or payment of compensation for action take him in good

faith while discharging his or her duties under this Act, other existing law or exercising power their under or carrying out decrease orders or warrants issued by the court”:

As a silver lining, the edge of black clouds there exists some provisions from which can hope for sanction to those police officers who violate international humanitarian law or other Human rights law. Chapter 6 of the Police Act contains a long list of crimes for police personal may be discipline. There is no provision that establishes individual criminal liability for extra judicial execution and disappearance, arbitrary, detention, torture all ill treatments, the only provision that could be constructed as introducing responsibility for human right abuse in section 34 (n), which makes police official liable for up to five years of imprisonment and up to one year suspension of salary if the unjustly harasses any person though arrogance or intimidator causes lose or damage to the property of any person. This provision lacks specificity and fails to ensure adequate accountability for law enforcement personnel in the discharge of their duties.”

The police department has taken disciplinary action against some policemen against whom complaints of human rights abuses were made, but the punishment imposed have been minimal (AIN, 2002). The overall analysis of the existing Police Act of Nepal leads to the inference that it is not human rights and humanitarian law friendly.

Government Commitment of Human Rights and Humanitarian Law

Nepal’s every Government has committed on the implementation of human rights and international humanitarian Law in the country. Government committed that every person shall have the right to life, dignity and security. The right to life shall be respected under all circumstances. Geneva Conventions in particular Article 3 provides for the protection of people who have laid down their arms, who are sick, wounded or detained or who have abandoned or are not actively engaged in. the armed activities. Measures will be undertaken to prevent illegal activities or arbitrary detention and forced disappearances.

In 2071 BS, the parliament of Nepal passed the bill ‘Disappeared Persons and Truth and Reconciliation Commission (TRC) Act 2071’. Under this bill, the government of Nepal formed the commissions. Both commissions effectively solved the problems regarding transitional justice. However, it could not completely settle down the transitional justice. The president of Nepal Ram Chandra Paudel, has authenticated the Disappeared Persons, Truth and Reconciliation Commission Act 2071 (Amendment) Bill paving the way for the completion of the remaining task of the peace process. The international committee also welcomed the Bill on Transitional Justice passed with consciousness by both houses of the Federal Parliament of Nepal (The Himalayan Times, August 30th, 2024)

Institutional Measures

Some institutional measures are given below:

National Human Rights Commission

The National Human Rights Commission of Nepal is an independent and autonomous constitutional body. It was established in the year 2000 AD as a statutory body under the Human Rights Commission Act 1997 (2053). The Interim Constitution of

Nepal 2053 BS made the NHRC a constitutional body. The Present Constitution of Nepal 2072 also contains the. It has a separate sphere of responsibilities in the constitutional legal system of the country. the commission was created in response to a 1991 UN-sponsored meeting of representatives of national institutions held in Paris, which laid down a detailed set of principles on the status of national institutions commonly known as the Paris Principle. This principle subsequently endorsed by the UN Commission on (Resolution 1992 of March) and the UN General Assembly (Resolution 48/134 of 20 Dec 1993) has become the foundation and reference point for the establishment and operation of the National Human Rights Commission of Nepal as well.

The Constitution of Nepal 2072. Article 218 has provisions of the National Human Rights Commission. Its power is limited to investigating reports of human rights violations and making recommendations to the government. It does not have clear powers to initiate prosecutions itself by referring cases directly to the attorney general office of the courts.²⁷

National IHL Committee

The National Committee for the Implementation of IHL was established in 2007. It was established based on a decision of the cabinet of the Government of Nepal on 26 February 2007. The committee comprises of representatives from ministry of law, Justice and parliament the prime minister and council of ministers, minister of foreign affair, defense minister, home minister, health and population minister, education, culture, tourism and civil aviation, women children old age and social welfare. The chairman of the committee is ministry of law justice and parliamentary affair.

The committee is mandated to carry out the following functions:

- To conduct promotional activities for the dissemination of IHL treaties at various levels including all activities relating to national implementation.
- To advise whether Nepal should become a party to other IHL instruments and on the task to be carried out this view.
- To develop the legal requirements to implement international humanitarian law treaties to which Nepal is a state party and to review existing law.

Human Rights Organizations.

Various national and international human rights organizations working for the cause of human rights in Nepal: advocacy forum. INSEC, CVICT, etc. are a few national organizations to name. They are involved in the documentation of the violation of human rights. Amnesty International and Human Rights Watch are international human rights. INGO is involved in Nepal. They have been working for the protection and promotion of human rights.

