

SYMPOSIUM ON THE MARSHALL ISLANDS CASE

CHOICE AND (THE AWARENESS OF) ITS CONSEQUENCES: THE ICJ'S "STRUCTURAL BIAS" STRIKES AGAIN IN THE *MARSHALL ISLANDS* CASE

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My very first publication, admittedly written in a language that many AJIL Unbound readers might be unable or unwilling to read, was an essay on the Treaty on the Non-Proliferation of Nuclear Weapons (NPT) and its effects vis-à-vis third parties.¹ Already back then, I found it difficult to justify how an international treaty could rubber-stamp such a highly uneven state of affairs. The overt acknowledgement of the discrimination between nuclear and nonnuclear states, the hypocrisy about "unofficial" nuclear states, and the Article VI obligation for nuclear states to negotiate effective measures of disarmament, largely ignored in the first twenty years of the treaty, were all elements that contributed to my perception of unfairness, if not blatant injustice. As a young researcher approaching international law with the enthusiasm of the neophyte, however, this looked like a little anomaly in an otherwise fair and equitable international legal order. It did not set off warning bells about the system as such. After all, international law was geared, at least in my eyes, towards enhancing the wellbeing of humanity. It must have been so. And it is not that I leaned particularly on the idealistic side; it seemed normal to me ... at the time.

Inevitably, the passing of time has erased many memories. International law has changed, so has my perception of it. Yet, when I learnt that the Marshall Islands had introduced an application before the International Court of Justice (ICJ) against a number of nuclear states for a violation of Article VI of the NPT, the souvenir of the feelings I had experienced at the beginning of my career suddenly re-emerged. The compelling force of the ideals that had inspired my choice of becoming an international lawyer brought back all the expectations I had. All the heroes of my youth took center stage again: nuclear disarmament; obligations *erga omnes*; and the ICJ. There was again a great chance for justice to prevail with David openly challenging Goliath in court. The fight between good and evil, represented respectively by the ICJ and powerful nuclear states, would eventually lead to the victory of international law. The plight of nuclear weapons would not disappear at once, but the judicial ascertainment of their obligation to disarm would heap scorn on nuclear states and their hubris. There was a glim of hope again. This may sound as an exaggeration or worse a caricature, but in fact it is not. To identify ICJ judges with the indefatigable champions of international law is an instinct that generations of international lawyers have had.

Certainly, if one were to look back at the other two cases dealing with nuclear weapons decided by the ICJ there could hardly be reason for being optimistic. In 1974 the ICJ did not rule on the *Nuclear Tests* case, by holding that the unilateral declaration by France that it would no longer undertake nuclear tests in the atmosphere had deprived New Zealand's and Australia's claims of their object.² The judgment was held by [some commentators](#) to be *ultra vires*, as the ICJ applied a normative category (unilateral declarations by states) that is nowhere to be seen in the list

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¹ Andrea Bianchi, *The Ultra-Activity of the Non-Proliferation Treaty vis-à-vis Third Parties*, 37 *STUDI SENESI* 263 (1988) (It).

² [Nuclear Test Case](#) (N.Z. v. Fr.), 1974 ICJ REP. 457, 478 (Dec. 20).

of rules that the ICJ may apply under Article 38 of its Statute.³ In the 1996 Advisory Opinion on the *Legality of Use or Threat of Use of Nuclear Weapons*—the closest that the ICJ ever got to a *non-liquet*—in a convoluted judgment rendered by a technical majority with the President’s casting vote, the ICJ ruled that the legality of the use of nuclear weapons could not be excluded in extreme cases of self-defense. The disappointment created by these two precedents nurtured the hope that the ICJ would not miss a third opportunity to redeem itself. Consequently, expectations were high that the ICJ would take a firmer stance at this time.

Such expectations were all the more reasonable, if one considers the stakes underlying the case. I believe it is fair to say that this was a “big case” by all standards, one bearing on issues of fundamental importance to the international community, such as nuclear disarmament. Without diminishing the relevance of other cases, the ICJ does not often have the opportunity to pass judgment on legal issues that touch the very nerves of the international legal system. Moreover, it was a long time that a high-profile case did not involve the conduct of powerful states, including permanent members of the Security Council. These geopolitical considerations are undoubtedly part of the picture. As [Judge Bennouna](#) highlighted in his dissenting opinion, further, the human dimension of the case could not be underestimated. A small state, such as the Marshall Islands that had suffered terribly from nuclear testing, seized “the principal judicial organ of the United Nations to seek justice, so that such suffering does not occur again in future, through compliance with a conventional and/or customary obligation under international law.”⁴ The statement well encapsulates all the relevant aspects and underlying issues that contributed to raise the expectations vis-à-vis international law and the ICJ.

And then the judgment on preliminary objections was eventually handed down and the case was dismissed for lack of jurisdiction, on the ground that there is no dispute among the parties.⁵ Ever since we all have been engaging in our professional ritual of analyzing the judgment as if it were a “*holy writ*,”⁶ of which this symposium of AJIL Unbound is a typical manifestation. Sentences and even individual words from the judgment and the judges’ individual opinions are analyzed and dissected, legal issues competently addressed in light of past decisions and relevant principles of international law. What has struck me most is the way in which both in the judicial opinions and in the ensuing scholarly debate everything seems to be a matter of “technique.” How to provide the correct definition of “dispute” is the main issue, which has to be addressed “technically,” with the usual skills that are deployed in such circumstances. International law experts gather and express their views. They weigh the arguments, try and distinguish precedents, usually take a cautious approach towards the judgment, by acknowledging the difficult balance that the Court had to strike among different conceptions of what is a dispute. Admittedly, this is nothing new. And yet this time around I found the ritual irritating and the exercise futile, as if we were all missing the point.

To me the point is that the judges, not the Court—as the latter does not exist independently of human beings, regardless of our desire to attribute to it [anthropomorphic](#) features⁷—made a deliberate choice not to entertain the case and to dismiss it right away, upholding the very first objection on jurisdiction. Of course, this can be presented as a technical decision based on the legal definition of “dispute” under international law. But how credible a justification could that be in the eyes of all those who expected the ICJ to take a stance on the breach of obligation by nuclear states to effectively pursue negotiations to disarm? The traditional view of the judge finding “the correct

³ Alfred Rubin, *The International Legal Effects of Unilateral Declarations*, 71 AJIL 1, 28 (1977).

⁴ Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marsh. Is. v. UK), Preliminary Objections, [Dissenting Opinion of Judge Bennouna](#) 3 (Oct. 5, 2016) [hereinafter *Nuclear Arms*].

⁵ For the purpose of this paper, reference is only made to the judgment *Marshall Islands v. United Kingdom* case.

⁶ Robert Jennings, *The Role of the International Court of Justice*, 68 BRIT. Y.B. INT’L L. 1, 41–42 (1997). See also, Robert Jennings, *The Judicial Function and the Rule of Law in International Relations*, in III INTERNATIONAL LAW AT THE TIME OF ITS CODIFICATION. ESSAYS IN HONOUR OF ROBERTO AGO 142–143 (1987).

⁷ ANDREA BIANCHI, [INTERNATIONAL LAW THEORIES – AN INQUIRY INTO DIFFERENT WAYS OF THINKING](#) 33 (2016).

legal view,” to use the expression used by Spender and Fitzmaurice in their dissenting opinion in the *South West Africa* case in 1962, is hardly tenable nowadays.⁸ Much more fitting is the idea propounded by [Lauterpacht](#) that judges [make choices](#).⁹ Most of the time such choices are not made between legally founded and legally ill-founded claims, but rather among legally plausible claims, among which the judge has to choose.

If I insist so much on this aspect of choice it is also because in this case it is self-evident that a different choice could have been made. To hold that there was a dispute between the parties would have shocked no one. It would have sufficed to [President Abraham](#) not to depart from the well-established approach of the Court that—in his own words—had never before rejected a case on a preliminary objection based “on the respondent’s contention that there was no dispute,”¹⁰ a stance attesting to “a strictly realistic and practical view, free of all hints of formalism.”¹¹ Perhaps the judges might have decided to emphasize other aspects of the definition of a dispute or, as highlighted by some of the dissenting opinions,¹² they might have decided not to accord any particular value to *Nicaragua v. Colombia* that had not yet been delivered when the Marshall Islands case was being argued,¹³ or they might have distinguished all prior references to the “awareness” of the dispute as being related to factual circumstances and not to a legal requirement.¹⁴