For the protection of Human Rights, Amnesty International has played a very significant role in Nepal: a worldwide movement of people campaigning for internationally recognized Human Rights for all; with more than 2.2 million members and subscribers in more than 150. ²⁷ The Constitution of Nepal, 2072 Article, 249(1) countries, they conduct research and generate action to prevent and end grave abuses of human right and to demand justice for those whose rights have been violated.²⁸ Additionally Save the

Children, an international NGO that promotes children's rights, provides relief and helps support children in developing countries.

Court Cases

Case of Raja Ram Dhakal vs. Council of Ministers HMG et al. This was possibly the first petition of this nature filed before the Supreme Court of Nepal, asking for the necessary orders to make the government comply with its international obligation. The Supreme Court Division Bench consisting of Hari Prasad Shrestha, and Khill Raj Regmi ordered on 9 January 2004 (writ No. 2942, 2059) the Nepalese government to take legislative measures to implement the obligation in the 1949 Geneva Conventions. It was a writ petition and the petitioners were advocate Raja Ram Dhakal and advocate Raju Gurung. The Supreme Court nevertheless decided that even if the Human Rights Commission Act implemented some of the provisions of the Geneva Conventions, further laws to address. All aspects of those conventions had to be adopted.

Case of Kamala Rakhau Magar regarding Tikaram. Rakhau vs. General Inspector of Police.

In this case, Supreme Court Division Bench Hon'ble Meera Khadka and Hon'ble Sushma Lata Mathema ordered the (077-WIH - 0227) bail cancellation issued from this court. The accused was directed to be arrested immediately upon receipt. Still, it is seen that the police have continued the act of keeping the accused in custody without adopting the required sensitivity as per the court order and holding a prejudiced view against accused and doing the act of, rearresting in co contravention of the constitution and law by merely mentioning the name of any officer as a formally.

Therefore, keeping Tikaram Rakhau Magar in custody for investigation without grounds to grant bail does not seem to be a legal act but an extra-legal one. Seeing this, as per the prayer of the petitioner, the honorable Supreme Court Rule 2074 Rule 37, a bail cancellation order shall be issued in the name. Inspector General of Police.

Case of Rabindra Prasad Dhakal vs. Government of Nepal. This was possibly the first petition of this nature filed before the Supreme Court of Nepal, asking for the necessary order to make the government comply with its international obligation. The Supreme Court Division Bench consisting of Hari Prasad Sharma and Khill Raj Regmi ordered the Nepalese government to take legislative measures to implement the obligation in the 1949 Geneva Conventions on 9 January 2004 (writ no. 2942, 2059). It was a writ petition, and the petitioners were advocate Raja Ram Dhakal and advocate Raju Gurung. The Supreme Court nevertheless decided that even if the Human Rights Commission Act implemented some of the provisions of the Geneva Conventions, further laws to address all aspects of those conventions had to be adopted.

Nepal and International Criminal Court (ICC)

Nepal has been a member of UNO since 1955 thus a member of the international community. It has been a party to various international treaties, relating to human rights and humanitarian law for the Geneva Conventions related to the law of war to which Nepal has been a party. Besides it is a party to the Genocide Convention, of 1948. Being

a party to these conventions along with UDHR and the charter of the United Nations itself Nepal has to bear some international treaty obligations. As penal repression for the violation of IHL is concerned, being a party to the aforementioned treaties does not create sufficient ground for the ICC to exercise its jurisdiction in Nepal. Nepal is not yet a party to Rome statute of ICC which is a precondition to enter into ICC regime.

Conclusion

The implementation of IHL has been a focus for a long back. Right after World War and the perpetrators of war crimes against humanity and crimes against peace were made accountable. They were brought to and that began penal provisions for the breach of as a party to IHL conventions Nepal bears inter obligation to repress the violation of IHL. Compliance to IHL is an all-time issue. Nepal has no particular legislation in place for the implementation of IHL means that Nepal has utterly failed to respond to IHL. to its obligation under international law. more means that Nepal has mentioned training to army personnel on IHL the Supreme Court's positive towards the state of Nepal has been very Obligated to respond to THL provisions. The judgment rendered in all is praiseworthy. Proper implementation of THL is crucial to put an end to the ongoing culture of impunity. The violation of IHL leads to an all-international level. The repression of individuals to criminal responsibility both at nation- THL violation is the primary obligation of the nation, and state. The victims have rights to reparation and preparation and the perpetrators deserve prosecution under IHL, firstly at the national level and at the international level too if national implementation is not possible.

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