I refuse to engage further in the heated debate about the requirement of “awareness” that appears to have been the decisive factor to discard the existence of a dispute. I would only note in passing that it is a bit odd, and not terribly persuasive, that after holding that a dispute must be ascertained objectively as a matter of substance and not of form, one should rely on the entirely subjective psychological criterion of awareness. Also, I would not advise to use the criterion in real life, particularly in your relationship with your partner. To say that you were not aware that you had a problem might not sound too convincing or too perceptive for that matter, and your partner may have gone by the time you become aware of the problem. And if you only become aware of the problem after he or she left, well that might be just too late to do something constructive to address the issue. This is neither an iconoclastic comment, nor a disrespectful one. [Law and life](#) cannot be utterly separate and in fact they are not.¹⁵ The irreverent example is simply meant to spur reflection about the consequences of certain interpretive choices that may sound elaborate at law but would make little sense in other contexts. Does all of the above mean that the ICJ got the law

⁸ [South West Africa Cases](#) (Eth. v. S. Afr.; Liber. v. S. Afr.), Preliminary Objections, 1962 ICJ REP. 1962, 465 (Dec. 21, 1962).

⁹ See [HERSCH LAUTERPACHT, THE DEVELOPMENT OF INTERNATIONAL LAW BY THE INTERNATIONAL COURT](#) 399 (1958). Accordingly, [ROSALYN HIGGINS, PROBLEMS & PROCESS: INTERNATIONAL LAW AND HOW WE USE IT](#) 3 (1994).

¹⁰ See *Georgia v. Russian Federation*, Preliminary Objections, [Separate Opinion of Judge Abraham](#), 2011 ICJ REP. 224, 226, para. 8 (Apr. 1), as noted by Nuclear Arms, [Dissenting Opinion of Judge Bennouna](#) 3.

¹¹ Separate Opinion of Judge Abraham in *Georgia v. Russian Federation*, Preliminary Objections, [Separate Opinion of Judge Abraham](#), 2011 ICJ Rep. 224, 228, para. 14 (Apr. 1).

¹² See, for instance, Nuclear Arms, [Dissenting Opinion of Cançado Trindade](#) paras. 5–15 (emphasizing the need for objective determination by the ICJ consistently with its constant jurisprudence); and Nuclear Arms, [Dissenting Opinion of Vice-President Yusuf](#) paras. 24–26; and Nuclear Arms, [Dissenting Opinion of Judge Robinson](#) paras. 52–55 (both placing emphasis on the principle of the sound administration of justice to rule out the applicability of the “awareness” requirement).

¹³ See Nuclear Arms, [Dissenting Opinion of Judge Crawford](#) para. 4 with reference to [Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea](#) (Nicar. v. Colom.), Preliminary Objections (Mar. 17, 2016).

¹⁴ See, for instance, on the “awareness” test, Nuclear Arms, [Dissenting Opinion Vice-President Yusuf](#) paras. 16–32, [Dissenting Opinion of Judge ad hoc Bedjaoui](#) paras. 23–31, [Dissenting Opinion of Judge Bennouna](#) 5–6, [Dissenting Opinion of Judge Crawford](#) paras. 3–6, [Dissenting Opinion of Judge Robinson](#) paras. 23–40 ; on the existence of a dispute prior to the filing of an application, see Nuclear Arms, [Dissenting Opinion of Vice-President Yusuf](#) paras. 33–41, [Dissenting Opinion of Judge Crawford](#) paras. 10–31, [Dissenting Opinion of Judge Robinson](#) paras. 41–51.

¹⁵ Whenever I am in doubt that this is actually so, I go back to reading [ALBIE SACHS, THE STRANGE ALCHEMY OF LIFE AND LAW](#) (2009).

wrong? No, it simply indicates that the ICJ made one choice to the detriment of others, which might have been equally or similarly plausible in terms of persuasive force.

The fact that a different choice could have been made on the basis of equally plausible legal arguments could be slightly reminiscent of the indeterminacy thesis, whereby emphasis is placed on the open-ended texture of international legal argumentation.¹⁶ In fact, the point I am trying to make is not so much that opposite arguments can often be plausibly made in international law. Rather, I am emphasizing the moment of choice, and the fact that faced with a particular choice in a particular context the ICJ opted for one specific outcome, thus manifesting its “structural bias” towards certain issues. When [Marti Koskenniemi](#) drew attention to the idea that most international institutions have a “structural bias” that makes them prefer certain normative outcomes or distributive choices to others, I believe he meant to refer to instances such as this.¹⁷ In international practice there is hardly anything that happens randomly,¹⁸ and structural biases are at work all the time to direct the system into the direction that particular institutions view as desirable. Some of the things that we feel are unjust, unfair, or politically wrong are often produced and supported by the “[deeply embedded preferences](#)” that institutions express more or less explicitly.¹⁹ It is the ICJ’s structural bias that best explains the outcome in the Marshall Islands case.

This is an entirely different matter from the accusation levied by some of the dissenting judges that the ICJ would be drifting towards a form of legal formalism. The “recent rise of formalism” expressly referred to by [Crawford](#) as the current jurisprudence of the Court goes hand in hand with the criticism expressed by other judges.²⁰ [Cançado Trindade](#) criticizes the “formalistic approach” and the “formalistic reasoning” used by the Court throughout the judgment.²¹ Likewise, Bennouna takes issue with the “pure formalism” by which the Court, “artificially stopping the time of law and analysis at the date of submission of the request by the Marshall Islands,”²² eventually came to the conclusion that there was no dispute among the parties. To me formalism is not so much the cause for the conservative stances taken by the Court lately, but rather the vehicle by which these stances are transformed into legal reasoning and judicial outcomes. Formalism is a particular way of looking at law, which emphasizes form over substance, exclusively focusing on rules and carefully setting aside any policy considerations that may be relevant to explain the context in which the application of the rules must take place. Quite obviously, this methodology is perhaps the aptest to convey outcomes that may be controversial and potentially divisive. Formalism tends to hide the moment of choice behind the alleged neutrality of the process of finding the correct rules to apply. Yet again, formalism is a choice. Even if the choice may occasionally coincide with some of the judges’ preferred legal methodology, it would be inaccurate to look at formalism as being the problem. The actual problem is the consequences of the choices made by judges and conveyed through a formalist legal reasoning. But the insights on the ICJ’s structural bias, the judges’ mindset, and the formalism of their legal reasoning converge at defending the social status quo, a particular order that is not naturally established but socially constructed and legally justified.

At this point one may wonder where does the structural bias come from and how can it so pervasively affect the judicial policy of the ICJ. Let me clarify at the outset that I do not believe that the judges of the ICJ are part of a world conspiracy, let alone the agents of some dark forces that in this particular case could be impersonated by the

¹⁶ On the indeterminacy thesis and its application in international law see BIANCHI, [supra note 7](#), at 147 ff.

¹⁷ Martti Koskenniemi, [The Politics of International Law – 20 Years Later](#), 20 EUR. J. INT’L L. 7, 11 (2009).

¹⁸ [Id.](#) at 9.

¹⁹ MARTTI KOSKENNIEMI, [FROM APOLOGY TO UTOPIA: THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT](#) 607 (2005).

²⁰ Nuclear Arms, [Dissenting Opinion of Judge Crawford](#) para. 19.

²¹ Nuclear Arms, [Dissenting Opinion of Cançado Trindade](#) paras. 11–13, 23–24, 28–30.

²² Nuclear Arms, [Dissenting Opinion of Judge Bennouna](#) 1.

nuclear states and their allies. [As I argued extensively elsewhere](#), it is rather the “mindset” of the judges currently sitting in the Court that is likely to determine this type of outcome.²³ It suffices to cast a glance at [their background](#) to realize that most of them have been legal advisers to government and international organizations, diplomats, or agents for their national state.²⁴ The government-lawyering mindset, often shared by academics as well, makes one see the world in a particular way. States are the almost exclusive protagonists of international life, the geopolitical equilibrium and power structures are often considered a given, not something that the law should affect or meddle with. This inevitably implies a commitment to the status quo, a certain aversion to calling into question the received worldview of a state-centered system of international law (often with a markedly Western bias), in which the role of international law is to preserve the current power structures. The ICJ has always had a strong sense of being the [guardian of the international community](#).²⁵ This sense of duty, however, has often come with a commitment to a certain worldview. In recent times, in the few relatively high-profile cases it has handled, the ICJ [has showed a tendency](#) to side quite systematically with what one could generally term the state-centered system of international law.²⁶

This is not a general trend and the fact that other international institutions have done rather the opposite in terms of using jurisdiction as a gateway to expanding international adjudication and dispute settlement, is there to prove that the ICJ has made a deliberate choice. Compare for instance the recent decisions of the United Nations Convention on the Law of the Sea Conciliation Commission in the [Timor Leste v. Australia](#) case, and the Award on Jurisdiction rendered by the Permanent Court of Arbitration on the [South China Sea](#) dispute.²⁷ I am perfectly aware that the cases and the institutional contexts are different, but I think that they represent a fair illustration of the tendency by international judicial and quasijudicial bodies to expand their jurisdiction, rather than narrowing it down.

Incidentally, this is not the first time that the ICJ uses the characterization of a dispute to avoid taking up a sensitive issue. One may remember that in 1999 the ICJ, seized with a request for interim measures to enjoin [NATO countries](#) to stop their bombings against the Federal Republic of Yugoslavia, used the qualification of the dispute as a means to dismiss the case for lack of prima facie jurisdiction.²⁸ In particular, the Court held that “each individual air attack could not . . . give rise to a separate subsequent dispute,” different from the dispute that arose when the bombings had started.²⁹ The qualification of the dispute as a single dispute and not as a series of disputes arising out of each individual air attack allowed the Court to conclude that it had no jurisdiction given

²³ Andrea Bianchi, [Gazing at the Crystal Ball \(again\): State Immunity and Jus Cogens beyond Germany v. Italy](#), 4 J. INT’L DISP. SETTLEMENT 457 (2013).

²⁴ The profiles of current members of the ICJ are available at [The Court: Current Members](#), INTERNATIONAL COURT OF JUSTICE.

²⁵ In [Questions of Interpretation and Application of the 1971 Montreal Convention, Arising from the Aerial Incident at Lockerbie](#) (Libya v. UK), Order on Provisional Measures, Separate Opinion of Judge Lachs, 1992 ICJ REP. 3, 26 (Apr. 14), Judge Lachs referred to the Court as “the guardian of legality for the international community as a whole, both within and without the United Nations.”

²⁶ I would definitely include among the relevant examples [Arrest Warrant of 11 April 2000](#) (Dem. Rep. Congo v. Belg.) 2002 ICJ REP. 3 (Feb. 14) and [Jurisdictional Immunities of the State](#) (Ger. v. It.: Greece Intervening) 2012 ICJ REP. 99 (Feb. 3).

²⁷ See [Conciliation Commission Constituted Under Annex V to the 1982 United Nations Convention on the Law of the Sea](#) (Timor-Leste v. Austl.), PCA Case N 2016–10, Decision on Australia’s Objections to Competence (Sept. 19, 2016), in which the Commission agreed with Timor-Leste (thus rejecting the Australian claim) that while the validity of the Treaty on Certain Maritime Arrangements in the Timor Sea will be settled by the separate arbitration proceedings, the decision of that process has no effect on the Commission’s competence (see *id.* at paras. 86–99). See also, [Phil. v. China](#), PCA Case No 2013–19, Award on Jurisdiction and Admissibility, (Oct. 29, 2015), in which the Tribunal stated that the existence of a dispute may be inferred from the conduct of a state, or from silence, and is a matter to be determined objectively. It then concluded that each of the Philippines’ claims reflected a dispute related to the Convention (see *id.* at paras. 158–178).

²⁸ [Case concerning the Legality of Use of Force](#) (Yugoslavia v. UK), Provisional Measures, 1999 ICJ Reports 826 (June 2).

²⁹ *Id.* at para. 29.

that the unilateral declaration of acceptance of the Court's jurisdiction under Article 36 of the Statute, submitted by Yugoslavia, was limited *ratione temporis* to disputes arising after a critical date that was clearly later than the date in which the NATO aerial campaign had begun.³⁰

More or less plausible explanations have been already put forward to justify the attitude of the ICJ in the *Marshall Islands* case. [Some commentators](#) have argued that the Court might have decided to take a very pragmatic approach, or even a “strategically smart” one “for a small court” in order not to antagonize or “drive away powerful States.”³¹ I suppose one could say that the Marshall Islands had decided to take their chance and use litigation strategically simply to draw attention on the issue of nuclear disarmament, and that therefore such an outcome is not such a complete loss as it might seem at first sight. Finally, with a little stretch of the imagination one could see in this quick rejection of the case on jurisdictional grounds, an indirect or even subliminal message sent to the world of politics that such issues as nuclear disarmament should be reserved to the political arena and not addressed by the Court for judicial determination. The ball having thus been thrown back into the court of the UN political bodies, the First Committee of the General Assembly on October 16, 2016 issued Resolution L.41 to convene negotiations in 2017 on a legally binding instrument to prohibit nuclear weapons, with a view to eliminating them. If one looks at the voting pattern (123 for; thirty-eight against; sixteen abstentions), however, it is clear that politically nuclear disarmament is not yet in sight.

Despite all the possible explanations that one can find for its choice, the naked truth is that the ICJ expeditiously refused to address the merit of the *Marshall Islands* case. I know that even if the obstacle of the existence of a dispute were overcome, other preliminary objections might have stood in the way. Even if the case had proceeded to the merits phase, it was far from obvious that the ICJ would have ascertained the responsibility of the nuclear state parties to the NPT, let alone those that are not a party to the NPT. But this is not the point. The point is that the Court had a choice at the outset to reassure the international community that power may be subjected to scrutiny and constrained, that imbalances and injustices can be redressed and fairness imposed across the board without distinctions based on geopolitical power or economic size. It makes a bad impression to avoid decisions on “big cases,” to stay clear of issues that are sensitive to big powers. One is left with a sense of uneasiness to find out that in this particular case the five judges who are nationals of the five permanent members of the Security Council—incidentally all nuclear powers—have unashamedly all sided with the majority to dismiss the case. Of course, this may be thought to be a coincidence. But whom do you expect to believe that this might actually be the case?

The consequences of the decision, however unintended, go well beyond the technicalities that international lawyers like to play with. The increasing disconnect between the ICJ and the outside world may lead to the progressive disempowerment of international law as an emancipatory tool to bring about more justice and fairness in international affairs. To alienate those who still believe in the liberating power of international law, in its capacity to restrain power and to counter the narratives in which power gets translated and implemented every day in international relations entails clear consequences for the credibility of the rule of law in international relations. Are the judges at the ICJ aware of this? Does their awareness change anything in terms of the consequences of their choices? I don't think so: awareness is not the point as it was not in the *Marshall Islands* case. Should the ICJ judges care about this type of criticism? I believe they should. In particular, they should be mindful that any choice has

³⁰ Interestingly, in [Bankovic v. Belgium](#), 2001 Eur. Ct. H.R. 890, the European Court of Human Rights did precisely the opposite, by refusing to consider the aerial bombing campaign as a whole in order to substantiate the requirement of “effective control” that would have granted jurisdiction to the Court. What the two cases have in common is their choice of dismissing on jurisdictional grounds a case related to the use of force in Kosovo.

³¹ Nico Krisch, [Capitulation in The Hague: The Marshall Islands Cases](#), *EJIL:TALK!* (Oct. 10, 2016). It should be pointed out that Krisch is critical of the approach taken by the ICJ, despite the explanations he puts forward of the Court's judicial policy.

consequences, even if they are not aware of them, and even when they believe that the law does not leave them a choice. To believe not to have a choice is in and of itself a choice.

The Court risks losing its symbolic power vis-à-vis lay persons if not its state-based constituency, of which it has a fairly conservative and geopolitically loaded view. An enthusiastic student that approaches international law with high expectations in terms of its capacity to deliver just or fair outcomes, now would have to come to terms not only with the unequal character of the NPT, but also with the ICJ decision in the *Marshall Islands* case. What a pity that, technically, the legal qualification of the dispute prevented the ICJ from entertaining the merit of the case! *Dura lex sed lex!* Perhaps Latin may confer a little more dignity to an outcome that surely no lay reader can understand. But Latin can do nothing to hide the simple fact that any choice carries consequences with it, whether or not you are aware of them.